

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20210389

Private First Class (E-3)

**JOHN K. JARLEGO,**

United States Army,

Appellant

Tried at Fort Bliss, Texas on 24 July 2020, 9–10 September 2020, 14 December 2020, 28–29 June 2021, and 18 October 2021, before a general court-martial convened by the Commander, 1st Armored Division and Fort Bliss, Colonel Robert L. Shuck and Colonel Jeffrey W. Hart, military judges, presiding.

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

**Assignments of Error<sup>1</sup>**

**I. WHETHER THE MILITARY JUDGE ERRED IN  
ADMITTING PROSECUTION EXHIBIT 1.**

**II. WHETHER APPELLANT’S CONFRONTATION  
RIGHTS WERE VIOLATED.**

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<sup>1</sup>The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error. To the extent that the *Grostefon* matters act as exhibits in support of appellant’s Assignment of Error VI, appellee addresses those matters in this brief.

**III. WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS.**

**IV. WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE IT IS MISSING THE MILITARY JUDGE'S RULING TO THE DEFENSE'S POST-TRIAL MOTION FOR A MISTRIAL AND THE MILITARY JUDGE'S RECUSAL.**

**V. WHETHER THE MILITARY JUDGE'S DENIAL OF APPELLANT'S MOTION FOR A MISTRIAL WAS ERROR.**

**VI. WHETHER APPELLANT'S SENTENCE IS APPROPRIATE WHEN HIS FIRST AMENDMENT RIGHTS WERE VIOLATED.**

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## Statement of the Case

On 28 June 2021, a military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of two specifications of rape of a child and one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2018) [UCMJ]. (R. at 383). The military judge sentenced appellant to confinement for forty-eight months, a dishonorable discharge from the service, forfeiture of all pay and allowances, and reduction to the grade of E-1.<sup>2</sup> (R. at 490). On 30 June 2021, the convening authority approved the findings and sentence as adjudged. (Action). On 23 July 2021, appellant submitted a post-trial motion requesting the following: a post-trial session under Article 39(a), 10 U.S.C. § 839(a); the military judge's recusal; and a mistrial or, in the alternative, a new trial. (App. Ex. LIX). On 21 November 2021, the military judge granted appellant's request for an Article 39(a) session and denied the remainder of appellant's post-trial motion. (Gov. App. Ex. 1). On 22 November 2021, the military judge entered judgment. (Judgment).

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<sup>2</sup>For Specification 1 of The Charge, appellant was sentenced to confinement for forty-eight months; for Specification 2 of The Charge, appellant was sentenced to confinement for thirty-six months; and for Specification 3 of The Charge, appellant was sentenced to confinement for eleven months. (R. at 490). In the adjudged sentence, all periods of confinement shall run concurrently. (R. at 490).

## **Statement of Facts**

### **A. Appellant had vaginal and oral sex with Miss [REDACTED] an eleven-year-old.**

On or about 15 July 2019, appellant, a soldier stationed in Fort Bliss, Texas, used Tinder to contact Miss [REDACTED] an eleven-year-old girl from El Paso, Texas. (R. at 323, 348, 352, 355–56; Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 51:00–52:30, 55:00–57:30, 1:05:00–1:07:00; Pros. Ex. 8). Appellant then started chatting with Miss [REDACTED] on Snapchat for about a week. (Pros. Ex. 5 at 51:00–52:30, 55:00–57:30, 1:05:00–1:07:00).

On or about 22 July 2019, appellant picked up Miss [REDACTED] from her house. (R. at 323, 348; Pros. Ex. 2; Pros. Ex. 5 at 55:30–56:30, 1:00:00–1:01:30, 1:02:00–1:03:30; Pros. Ex. 8). After picking up Miss [REDACTED] and taking her to Taco Bell, appellant went with Miss [REDACTED] to McKelligon Canyon, in El Paso, where they had vaginal sex and where Miss [REDACTED] performed oral sex on appellant. (R. at 355; Pros. Ex. 5 at 55:00–56:30, 1:04:00–1:06:00, 1:12:45–1:14:00).

### **B. Appellant admitted to Special Agent [REDACTED] that he had vaginal and oral sex with Miss [REDACTED]**

After appellant's sexual acts with Miss [REDACTED] Criminal Investigation Command (CID) investigated appellant's crimes and interviewed him on 29 October 2019. (Pros. Ex. 5 at 1:40:00–1:43:00; Pros. Ex. 8).

To orient the interview, Special Agent (SA) [REDACTED] the interviewing agent, first informed appellant that the interview was about Miss [REDACTED] and her relationship with

appellant; then SA [REDACTED] showed photographs of Miss [REDACTED] to appellant and also identified Miss [REDACTED] as the girl in the photographs. (Pros. Ex. 5 at 13:00–14:15, 50:45–52:00). After admitting that the person in the photographs “kind of looks like her,” appellant admitted or confirmed at least three times that he engaged in sexual acts—including vaginal and oral sex—with Miss [REDACTED] (Pros. Ex. 5 at 51:00–51:30, 55:00–56:00, 1:04:00–1:07:00, 1:12:45–1:13:30).

Special Agent [REDACTED] while showing appellant photographs of Miss [REDACTED] informed appellant that Miss [REDACTED] was only eleven years old; appellant subsequently confirmed again that he had had sex with Miss [REDACTED] and he asserted that Miss [REDACTED] had “looked sixteen” when he had met her in person. (Pros. Ex. 5 at 1:08:00–1:12:00, 1:12:45–1:13:30). When SA [REDACTED] showed appellant the photographs of Miss [REDACTED] and asked how old she looked, appellant also claimed that she looked sixteen years old. (R. at 58:00–59:30).

The interview focused on only appellant’s sexual acts and relationship with Miss [REDACTED] (Pros. Ex. 5 at 13:00–14:15, 50:45–52:00, 53:00–54:15, 1:03:00–1:06:00). In particular, SA [REDACTED] did the following to ensure the focus was on appellant’s interactions with Miss [REDACTED] showed photographs of Miss [REDACTED] to appellant near the beginning of the interview; indicated to appellant that the person in the photographs was Miss [REDACTED] confirmed with appellant that he had chatted with Miss [REDACTED] on Snapchat; confirmed with appellant that he had sex with Miss

████ and told appellant at least three times that the interview was about his relationship with Miss █████ not any other relationship appellant had. (Pros. Ex. 5 at 13:00–14:15, 50:45–52:00, 53:00–54:15, 56:00–57:30, 1:03:00–1:06:00).

**C. CID obtained appellant’s cellphone, which contained Snapchat messages that both corroborated appellant’s sexual acts with Miss █████ and showed his indecent language toward her.**

During the CID interview with appellant, SA █████ obtained appellant’s cellphone, which was protected by appellant’s passcode. (R. at 358–60; Pros. Ex. 5 at 1:40:00–1:43:00; Pros. Ex. 8). Appellant also confirmed that he had only one Snapchat account, which was also protected by appellant’s password. (Pros. Ex. 5 at 56:00–57:00, 1:47:30–1:50:30).

During a review of appellant’s phone in October of 2019, SA █████ found Miss █████ as a contact in appellant’s Snapchat account. (R. at 340–43, 346–47). Miss █████’s profile in Snapchat contained Miss █████’s name. (R. at 343, 346–47; Pros. Ex. 2). On Miss █████’s Snapchat profile, her associated screen name was “████████████████████” (also styled as “████████████████████”). (R. at 344, 347; Pros. Ex. 2).

On 22 July 2019, in Snapchat, Miss █████ wrote to appellant, “U were my second fuck,” and appellant replied, “I mean u was nice[.]” (R. at 323, 346–48; Pros. Ex. 2; Pros. Ex. 8). Appellant also told her, “Ur awesome lol I like the way u were moaning too[.]” (Pros. Ex. 2). When Miss █████ asked, “And how was my pussy[?]” appellant said, “It made me want to fuck u more gave me energy. It was

nice[.]” (Pros. Ex. 2). Appellant also asked Miss [REDACTED] “Next time I’ll cum in ur face?” and she replied, “Sure[.]” (Pros. Ex. 2). Appellant then added, “Ima fuck u for more than 5hrs ima beat that pussy[.]” (Pros. Ex. 2).

**D. Miss [REDACTED]’s birth verification confirmed that she was eleven years old during appellant’s sexual abuse against her.**

A certified, sealed, and signed birth verification from the El Paso County Clerk’s office confirmed that Miss [REDACTED] was eleven years old during appellant’s crimes. (Pros. Exs. 1, 2). This birth verification, obtained on or about 13 April 2021, confirmed what CID knew about Miss [REDACTED]’s age. (Pros. Ex. 1; Pros. Ex. 5 at 1:08:00–1:12:00, 1:12:45–1:13:30). Indeed, during the 29 October 2019 CID interview, SA [REDACTED] had informed appellant that Miss [REDACTED] was eleven years old. (R. at 358–60; Pros. Ex. 1; Pros. Ex. 5 at 1:08:00–1:12:00, 1:12:45–1:13:30).

Miss [REDACTED]’s name on the birth verification and her name on her Snapchat profile are the same; the birth verification also lists Miss [REDACTED]’s birthplace as El Paso, provides her middle name, and gives her date of birth, which shows that she was eleven years old when appellant engaged in sexual and lewd acts with her. (Pros. Exs. 1, 2).

## **Assignment of Error I**

### **WHETHER THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBIT 1.**

#### **Additional Facts**

In Texas, a birth verification states whether a certain person's birth was registered with the state of Texas; if so, the birth verification will set forth the person's name, date of birth, county of birth, and other details. (App. Ex. LVII; Pros. Ex. 1). Members of the public can request a birth verification, as evidenced by instructions posted on a Texas government website print-out, which was put forth by appellant and apparently quoted by his counsel at trial. (R. at 316–17, 496; App. Ex. LVII). In fact, trial defense counsel spoke with a certifying officer from the El Paso County Clerk's office to confirm that the office fulfills such birth-verification requests. (R. at 317–18). A birth verification is different from a birth certificate; accordingly, a birth verification like Miss [REDACTED]'s is a separate document that does not purport to merely repeat information from a birth certificate. (Pros. Ex. 1; App. Ex. LVII; R. at 316–17).

Near the bottom-right-hand corner, Miss [REDACTED]'s birth verification bears a seal from the El Paso County Clerk's office; indeed, right under the seal, one can see the word “(SEAL)” designating where the seal should typically go. (Pros. Ex. 1). Miss [REDACTED]'s birth verification is an official and certified record, signed by a person

who is a certifying officer, records custodian, and deputy of the County Clerk's office. (Pros. Ex. 1).

The birth verification has an attached affidavit from the custodian, with the following sworn statement:

I further certify that these records were prepared at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters. These records were made by the regularly conducted business activity of this organization as a regular practice. These records are kept in the course of the regularly conducted business activity of this organization. They are true and accurate copies of the originals that are kept in the official files of this organization.

(Pros Ex. 1).

During trial, appellant objected to admission of the birth verification based on hearsay, hearsay within hearsay, the "best evidence rule," relevance, and unfair prejudice. (R. at 315–21). After extensive argument, the court sided with the prosecution and admitted the birth verification under "803(c)(9)," i.e., Military Rule of Evidence (Mil. R. Evid.) 803(9). (R. at 315–21; Appellant's Br. 10).

### **Standard of Review**

Appellate courts review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020).

## Law

### A. Hearsay.

Mil. R. Evid. 803(9) states that a “record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty,” is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

Second, under Mil. R. Evid. 803(8), a “record or statement of a public office” is not excluded by the rule against hearsay if:

- (A) it sets out:
  - (i) the office’s activities; [and]
  - . . .
- (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Lastly, under Mil. R. Evid. 803(6), a “record of an act, event, condition, opinion, or diagnosis” is likewise not excluded by the rule against hearsay if:

- (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a uniformed service, business, institution, association, profession, organization, occupation, or calling of any kind, whether or not conducted for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness . . . ; and
- (E) the opponent does not show that the source of information or the method or circumstance of preparation indicate a lack of trustworthiness.



## **B. Self-Authentication**

Domestic public documents that are sealed and signed are self-authenticating and thus require no extrinsic evidence of authenticity in order to be admitted. Mil.

R. Evid. 902(1). To qualify under this rule, a document must bear:

- (A) a seal purporting to be that of . . . any State . . . ; . . . a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
- (B) a signature purporting to be an execution or attestation.

In addition, under Mil. R. Evid. 902(4), certified copies of public records are also self-authenticating. A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—is self-authenticating if the copy is certified as correct by the custodian or another person authorized to make the certification. Mil. R. Evid. 902(4).

Lastly, a copy of a domestic record is also self-authenticating if it meets the requirements of Mil. R. Evid. 803(6)(A)–(C), as shown by a certification of the custodian. Mil. R. Evid. 902(11). Before the trial, the proponent must give an adverse party reasonable written notice of the intent to offer the record and must make the record and certification available for inspection so that the party has a fair opportunity to challenge them. Mil. R. Evid. 902(11).

## Argument

**A. The sealed, signed, and certified birth verification is self-authenticating as either a public document that is sealed and signed, a certified public record, or a certified record of a regularly conducted activity.**

The military judge did not abuse his discretion by admitting the birth verification; the military judge's findings of fact were not clearly erroneous, the military judge's decision was not influenced by an erroneous view of the Military Rules of Evidence, and the military judge's decision on the issue at hand is within the range of choices reasonably arising from the applicable facts and the law. *Finch*, 79 M.J. at 394. As to authentication, the birth verification was self-authenticating under Mil. R. Evid. 902(1), 902(4), and 902(11).

First, under Mil. R. Evid. 902(1), Miss [REDACTED]'s birth verification is self-authenticating as a domestic public document because it (1) bears a seal from the El Paso County Clerk's office, which is an agency of a political subdivision (i.e., county) of the state of Texas; and (2) is executed by a certifying officer's signature. (Pros. Ex. 1).

Second, under Mil. R. Evid. 902(4), the birth verification is self-authenticating as a certified public record because the County Clerk's certifying officer certified the birth verification as correct. (Pros. Ex. 1).

Lastly, under Mil. R. Evid. 902(11), the birth verification is self-authenticating as a certified domestic record of a regularly conducted activity

because the County Clerk’s certifying officer certified that the birth verification met the requirements of Mil. R. Evid. 803(6)(A)–(C), and the trial transcript shows that the prosecution gave appellant a fair opportunity to challenge the birth verification before trial. (Pros. Ex. 1; R. at 320–21).

**B. The birth verification is admissible as either a public record of vital statistics, a public record, or a record of regularly conducted activity.**

Under the hearsay rules, the birth verification is admissible under Mil. R. Evid. 803(6), 803(8), and 803(9).

First, under Mil. R. Evid. 803(9), Miss [REDACTED]’s birth verification is admissible as a public record of vital statistic; it is a “record of a birth” because it sets forth Miss [REDACTED]’s date of birth, place of birth, and other personal details. (Pros. Ex. 1). And, without abusing discretion, a military judge can reasonably infer—based on common sense, knowledge of the ways of the world, and the very nature of the document—that this certified birth verification from the County Clerk’s office is a record of a birth that was reported to a public office in accordance with a legal duty. (Pros. Ex. 1).

Second, the birth verification could have been admitted as a public record under Mil. R. Evid. 803(8) because it is a record of the County Clerk’s office (a public office), and the birth verification sets out the office’s activities of maintaining vital statistics. (Pros. Ex. 1). And as a certified, official, signed, and sealed birth verification, it can reasonably be trusted. (Prox. Ex. 1).

In arguing that this document is untrustworthy, appellant claims that the birth verification is not “like a birth certificate” and that there is an “inadequate showing as to the process the clerk used to determine who” Miss [REDACTED] is. (Appellant’s Br. 12, 21). But even though a birth verification and a birth certificate are different, separate documents, both can still be trustworthy; after all, Miss [REDACTED]’s birth verification is a certified, official, signed, and sealed vital record from the County Clerk’s office. (App. Ex. LVII; R. at 316–17; Pros. Ex. 1). And to ensure this birth verification is for the proper Miss [REDACTED] appellant’s own print-out from the Texas government website shows how birth verifications are requested and obtained: the requester must provide specific personal details, including Miss [REDACTED]’s full name, date of birth, and mother’s maiden name. (App. Ex. LVII). In fact, appellant’s trial defense counsel spoke with the County Clerk’s certifying officer, and counsel pointed out no unreliability in the office’s operations. (R. at 317–18). So it was no an abuse of discretion for the court to find this certified, official, signed, and sealed birth verification to be trustworthy. (Pros. Ex. 1).

Lastly, the birth verification, as a record of an event or act, would fall under Mil. R. Evid. 803(6)’s “business records” exception, because the certifying officer’s affidavit met the specific requirements of Mil. R. Evid. 803(6)(A)–(D), and, as discussed before, appellant has not shown this document to be untrustworthy. (Pros. Ex. 1).

**C. Because the birth verification is a relevant, non-prejudicial document that does not purport to merely repeat information from a birth certificate, it should not be excluded either as “hearsay within hearsay” or under the best-evidence rule.**

The birth verification is relevant and non-prejudicial because it gives documentary proof of Miss [REDACTED]’s age, which is an element of the crimes charged. (Pros. Ex. 1; App. Ex. LVII). And the birth verification differs from a birth certificate; it is a separate document that does not purport to merely repeat information from a birth certificate, so it should not be excluded as “hearsay within hearsay.” (Pros. Ex. 1; App. Ex. LVII). Only one layer of hearsay exists because the birth verification is a standalone document, which has been signed and sealed as a single public document. (Pros. Ex. 1).

Appellant’s brief also claims that admitting the birth verification “violates Mil. R. Evid. 1002, a.k.a. the Best Evidence Rule” (generally requiring originals). (Appellant’s Br. 11). But under Mil. R. Evid. 1003, a “duplicate is admissible to the same extent as the original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.” And this birth verification is a certified copy with no sufficient cause to genuinely question authenticity; birth verifications like Miss [REDACTED]’s come from a public office and are regularly made by the County Clerk’s office. (Pros. Ex. 1; App. Ex. LVII).

In admitting the birth verification, the court acted well within its discretion because the birth verification is a standalone, self-authenticating official vital

record—as well as a business record and public record—that has been certified, signed, and sealed by a certifying officer of the County Clerk’s office, as part of the office’s regular business activities. (Pros. Ex. 1; App. Ex. LVII; R. at 321).

## **Assignment of Error II**

### **WHETHER APPELLANT’S CONFRONTATION RIGHTS WERE VIOLATED.**

#### **Additional Facts**

Appellant objected to the admission of the birth verification based on five reasons—but not the Confrontation Clause. (R. at 315–21). Trial defense counsel stated, “The first objection would be hearsay. The second objection would be hearsay within hearsay. The third objection would be the best evidence rule. And the fourth objection would be relevance[;]” and counsel also claimed unfair prejudice, too. (R. at 315–21). Appellant also objected to—and successfully kept out—a different exhibit, marked Prosecution Exhibit 3 for identification, based on the “Confrontation clause, hearsay, and foundation.” (R. at 326–27, 339).

The appellee here also incorporates the “Additional Facts” from Assignment of Error I.

#### **Standard of Review**

Appellate courts review *de novo* whether statements are testimonial, for purposes of the Sixth Amendment. *United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020).

## Law

### A. Confrontation Clause.

The Confrontation Clause “permits the admission of testimonial statements of a witness absent from trial only where the declarant is unavailable, and the defendant has had a prior opportunity to cross-examine.” *Baas*, 80 M.J. at 120 (cleaned up).

In determining whether a statement is testimonial, courts ask “whether it would be reasonably foreseeable to an objective person that the purpose of any individual statement is evidentiary, considering the formality of the statement as well as the knowledge of the declarant.” *Baas*, 80 M.J. at 120 (cleaned up). A statement is testimonial if “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *United States v. Katso*, 74 M.J. 273, 279 (C.A.A.F. 2015) (internal quotation marks omitted).

Business and public records are “generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” *Melendez Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

## **B. Waiver and forfeiture.**

Appellate courts generally “do not review waived issues because a valid waiver leaves no error to correct on appeal.” *See United States v. Hardy*, 76 M.J. 732, 736 (A.F. Ct. Crim. App. 2017), *aff’d* 77 M.J. 289 (C.A.A.F. 2018). In contrast, forfeiture is the “failure to make the timely assertion of a right” and is reviewed for plain error. *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020).

### **Argument**

#### **A. When appellant offered five bases for denying the birth verification’s admission—but failed to put forth the Confrontation Clause—he waived his right to assert his right to confrontation.**

Appellant waived his right to confrontation as to the birth verification because, during trial, appellant offered a thought-out, detailed objection based on five reasons—but not the Confrontation Clause. (R. at 315–21). In addition, appellant’s willingness and ability to assert his confrontation rights in one objection (to evidence marked Prosecution Exhibit 3 for identification)—but not in another objection (for the birth verification)—further demonstrate that he made a knowing choice to relinquish his confrontation rights as to the birth verification. (R. at 315–21).

If appellant did not waive his confrontation rights, then he certainly forfeited them, because he failed to assert them while objecting to the birth verification. (R. at 315–21). By failing to timely assert his confrontation rights, appellant forfeited



this right. (R. at 315–21). Even if the trial court committed a Confrontation Clause error, the error was not plain or obvious, because *Melendez Diaz*, 557 U.S. at 324—which appellant’s brief calls “the best controlling case”—has found that business and public records are “generally admissible absent confrontation . . . because . . . they are not testimonial.” (Appellant’s Br. 15).

**B. In any event, the birth verification is non-testimonial because it was a vital record created as part of a public office’s regular administrative affairs, and not for the purpose of establishing or proving some fact at trial.**

Because the birth verification was created by the County Clerk’s office as part of its regular business activities—and not specifically for trial—it is non-testimonial. (Pros. Ex. 1; App. Ex. LVII). As the birth verification and appellant’s print-out of the Texas government website show, these birth verifications are regularly prepared as part of a county clerk’s administrative activities, and these documents can be regularly requested by anyone. (Pros. Ex. 1; App. Ex. LVII; R. at 316–17, 496). Here, the County Clerk’s office did not act as an arm of law enforcement by supposedly fulfilling a one-off request for a tailor-made document fit for the prosecution—rather, the office acted like any other Texas county clerk’s office by providing a document that anyone can request by taking the same steps listed on the state’s website. (Pros. Ex. 1; App. Ex. LVII; R. at 317–18).

Therefore, an objective person would conclude that Miss [REDACTED]’s birth verification was not “made under circumstances which would lead an objective

witness reasonably to believe that the statement would be available for use at a later trial.” *Katso*, 74 M.J. at 279 (internal quotation marks omitted). This conclusion aligns with the general principle that business and public records “are not testimonial” and have “been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.” *Melendez Diaz*, 557 U.S. at 324.

### **Assignment of Error III**

#### **WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT’S CONVICTIONS.**

#### **Standard of Review**

This court conducts a de novo review of legal and factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

#### **Law**

##### **A. Factual sufficiency.**

To test factual sufficiency under Article 66, UCMJ, 10 U.S.C. § 866 (2018), courts decide “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant’s guilt beyond a reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (cleaned up). When conducting this review, this court takes “a fresh, impartial

look at the evidence,” applying “neither a presumption of innocence nor a presumption of guilt.” *Washington*, 57 M.J. at 399.

### **B. Legal sufficiency.**

“The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (internal quotation marks omitted). The standard for legal sufficiency “involves a very low threshold to sustain a conviction.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks omitted).

### **C. Rape of a Child.**

In this case, the elements of rape of a child, as charged in Specifications 1 and 2 of The Charge, are met when a person (1) commits a sexual act (2) upon a child who has not attained the age of 12 years. Article 120b(a), UCMJ, 10 U.S.C. § 920b(a); *Manual for Courts Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶62.a.(a). Under Article 120b(d), if the victim is under 12 years of age, it need not be proven that the appellant knew the age of the victim.

### **D. Sexual Abuse of a Child**

In this case, the elements of sexual abuse of a child, as charged in Specification 3 of The Charge, are met when a person (1) commits a lewd act (2)

upon a child. Article 120b(c), UCMJ; MCM, pt. IV, ¶62.a.(c). A “lewd act” can include “intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to . . . arouse . . . the sexual desire of any person.” Article 120b(h)(5)(C), UCMJ; MCM, pt. IV, ¶62.a.(h)(5)(C). Similarly, if the child victim is under 12 years of age, it need not be proven that the appellant knew the age of the victim. Article 120b(d), UCMJ.

### **Argument**

#### **A. Appellant’s statements to CID, his Snapchat account and Snapchat messages on his phone, Miss [REDACTED]’s Snapchat profile, and the birth verification provide factual and legal sufficiency for his two convictions of rape of a child.**

Regarding the sexual-act element of rape of a child, appellant’s brief does not dispute that he engaged in sexual acts—“Appellant and Ms. [REDACTED] met in person and had sex”—and, indeed, appellant himself admitted the same in his CID interview. (Appellant’s Br. 1, 17–21; R. at 355; Pros. Ex. 5 at 55:00–56:30, 1:04:00–1:06:00, 1:12:45–1:14:00).

Instead, appellant disputes the second element—whether those sexual acts were with a child under twelve years old. (Appellant’s Br. 17–21). In particular, appellant claims that the prosecution failed to prove (1) that appellant’s Miss [REDACTED] (whom appellant had sex with and “chatted with online”) is the same Miss [REDACTED] who was the victim in CID’s investigation; and (2) that this one Miss [REDACTED] (who

was both CID's victim and appellant's victim) is the same Miss [REDACTED] named in the birth verification. (Appellant's Br. 21).

**1. During the CID interview, when appellant admitted to having sex with Miss [REDACTED] he and the interviewer were talking about the same person.**

Appellant's interview with CID shows that when appellant admitted to having vaginal and oral sex with Miss [REDACTED] he and the interviewer were talking about the same Miss [REDACTED] (Pros. Ex. 5 at 13:00–14:15, 51:00–52:00, 55:00–56:00, 1:04:00–1:07:00, 1:12:45–1:13:30).

Indeed, SA [REDACTED] took multiple steps to focus the interview only on appellant's relationship with Miss [REDACTED] he showed photographs of Miss [REDACTED] to appellant; indicated to appellant that the person in the photographs was Miss [REDACTED] later confirmed with appellant that he had chatted with Miss [REDACTED] on Snapchat; and confirmed with appellant that he had vaginal and oral sex with Miss [REDACTED] (Pros. Ex. 5 at 13:00–14:15, 50:45–52:00, 53:00–54:15, 56:00–57:30, 1:03:00–1:06:00). After SA [REDACTED] identified Miss [REDACTED] through her name and photographs, appellant said that the person in the photographs "kind of looks like her," and then also admitted or confirmed at least three times that he engaged in sexual acts with Miss [REDACTED] (Pros. Ex. 5 at 51:00–51:30, 55:00–56:00, 1:04:00–1:07:00, 1:12:45–1:13:30). Even after finding out Miss [REDACTED] was eleven years old, appellant re-affirmed that he had had sex with her. (Pros. Ex. 5 at 1:08:00–1:12:00, 1:12:45–1:13:30).

In addition, appellant's Snapchat account and messages show that he knew Miss [REDACTED] and engaged in sexual acts with her. (Pros. Ex. 2). For example, appellant's Snapchat account had Miss [REDACTED] as a contact. (R. at 343, 346–47; Pros. Ex. 2). Miss [REDACTED]'s Snapchat profile said she was from El Paso, Texas; and appellant admitted to having sex with Miss [REDACTED] in El Paso, Texas. (R. at 355; Pros. Ex. 2; Pros. Ex. 5 at 55:00–56:30, 1:04:00–1:06:00, 1:12:45–1:14:00). Appellant's Snapchat messages with Miss [REDACTED] also discuss his sexual acts and thus corroborate that he had engaged in sexual acts with Miss [REDACTED] (Pros. Ex. 2).

**2. The Miss [REDACTED] who was part of CID's investigation—and whom appellant had sex with—is the same Miss [REDACTED] on the birth verification.**

The evidence establishes that the Miss [REDACTED] who was part of CID's investigation—and whom appellant admittedly had sex with—is the same Miss [REDACTED] on the birth verification. (Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 13:00–14:15, 50:45–52:00, 53:00–54:15, 56:00–57:30, 1:03:00–1:06:00).

The information on the birth verification aligns with the remainder of the evidence pointing to the same Miss [REDACTED] (Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 13:00–14:15, 50:45–52:00, 53:00–54:15, 56:00–57:30, 1:03:00–1:06:00). First, Miss [REDACTED]'s name on the birth verification has the same spelling as Miss [REDACTED]'s name on her Snapchat profile, which was found as a Snapchat contact on appellant's phone. (R. at 343, 346–47; Pros. Exs. 1, 2). Second, the birthplace on the birth verification is El Paso; and Miss [REDACTED] was from El Paso, and appellant had

sex with Miss [REDACTED] in El Paso. (R. at 355; Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 55:00–56:30, 1:04:00–1:06:00, 1:12:45–1:14:00). Third, the birth verification indicates that Miss [REDACTED] was eleven years old during appellant’s crimes, and the CID interviewer had also indicated that Miss [REDACTED] was eleven years old during the crimes. (Pros. Ex. 1; Pros. Ex. 5 at 1:08:00–1:12:00, 1:12:45–1:13:30).

These links between the birth verification and Miss [REDACTED] arise from no mere coincidence; they exist because Miss [REDACTED] the victim in CID’s case whom appellant admittedly had sex with, is the same Miss [REDACTED] on the birth verification.<sup>3</sup> (Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 13:00–14:15, 50:45–52:00, 53:00–54:15, 56:00–57:30, 1:03:00–1:06:00).

Appellant’s admissions about having vaginal and oral sex with Miss [REDACTED] his three confirmations that he had sex with [REDACTED] after SA [REDACTED] had shown him photographs of Miss [REDACTED] and identified her as Miss [REDACTED] his corroborating Snapchat messages about having sex with Miss [REDACTED] the presence of Miss [REDACTED] as a contact on appellant’s Snapchat account; Miss [REDACTED]’s Snapchat profile; and the birth verification all provide proof beyond a reasonable doubt for the two convictions of rape of a child. (R. at 343, 346–47; Pros. Ex. 1; Pros. Ex. 2; Pros.

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<sup>3</sup>To further show that this birth verification is for the same Miss [REDACTED] that was part of CID’s investigation, according to appellant’s print-out from a Texas state website, the government would have needed to first provide Miss [REDACTED]’s full name, the date of birth, her mother’s maiden name, and other personal information, in order to obtain Miss [REDACTED]’s birth verification. (R. at 316–17, 496; App. Ex. LVII).

Ex. 5 at 13:00–14:15, 50:45–52:00, 53:00–57:30, 1:03:00–1:07:00, 1:08:00–1:12:00, 1:12:45–1:13:30; Appellant’s Br. 17–21).

**B. Appellant’s Snapchat messages on his phone; the birth verification; his message to Miss [REDACTED] asking, “Next time I’ll cum in ur face?”; and appellant’s corroborating statements to CID provide factual and legal sufficiency for his conviction of sexual abuse of a child.**

For the lewd-act element of sexual abuse of a child, appellant’s Snapchat messages on his phone show that he committed a lewd act: in a broader chat discussion about their plans for future sexual acts, appellant asked Miss [REDACTED] “Next time I’ll cum in ur face?” (Pros. Ex. 2). Sending such a message to the eleven-year-old Miss [REDACTED] would be a lewd act because it constitutes “intentionally communicating indecent language to a child . . . via any communication technology, with an intent to . . . arouse or . . . the sexual desire of any person.” Article 120b(h)(5)(C), UCMJ; MCM, pt. IV, ¶62.a.(h)(5)(C).

In addition, appellant does not dispute that he sent a Snapchat message that would have been lewd if sent to an eleven-year-old. (Appellant’s Br. 17–21). Instead, appellant focuses on the second element—that the message was sent to a child—and claims that the prosecution failed to prove that appellant sent the indecent language to the eleven-year-old Miss [REDACTED]<sup>4</sup> (Appellant’s Br. 17–21).

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<sup>4</sup>In Section A of the Argument section of Assignment of Error III, appellee discussed the evidence showing that the Miss [REDACTED] who was the victim in CID’s investigation that appellant admittedly had sex with, is the same Miss [REDACTED] on the birth verification. (Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 13:00–14:15, 50:45–



But appellant’s own statements to CID about sending Snapchat messages and appellant’s own Snapchat messages show that he had indeed sent the indecent language to the eleven-year-old Miss [REDACTED] (R. at 343, 346–47; Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 13:00–14:15, 50:45–52:30, 53:00–57:30, 1:03:00–1:07:00, 1:08:00–1:12:00, 1:12:45–1:13:30). During the CID interview, appellant told SA [REDACTED] that he had sent Snapchat messages to Miss [REDACTED] (Pros. Ex. 5 at 51:00–52:30, 55:00–57:30, 1:05:00–1:07:00).

In corroboration of those statements to CID, appellant’s own password-protected Snapchat account—found on appellant’s passcode-protected phone—shows that he had Miss [REDACTED] added as a contact and that he had sent her sexually explicit messages meant to arouse the sexual desires of him, her, or both of them. (Pros. Exs. 2, 8; R. at 343, 346–47). Appellant’s Snapchat messages, in graphic detail, discuss his previous sexual acts with Miss [REDACTED] and the future sexual acts he will commit with her. (Pros. Ex. 2). Among other sexual statements, appellant asked Miss [REDACTED] “Next time I’ll cum in ur face?” (Pros. Ex. 2). The statement about “cum in ur face”—especially in the context of the larger sexual conversation with an eleven-year-old girl—constituted indecent language that appellant sent to Miss [REDACTED] to arouse the sexual desires of him, her, or both of them. *United States v. Avery*, 79 M.J. 363, 369 (C.A.A.F. 2020) (Article 120b(c) “proscribes ‘lewd acts’

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52:00, 53:00–54:15, 56:00–57:30, 1:03:00–1:06:00). The appellee incorporates those same arguments here.

upon children, and ‘lewd acts’ is defined to . . . ‘gratify the sexual desire of any person.’” (cleaned up)).

Appellant’s own words in his Snapchat messages and in his CID interview provide the factual and legal sufficiency for his conviction of sexual abuse of a child. (Pros. Ex. 2; Pros. Ex. 5 at 51:00–52:30, 55:00–57:30, 1:04:00–1:07:00, 1:12:45–1:13:30; Pros. Ex. 8; R. at 343, 346–47).<sup>5</sup>

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<sup>5</sup>Appellant mentions—in passing in a footnote—a one-letter variance in the victim’s name (e.g., “Alison” instead of “Allison”) on the Charge Sheet, but appellant still received proper notice because Miss [REDACTED]’s name in the specifications is phonetically identical to Miss [REDACTED]’s name throughout the record, including in appellant’s CID interview. (Charge Sheet; Appellant’s Br. 2; Pros. Exs. 1, 2, 5). To the extent appellant believes that this one-letter variance is cause for relief, such an argument should be rejected because the “name given was sufficient to designate the person referred to.” *See United States v. Hunter*, 6 C.M.R. 349, 356 (A.B.R. 1951) (findings of guilty are proper in law and fact even though victim’s name was spelled “Kim Chung cha” in the specification, and the evidence established her name as “Kim Chung Ja”); *United States v. Plummer*, 1 C.M.R. 351, 356 (A.B.R. 1951) (when victim’s name was spelled “Chong Soon Chai” in the specifications, but the victim and her neighbor testified that the victim’s name was “Chai Chang Sook,” the court held that the variance “is not a material variance” and applied the “doctrine of idem sonans”).

Under the military’s “notice pleading jurisdiction,” appellant receive sufficient notice because the victim’s name on the specifications is phonetically identical to the victim’s name throughout the record. *See United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022) (internal quotation marks omitted).

Furthermore, the trial record does not show that appellant ever brought up the issue of the specifications’ spelling; so appellant forfeited any objection he had to defects in the specifications, because, under R.C.M. 905(b) and R.C.M. 905(e), an accused forfeits any defenses or objections based on defects in the specifications, unless he raises them before entering a plea. (R. at 1–312).

**C. If appellant’s convictions are factually sufficient, then they are certainly legally sufficient.**

Because appellant’s convictions are factually sufficient, they would certainly endure a legal-sufficiency review, which “involves a very low threshold to sustain a conviction,” *King*, 78 M.J. at 221(internal quotation marks omitted), and that requires a review of the evidence in the light most favorable to the prosecution, *Robinson*, 77 M.J. at 297–98.

**Assignment of Error IV**

**WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE IT IS MISSING THE MILITARY JUDGE’S RULING TO THE DEFENSE’S POST-TRIAL MOTION FOR A MISTRIAL AND THE MILITARY JUDGE’S RECUSAL.**

On 20 March 2023, this court granted appellee’s motion to supplement the record with the military judge’s post-trial ruling, so appellee has remedied any error regarding an incomplete record of trial. (Gov. App. Ex. 1).

## **Assignment of Error V**

### **WHETHER THE MILITARY JUDGE’S DENIAL OF APPELLANT’S MOTION FOR A MISTRIAL WAS ERROR.**

#### **Additional Facts**

#### **A. About fifty years ago, a Boy Scout troop leader inappropriately touched Judge Hart for about two seconds when he was about seven or eight years old.**

About fifty years ago, when the assigned military judge, Colonel Jeffrey W. Hart, was a Cub Scout, a Boy Scout troop leader touched his penis for about two seconds. (Gov. App. Ex. 1; R. at 499–501, 508). Judge Hart was “seven or eight maybe” at the time. (R. at 500). The man who touched Judge Hart was approximately in his sixties. (R. at 507). So Judge Hart believes that the offender is now dead. (App. Ex. LX at 2–3).

Judge Hart does not think about the childhood incident at all, except for whether to disclose it to counsel; the incident “really didn’t have any impact” on him, and he has required no counseling for it. (R. at 499, 507–08). He does not suffer any lasting psychological effects; and after the incident he went on to graduate from college, law school, and Army War College. (App. Ex. LX at 2–3).

Having served as an attorney for almost thirty years and as a military judge since 2011, Judge Hart has been a prosecutor, defense attorney, and military judge in cases about child sexual abuse. (R. at 499, 501–02, 508; App. Ex. LIX at 2; App. Ex. LXIII at 1; App. Ex. LXIV at 1–9). Judge Hart never reported the

childhood incident; and he mentioned it only to his brothers about five or ten years after the incident, without going into much detail. (R. at 501–02, 508). Neither his brothers nor anyone else reported the incident. (R. at 500–02, 508).

**B. After the parties declined an opportunity to question or challenge Judge Hart, appellant elected to have a trial before a military judge alone.**

During an Article 39(a) session, on 28 June 2021, before forum selection, Judge Hart told the parties, “I’m not aware of any [matter] that might be a ground for challenge against me.” (R. at 307–09). He did not disclose his childhood incident from about fifty years ago; in a post-trial ruling, he found that the incident was not a matter that might be a ground for challenge against him. (R. at 307–09; Gov. App. Ex. 1).

Judge Hart then offered the parties an opportunity to question or challenge him, but all parties declined. (R. at 307–09). After receiving an explanation about forum rights, appellant requested a trial before a military judge alone with Judge Hart and also submitted a written request. (R. at 311–12; App. Ex. LVI).

When requesting trial before a military judge alone, appellant had received advice from counsel, had been advised of his right to trial by members, and knew that Judge Hart would be the assigned military judge. (App. Ex. LVI; R. at 311). After further discussing forum rights with the court, appellant affirmed that he still wanted to proceed with trial before a military judge alone. (R. at 311–12).

Judge Hart had been the assigned military judge since 23 June 2021, at latest, and all parties were aware of his assignment as the military judge. (R. at 307–09; App. Ex. LII; App. Ex. LVI; App. Ex. LXIII at 1; App. Ex. LIX at 1–2).

**C. Over the prosecution’s objection, Judge Hart allowed appellant’s expert witness to testify, and the court subsequently examined the expert witness to clarify how recidivism statistics are calculated.**

During the presentencing phase, Judge Hart allowed, over objection, the defense’s expert witness to testify, even though appellant had previously informed the court that he did not intend to offer expert testimony. (App. Ex. LXIII at 2; R. at 398, 401–04). The court also allowed the expert witness to testify even though appellant had failed to provide notice of the expert’s testimony and failed to put the expert on the defense’s witness list. (R. at 398, 401–04).

During appellant’s examination of the expert witness, one of defense counsel’s questions said “that there’s a 92 percent likelihood, based on PFC Jarlego’s risk factors that he will not re-offend . . . .” (R. at 437–38). After appellant’s examination, Judge Hart also asked the expert seven questions, and the court’s examination mostly clarified aspects of recidivism statistics. (R. at 437–38; 465–66). For example, the court engaged in exchanges like the following to better understand how recidivism statistics are calculated:

Q. Okay. So to say that 92 percent will not reoffend, it really is more accurate to say 92 percent may not be rearrested, is that right?

A. Absolutely. It's more correct to say that 92 percent will not be rearrested.

...

Q. So if somebody reoffends and then commits suicide, and presumably they're not arrested, that would not show up in that eight percent [of offenders who get rearrested], is that correct?

A. No. We're looking at people who are rearrested for a subsequent sexual offense once they enter into the community again.

(R. at 465–66). Appellant did not object to any of the court's questions, and the parties had opportunity to conduct follow-up examination. (R. at 465–67).

**D. In two separate courts-martial, Judge Hart was not disqualified even after his childhood incident was revealed.**

Judge Hart's practice is to consider when disclosure of his childhood incident is appropriate in certain cases, and, in the past, he has chosen to disclose the incident in at least one court-martial. (Request for Extension to Submit R.C.M. 1106 Matters ("R.C.M. 1106 Extension Request"); R. at 499, 507). But nothing in the record shows that the childhood incident has ever led to his disqualification. (App. Ex. LX at 2–3; R. at 504–05).

In particular, there have been two separate courts-martial revealing Judge Hart's childhood incident, and appellant was apparently able to find information about both. (App. Ex. LIX at 1–2). The first court-martial, *United States v. Close*, concluded on 9 December 2014. *United States v. Close*, ARMY 20140984, 2017 CCA LEXIS 175, at \*2 (Army Ct. Crim. App. 22 Mar. 2017) (summ. disp), pet.

denied, No. 17-0568/AR, 2017 CAAF LEXIS 1010 (C.A.A.F. 17 Oct. 2017).

News coverage of *United States v. Close*, from 2014, also showed that Judge Hart was presiding over the case. (App. Ex. LXIII at 1). The second pertinent court-martial proceeding, in *United States v. Gilkey*, occurred in February 2021, a few months before appellant’s forum selection. (App. Ex. LIX at 1–2).

The record reveals that only in *United States v. Close* was Judge Hart’s qualification ever challenged based on his childhood incident; and that challenge was denied on 7 December 2014. (App. Ex. LX at 2–3; R. at 504–05). Citing *Mann v. Thalacker*, 246 F.3d 1092 (8th Cir. 2001), the 7 December 2014 ruling found that Judge Hart’s childhood incident was not subject to mandatory disclosure but that the childhood incident was merely “the sort of thing a lawyer advising a client would like to know.” (App. Ex. LX at 2–3). And the appellate decisions arising from *Close* did not disturb or discuss this disqualification ruling. *See United States v. Close*, ARMY 20140984, 2017 CCA LEXIS 432 (Army Ct. Crim. App. 27 Jun. 2017) (mem. op. on further review); *Close*, 2017 CCA LEXIS 175.

**E. The day after appellant had already been convicted and sentenced, his defense counsel “discovered” information related to Judge Hart’s childhood incident; and counsel then moved for recusal and mistrial, which were denied.**

The day after appellant was convicted and sentenced, defense counsel “discovered” information related to Judge Hart’s childhood incident. (App. Ex. LVIII at 1–3; R.C.M. 1106 Extension Request, dated 9 July 2021). Defense



counsel “began investigating” this childhood incident, asked other attorneys about Judge Hart’s other courts-martial, and obtained records from other trials Judge Hart presided over. (App. Ex. LVIII at 1–3; R.C.M. 1106 Extension Request).

On 23 July 2021, appellant moved for the following: a post-trial Article 39(a) session; Judge Hart’s recusal; and a mistrial or, in the alternative, a new trial. (App. Ex. LIX). The particular defense counsel who submitted the post-trial motion had been appellant’s assigned counsel from the first day of court-martial proceedings on the record. (R. at 2, 307, 311; App. Exs. LVI, LVIII, LIX).

Appellant requested recusal and a mistrial because Judge Hart had not disclosed his childhood incident during appellant’s court-martial. (App. Ex. LIX at 3–8). Appellant also claimed that the way Judge Hart questioned the defense’s expert witness showed “actual bias.” (App. Ex. LIX at 5–6).

After counsel examined Judge Hart during a post-trial Article 39(a) session, Judge Hart issued a post-trial ruling in which he granted appellant’s request for a post-trial Article 39(a) session; denied the request for recusal; and denied the request for a mistrial or a new trial. (Gov. App. Ex. 1). The court found that the “passage of time and the many differences between the Military Judge’s experiences, including that the alleged victim in this case willingly engaged in sexual acts, presented herself as an adult, was older [than] the Military Judge was at the time in question, and is a different gender than the Military Judge are some

of the circumstances which if known would satisfy the public that the accused was not deprived of a trial by a fair, impartial military judge.” (Gov. App. Ex. 1).

### **Standard of Review**

This court reviews a military judge’s disqualification decision for an abuse of discretion. *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021). And in the context of evaluating whether an accused’s waiver of the right to trial by members was “knowing and voluntary,” appellate courts will review de novo the military judge’s compliance with Rule for Courts-Martial (R.C.M.) 903 and Article 16, UCMJ, 10 U.S.C. § 816. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). Lastly, appellate courts will not reverse a military judge’s determination on a mistrial absent clear evidence of an abuse of discretion. *United States v. Short*, 77 M.J. 148, 150 (C.A.A.F. 2018).

### **Law**

#### **A. Disqualification.**

Under R.C.M. 902(a), “a military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.” Actual bias is not required for disqualification. *Uribe*, 80 M.J. at 446. An appearance of bias is sufficient to disqualify a military judge; and the test for identifying an appearance of bias is “whether a reasonable person knowing all the circumstances would conclude that the military judge’s impartiality might

reasonably be questioned.” *Uribe*, 80 M.J. at 446 (internal quotation marks omitted). The Discussion section in R.C.M. 902 cautions that military judges “should not step down from a case unnecessarily.”

#### **B. Knowing and voluntary waiver of right to trial by members.**

R.C.M. 903 ensures “that an accused’s waiver of the right to trial by members is knowing and voluntary” by requiring the following: (1) that “the request for trial by military judge alone must be made in a signed writing by the accused or made orally on the record”; (2) that the accused “consulted with defense counsel” about the choice; (3) that the accused has “been informed of the identity of the military judge”; and (4) that the accused has been informed “of the right to trial by members.” *St. Blanc*, 70 M.J. at 427–28. Through these requirements, R.C.M. 903 “ensures that an accused understands the nature of the choice before waiving the right to trial by members.” *St. Blanc*, 70 M.J. at 428.

#### **C. Mistrial.**

Under R.C.M. 915, a “military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.” The Discussion section of R.C.M. 915 cautions that the “power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons.” For a mistrial is

an “unusual and disfavored” remedy, and it should be applied “only as a last resort to protect the guarantee for a fair trial” or “where the military judge must intervene to prevent a miscarriage of justice.” *Short*, 77 M.J. at 150 (internal quotation marks and citations omitted).

## **Argument**

**A. Because Judge Hart’s childhood incident was about fifty years old, lasted about only two seconds, left no lasting psychological effects, and differed from the crimes Miss █████ experienced, he did not need to disqualify himself or disclose the childhood incident.**

### **1. Judge Hart did not need to disclose the childhood incident.**

Here—because Judge Hart’s childhood incident was far distant in time (about fifty years ago), had significant differences from Miss █████’s case, did not involve a victim who sought to have sex with his offender, was much briefer than the abuse Miss █████ suffered (about two seconds), and left no lasting psychological effects—no reasonable person would conclude that Judge Hart’s “impartiality might reasonably be questioned” under *Uribe*, 80 M.J. at 446, and Judge Hart was thus under no obligation to disclose the incident—let alone to disqualify himself. (Gov. App. Ex. 1; R. at 499–501, 507–08; App. Ex. LX at 2–3).

When making a forum selection, an accused might like to know many things of varying relevance; but even if appellant would have liked to have known about Judge Hart’s childhood incident, such mere desire cannot make the incident subject to mandatory disclosure. *Mann*, 246 F.3d at 1098. For a comparable example, in a

child-sexual-abuse case, the judge in a judge-alone trial did not previously disclose a that he had been a victim of sexual abuse when eleven to fourteen years old, and this information came to light only after the defendant was already convicted and sentenced. *See Mann*, 246 F.3d at 1095, 1097. The Eighth Circuit upheld the conviction and held that the judge's past childhood incident of being sexually abused was merely "the sort of thing a lawyer advising a client would like to know. But there might be many personal facts about a judge from which lawyers would try to derive some tactical advantage, and not all such facts are subject to disclosure." *Mann*, 246 F.3d at 1098.

**2. Even if Judge Hart was required to disclose the childhood incident, he did not abuse his discretion by staying on the case.**

Even if Judge Hart was required to disclose his childhood incident, he did not abuse his discretion by denying appellant's disqualification request. (Gov. App. Ex. 1). To evaluate challenges to a military judge based on a past incident of victimization, *United States v. Robbins*, 48 M.J. 745, 754 (A.F. Ct. Crim. App. 1998), offers helpful guidance in determining whether disqualification was warranted:

1) the time frame of the offense; was the military judge victimized in the very recent past or the distant past?; 2) were the facts and surrounding circumstances of the crime especially egregious so as to inflame one's emotions at the expense of one's judicial instincts when recalling the event?; and, 3) if the answer to 2 is yes, would a reasonable person with knowledge of all of the

relevant facts conclude that sufficient time has passed whereby the military judge's judicial instincts and temperament are no longer compromised?

Applying this guidance, *Robbins*, 48 M.J. at 754, also offers a helpful example of a military judge who was a past spousal-abuse victim and who was not required to recuse herself in a spousal-abuse case:

First, the events in question occurred 13 years prior to the trial. Second, it is clear from the military judge's responses that she was in no way inflamed at the prospect of being confronted with an instance of spouse abuse. Third, even if she were, at some point in her past, inflamed by her personal experience, we find that a reasonable person would conclude from her answers that she has put the experience behind her and moved on.

Under the same guidance, Judge Hart's situation poses an even stronger case for a finding that his "impartiality might not reasonably be questioned." *See Robbins*, 48 M.J. at 753.

First, the amount of time since Judge Hart's childhood incident is more than three times as long as the amount at issue in *Robbins*, 48 M.J. at 754. (Gov. App. Ex. 1). Judge Hart has been an attorney for almost thirty years, as a prosecutor, defense attorney, and judge. (Gov. App. Ex. 1; R. at 499, 501–02, 508; App. Ex. LIX at 2; App. Ex. LXIII at 1; App. Ex. LXIV at 1–9). So not only has much time passed since the incident, but Judge Hart has gained significant legal experience and judicial expertise. (Gov. App. Ex. 1; R. at 499, 501–02, 508; App. Ex. LIX at 2; App. Ex. LXIII at 1; App. Ex. LXIV at 1–9).

Second, the facts and surrounding circumstances of the crime would not inflame one's emotions at the expense of judicial instincts, as evidenced by Judge Hart's testimony that the incident "really didn't have any impact" on him and by the lack of lasting psychological effects. (R. at 499, 507–08; App. Ex. LX at 2–3; Gov. App. Ex. 1). Judge Hart testified that he did not require counseling for this incident, and he has been able to graduate from college, law school, and the Army War College. (R. at 499, 507–08; App. Ex. LX at 2–3; Gov. App. Ex. 1).

Lastly, even if the childhood incident would tend to inflame one's emotions, all the relevant facts would lead a reasonable person to conclude that Judge Hart's "judicial instincts and temperament" are not compromised. *See Robbins*, 48 M.J. at 754. In addition to the passage of time and the incident's lack of lasting psychological effects and lack of "any impact" on Judge Hart, there are many differences between the two victims' cases here. (R. at 499–501, 507–08; App. Ex. LX at 2–3; Gov. App. Ex. 1). Miss [REDACTED] was eleven years old when she engaged in two sexual acts—vaginal and oral sex—with appellant. (R. at 355; Pros. Ex. 1; Pros. Ex. 5 at 55:00–56:30, 1:04:00–1:06:00, 1:12:45–1:14:00). But Judge Hart was seven or eight during his incident, and the offender touched him—not penetrated him—for only about two seconds. (Gov. App. Ex. 1; R. at 499–501, 508). Appellant, who was twenty years old, and Miss [REDACTED] who was eleven, met on Snapchat, discussed sexual acts on Snapchat, and made plans to engage in

sexual acts. (R. at 323, 348; Pros. Ex. 2; Pros. Ex. 5 at 55:30–56:30, 1:00:00–1:01:30, 1:02:00–1:03:30; Pros. Ex. 8; Def. Ex. A). Unlike Miss [REDACTED] Judge Hart did not plan or discuss sexual acts with his offender, who was around his sixties. (Gov. App. Ex. 1; R. at 499–501, 508).

The analysis under the factors in *Robbins*, 48 M.J. at 753–54, counsels against disqualification—a great length of time has passed since the event, Judge Hart’s emotions have not been inflamed, and the passage of time has allowed his judicial instincts and temperament to stay uncompromised—so Judge Hart did not abuse his discretion by staying on the case. (Gov. App. Ex. 1; R. at 499–501, 507–08; App. Ex. LX at 2–3). In fact, it would have been inappropriate for Judge Hart to have stepped down from the case “unnecessarily,” as the Discussion section in R.C.M. 902 cautions against, because “the mere fact that a military judge has been the victim of the type offense with which an accused is charged, standing alone, will not constitute sufficient grounds for recusal.” *See Robbins*, 48 M.J. at 754.

**B. Even if Judge Hart was required to disclose his childhood incident, appellant’s waiver of the right to trial by members was still knowing and voluntary because R.C.M. 903’s requirements were fulfilled.**

Even if Judge Hart was required to disclose his childhood incident, appellant’s waiver of the right to trial by members was knowing and voluntary because R.C.M. 903’s requirements were fulfilled. (R. at 311–12; App. Ex. LVI). The court ensured that appellant’s waiver was knowing and voluntary by



confirming the following: that appellant made his request in writing and orally on the record; that appellant consulted with defense counsel about the choice; that the appellant knew Judge Hart would be the assigned military judge; and that appellant knew about his right to trial by members. (R. at 311–12; App. Ex. LVI). These prescribed steps that the court followed were exactly what R.C.M. 903 and *St. Blanc*, 70 M.J. at 427–28, required to “ensure[] that an accused understands the nature of the choice” before waiving his right. To find a waiver knowing and voluntary, neither R.C.M. nor *St. Blanc* require an accused’s knowledge of the military judge’s background, beyond the judge’s identity. R.C.M. 903; *St. Blanc*, 70 M.J. at 427–28.

As seen in comparable federal circuit cases, knowing a judge’s background is not part of the inquiry when determining whether a waiver of the right to trial by jurors is knowing and voluntary. For example, in *Mann*, the court held that the criminal defendant’s “waiver of jury was sufficiently informed, notwithstanding that he did not know about the judge’s personal experience with sexual abuse,” because “the purpose of the ‘knowing and voluntary’ inquiry is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced. The weight of judicial opinion favors the view that the ‘significance and consequences’ in question are purely legal and do not include personal information about the judge.”

*Mann*, 246 F.3d at 1098 (cleaned up); *see also United States v. Kelley*, 712 F.2d 884, 888 (1st Cir 1983) (“In fact, the type of information required to make a proper jury waiver relates to the defendants’ knowledge of their constitutional rights, not to the judge’s innermost thoughts or out-of-court statements.” (citation omitted)).

Similarly, R.C.M. 903’s enumerated requirements constitute the vehicle for ensuring that a forum selection “is knowing and voluntary” and “that an accused understands the nature of the choice”—so other than knowledge of the military judge’s identity, knowledge of the military judge’s background has no bearing on whether a forum selection is knowing and voluntary. *St. Blanc*, 70 M.J. at 427–28. There “are myriad reasons an accused may choose one forum over another,” so even if appellant would have wanted to know about Judge Hart’s childhood incident before making a forum selection, “R.C.M. 903 does not require that a military judge inquire into any nonenumerated factors or collateral matters that may have influenced the accused’s election.” *St. Blanc*, 70 M.J. at 429–30.

**C. Even if Judge Hart was required to both disclose his childhood incident and disqualify himself, a mistrial would be an unsuitable remedy, because the purported error would not have cast substantial doubt upon the trial’s fairness.**

Even if Judge Hart was required to disclose his childhood incident and to also disqualify himself, denying a mistrial would not be an abuse of discretion, because the error would not have “cast substantial doubt upon the fairness of the proceedings.” *See* R.C.M. 915. Appellate courts consider three factors when

deciding whether a judge’s wrongful failure to disqualify himself warrants a remedy: (1) the “risk of injustice to the parties in the particular case”; (2) the “risk that the denial of relief will produce injustice in other cases”; and (3) the “risk of undermining the public’s confidence in the judicial process.” *United States v. Rudometkin*, 82 M.J. 396, 398 (C.A.A.F. 2022) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)).

As to the first factor, Judge Hart’s failure to recuse himself did not cause any injustice to appellant, who would have still been convicted by any reasonable factfinder, because—as explained in appellee’s Argument section under Assignment of Error III—the weight of the evidence was legally and factually sufficient to support appellant’s convictions. (Pros. Ex. 1; Pros. Ex. 2; Pros. Ex. 5 at 51:00–52:30, 55:00–57:30, 1:04:00–1:07:00, 1:12:45–1:13:30; Pros. Ex. 8; R. at 343, 346–47).

And as previously discussed in subsection A of the Argument section under Assignment of Error V, because Judge Hart’s childhood incident was distant in time, was different from Miss [REDACTED]’s incident, and left no lasting psychological effects, the childhood incident had no material effect on Judge Hart’s impartiality. (Gov. App. Ex. 1; R. at 499–501, 507–08; App. Ex. LX at 2–3).

Furthermore, as explained in subsection B of the Argument section under Assignment of Error V, even if Judge Hart was required to disclose his incident,

appellant's forum selection was still knowing and voluntary because "R.C.M. 903 does not require that a military judge inquire into any nonenumerated factors or collateral matters that may have influenced the accused's election." *See St. Blanc*, 70 M.J. at 429–30.

As to the second factor, denial of relief would not cause injustice in any other cases, because Judge Hart, as a practice, considers when disclosure of his childhood incident is appropriate; and, in the past, he has chosen to disclose. (R.C.M. 1106 Extension Request; R. at 499, 507). And Judge Hart was impartial, remaining the military judge in the two courts-martial where his childhood incident was revealed. (App. Ex. LIX at 1–2; App. Ex. LX at 2–3; R. at 504–05).

As to the third factor, based on the same arguments set forth in subsection B of the Argument section under Assignment of Error V, the public would still be confident that appellant received a fair trial. (App. Ex. LXIII at 2; R. at 398, 401–04). For example, Judge Hart allowed—over the prosecution's objection—the defense's expert witness to testify, even though appellant had previously informed the court that he did not intend to offer expert testimony, had failed to put the expert on the witness list, and had failed to provide notice of the expert's testimony. (App. Ex. LXIII at 2; R. at 398, 401–04). The sentence was also less than the five years requested by the prosecution at trial. (R. at 483). In light of

Judge Hart's fair treatment of appellant and the prosecution's rejected five-year request, appellant's trial was fair and appropriate. (R. at 490).

Finally, the public would have confidence in the fairness of the trial because Judge Hart's childhood incident was so long ago, lasted just two seconds, and was so different from Miss [REDACTED]'s, especially considering other mistrial denials that have passed appellate scrutiny. *See, e.g., Rudometkin*, 82 M.J. at 397–99 (upholding a denial of mistrial under *Liljeberg* analysis, even though an accused charged with adultery had waived his right to trial by members, and it was later revealed post-trial that the military judge had engaged in “an intimate and suspicious personal relationship” with the wife of a Trial Defense Service captain).

Because an analysis of the *Liljeberg* factors counsels against the “unusual and disfavored remedy” of a mistrial, Judge Hart's determination about mistrial was appropriate and does not constitute “clear evidence of an abuse of discretion.” *See Short*, 77 M.J. at 150 (internal quotation marks omitted).

**D. By declining to question or challenge Judge Hart before forum selection, appellant waived and forfeited his right to relief based on Judge Hart's qualification.**

By declining to challenge or question Judge Hart before making a forum selection, appellant waived his rights to either challenge Judge Hart, contest the forum selection, or otherwise seek relief based on Judge Hart's qualification. (R. at 307–09). If appellant did not waive these rights, then he certainly forfeited

them, because, right before forum selection, he had declined Judge Hart's offer to question or challenge him. (R. at 307–09). This court should not disturb appellant's waiver, because, in any event, appellant's forum selection was still knowing, and Judge Hart's decisions about disclosure and disqualification were not in error. (Subsections A–C, Argument section, Assignment of Error V).

### **Assignment of Error VI**

#### **WHETHER APPELLANT'S SENTENCE IS APPROPRIATE WHEN HIS FIRST AMENDMENT RIGHTS WERE VIOLATED.**

#### **Additional Facts**

Appellant's brief alleges that Fort Leavenworth's prison policies improperly prevent child sex-offenders like him from interacting with minors, including appellant's son and sister. (Appellant's Br. 31). The only evidence appellant offers in support of his allegations are three filled-out forms: an Inmate Visitation Request form and two Prisoner Request forms. (Appellant's Br. Appendix). The two Prisoner Request forms are part of appellant's request "to get an exception to policy to be visited by" appellant's sister and son, and the prison responded by telling appellant that the request was pending. (Appellant's Br. Appendix). Appellant provided no evidence of any other steps taken to exhaust his administrative remedies. (Appellant's Br. Appendix).

## **Standard of Review**

Under Article 66(d), UCMJ, 10 U.S.C. § 866, “the Court of Criminal Appeals conducts a de novo review of the record in such cases for . . . sentence appropriateness.” *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

## **Law**

### **A. Sentence appropriateness and prison conditions**

Under Article 66(d), UCMJ, a Court of Criminal Appeals (CCA) may affirm “the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Of course, “it still remains the case that an appellant who asks a CCA to review prison conditions must establish the following: (1) a record demonstrating exhaustion of administrative remedies (i.e., exhaustion of the prisoner grievance system and a petition for relief under Article 138, UCMJ, 10 U.S.C. § 938, except in unusual or egregious circumstances that would justify the failure to exhaust; (2) a clear record demonstrating the jurisdictional basis for the CCA’s action; and (3) a clear record demonstrating the legal deficiency in administration of the prison.” *United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021) (cleaned up).

### **B. Matters outside the record**

This court may not consider anything outside of the “entire record” when reviewing a sentence under Article 66(d), UCMJ. *United States v. Jessie*, 79 M.J.

437, 441 (C.A.A.F. 2020). The UCMJ does not “provide an opportunity for the accused and his counsel to supplement the ‘record’ after the convening authority has acted.” *Id.* (citation omitted). The Court of Appeals for the Armed Forces has held that a Court of Criminal Appeals “could not consider materials outside the record in deciding whether a prison policy violated a prisoner’s First Amendment rights.” *United States v. Pullings*, 2023 CAAF LEXIS 212, at \*12 (C.A.A.F. 14 Apr. 2023).

### **Argument**

Because appellant “did not raise the conditions of his post-trial confinement in any post-trial submissions to the convening authority . . . the issue was not raised by materials in the record.” *Pullings*, 2023 CAAF LEXIS 212, at \*11–12. So appellant’s outside-the-record materials merit no sentence relief based on alleged First Amendment violations, because this court may not “consider materials outside the record in deciding whether a prison policy violated a prisoner’s First Amendment rights.” *Id.*

Even if this court may consider the three forms attached to appellant’s brief, the forms fail to establish that appellant exhausted his administrative remedies, and thus the court should deny him sentence relief. (Appellant’s Br. Appendix). The three forms merely show that he requested an exception to policy so that his sister and son can visit him, and that the request was pending around the time he




submitted the forms. (Appellant's Br. Appendix). Appellant also failed to offer any reason for his failure to exhaust administrative remedies. (Appellant's Br. Appendix).

Because of this failure to exhaust, appellant's case is unlike the prisoner's in *Guinn*, a case in which the prisoner had "unsuccessfully complained to prison officials and the convening authority." 81 M.J. at 197. Furthermore, in *Guinn*, under an old Fort Leavenworth prison policy, those convicted of child sex offenses were prohibited from having "direct or indirect written, telephonic, or in-person contact" with any children, even their own biological children, unless the convicts followed certain steps, including having to "admit guilt and complete a treatment program for sexual offenders." 81 M.J. at 198. Unlike the prisoner in *Guinn*, appellant offered no evidence that the current Fort Leavenworth policy is as strict; he has failed to show that he is prohibited from having indirect or written contact with his son and sister, or that he has been forced to admit guilt and complete a sex-offender treatment program. (Appellant's Br. Appendix). Appellant should therefore be denied relief for failing to offer evidence of ever petitioning for relief under Article 138, UCMJ, using the prisoner grievance system, or otherwise exhausting administrative remedies. (Appellant's Br. Appendix).

## Conclusion

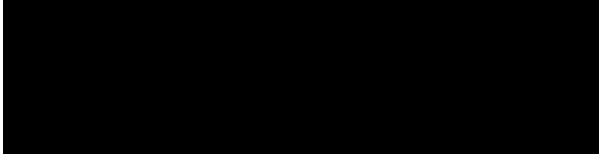
WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.



JOSEPH H. LAM  
MAJ, JA  
Appellate Attorney, Government  
Appellate Division



CYNTHIA A. HUNTER  
CPT, JA  
Acting Branch Chief, Government  
Appellate Division



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

# Appendix

# United States v. Close

United States Army Court of Criminal Appeals

March 22, 2017, Decided

ARMY 20140984

## Reporter

2017 CCA LEXIS 175 \*

UNITED STATES, Appellee v. Private First Class  
JASON A. CLOSE United States Army, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** On reconsideration by,  
Dismissed by, in part, Decision reached on appeal by,  
Sentence imposed by [United States v. Close, 2017 CCA  
LEXIS 432 \(A.C.C.A., June 27, 2017\)](#)

Review denied by [United States v. Close, 2017 CAAF  
LEXIS 1010 \(C.A.A.F., Oct. 17, 2017\)](#)

**Prior History:** [\*1] Headquarters, U.S. Army Fires  
Center of Excellence and Fort Sill. Jeffery R. Nance,  
Military Judge (arraignment and motions hearing).  
Jeffrey W. Hart, Military Judge (trial). Colonel Mark W.  
Seitseinger, Staff Judge Advocate (pretrial). Colonel  
David E. Mendelson, Staff Judge Advocate (post-trial).

**Counsel:** For Appellant: Major Andres Vazquez, Jr., JA;  
Captain Michael A. Gold, JA (on brief); Lieutenant  
Colonel Melissa R. Covolessky, JA; Captain Katherine L.  
DePaul, JA; Captain Michael A. Gold, JA (on reply  
brief); Captain Katherine L. DePaul, JA; Captain Michael  
A. Gold, JA (on supplemental brief).

For Appellee: Colonel Mark H. Sydenham, JA;  
Lieutenant Colonel A.G. Courie, III, JA; Major Anne C.  
Hsieh, JA; Major Steve T. Nam, JA (on brief).

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

**Opinion by:** PENLAND

## Opinion

### SUMMARY DISPOSITION

PENLAND, Judge:

A military judge sitting as a general court-martial

convicted appellant, contrary to his pleas, of two  
specifications of possessing child pornography, in  
violation of Article 134, Uniform Code of Military Justice,  
[10 U.S.C. § 934 \(2012\)](#) [hereinafter UCMJ].<sup>1</sup> The  
military judge sentenced appellant to a dishonorable  
discharge, [\*2] confinement for two years, forfeiture of  
all pay and allowances, and reduction to the grade of E-  
1. The convening authority approved only so much of  
the adjudged sentence as provided for a dishonorable  
discharge, confinement for twenty-three months, total  
forfeitures, and reduction to the grade of E-1.

This case is before us pursuant to *Article 66, UCMJ*.  
Appellant assigned two errors, one of which merits  
discussion but not relief. Additionally, we have reviewed  
both sets of appellant's matters personally asserted  
pursuant to [United States v. Grostefon, 12 M.J. 431  
\(C.M.A. 1982\)](#), and find they lack merit.

## BACKGROUND

Appellant's court-martial concluded on 9 December  
2014 and the transcript was completed on 29 January  
2015. Appellant's military defense counsel, CPT JK,  
submitted three pages of corrections on the errata sheet  
he signed. These corrections did not include any  
corrections between pages 250 and 448.

Defense appellate counsel filed with this court a motion  
to attach an affidavit signed by CPT JK on 12 July 2016  
which alleged:

1. The transcript included in the appellate record for  
PFC Close's appeal is incomplete.<sup>2</sup>
2. On page 324, line 4 of the transcript, the record  
states: "[The civilian defense counsel played

<sup>1</sup> Appellant was acquitted of rape and forcible sodomy of a  
child under the age of twelve and two specifications of  
indecent acts with a child.

<sup>2</sup> Captain JK's first affidavit does not explain why he did not  
raise this issue during the errata process.

Defense Exhibit A.[sic]." [\*3] This statement does not accurately reflect the statements that were made during court-martial.

3. During the playing of Defense Exhibit A, the Civilian Defense Counsel (CDC) engaged in a detailed colloquy with the witness<sup>3</sup> about her statements and actions displayed on Exhibit A. This colloquy between the CDC and the witness is not included in the appellate record.

We ordered the government to obtain affidavits on this issue. The government moved this court to attach the court reporter's recent transcription of the nine pages of the omitted portion of the court-martial transcript.<sup>4</sup> The government has also filed motions to attach affidavits from the court reporter, the military judge, and a second affidavit from CPT JK. These affidavits confirm CPT JK's observation that the transcript was incomplete and conclude that the nine pages transcribed by the court-reporter are an accurate transcription. We granted these motions and are now able to address this assigned error.

## LAW AND ANALYSIS

Whether a transcript is complete and verbatim is a question of law we review *de novo*. [\*United States v. Henry\*, 53 M.J. 108, 110 \(C.A.A.F. 2000\)](#)("The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim [\*4] record sentence is one of jurisdictional proportion that cannot be waived."). According to Rule for Courts-Martial [hereinafter R.C.M.] 1103(b)(2):

(B) . . . [T]he record of trial shall include a verbatim transcript of all sessions except sessions closed for deliberations and voting when: (i) The sentence adjudged includes confinement for twelve months or more or any punishment that may not be adjudged by a special court-martial; or (ii) A bad-conduct discharge has been adjudged.

...

(D) . . . In addition to the matter required under subsection (b)(2)(B) or (b)(2)(C) of this rule, a

complete record shall include: (i) The original charge sheet or a duplicate; (ii) A copy of the convening order and any amending order(s); (iii) The request, if any, for trial by military judge alone, or that the membership of the court-martial include enlisted persons, and, when applicable, any statement by the convening authority required under R.C.M. 201(f)(2)(B)(ii) or 503(a)(2); (iv) The original dated, signed action by the convening authority; and (v) Exhibits, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.<sup>5</sup>

When our superior court addressed this issue in *United States [\*5] v. Davenport*, it noted, although a nonverbatim transcript and an incomplete record are separate and distinct errors under the R.C.M., the distinction had been blurred by dicta in previous cases. [\*73 M.J. 373, 376 \(C.A.A.F. 2014\)\*](#) (citing [\*United States v. Gaskins\*, 72 M.J. 225, 230 \(C.A.A.F. 2013\)](#)). In *Davenport*, the transcript was missing all of the testimony of a key government witness and the court reporter was unable to recreate the transcript by the time the omission was discovered on appeal. [\*Id.\* at 375](#). Our superior court held that the transcript was nonverbatim because it could not be determined that the omitted witness's testimony related only to offenses of which Davenport was acquitted. [\*Id.\* at 378](#).

In appellant's case, a verbatim transcript is clearly required based upon appellant's sentence. We are confident that the transcript is now verbatim and complete given the addition of the omitted portion of the transcript.

## CONCLUSION

The findings of guilty and sentence are AFFIRMED.

Senior Judge CAMPANELLA and Judge HERRING concur.

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End of Document

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<sup>3</sup> The witness referred to by CPT JK is WA, the victim of the rape and forcible sodomy of a child under the age of twelve and indecent acts with a child specifications of which appellant was acquitted.

<sup>4</sup> We required the government to obtain confirmation from trial counsel, civilian defense counsel, and CPT JK that the newly-provided transcript is an accurate record of the proceedings.

<sup>5</sup> See also [\*UCMJ art. 54\(c\)\(1\)\*](#).

## United States v. Close

United States Army Court of Criminal Appeals

June 27, 2017, Decided

ARMY 20140984

### Reporter

2017 CCA LEXIS 432 \*

UNITED STATES, Appellee v. Private First Class  
JASON A. CLOSE, United States Army, Appellant

**Notice:** NOT FOR PUBLICATION

**Prior History:** [\*1] Headquarters, U.S. Army Fires Center of Excellence and Fort Sill. Jeffery R. Nance, Military Judge (arraignment and motions hearing), Jeffrey W. Hart, Military Judge (trial), Colonel Mark W. Seitseinger, Staff Judge Advocate (pretrial), Colonel David E. Mendelson, Staff Judge Advocate (post-trial).

[United States v. Close, 2017 CCA LEXIS 175 \(A.C.C.A., Mar. 22, 2017\)](#)

**Counsel:** For Appellant: Captain Michael A. Gold, JA (argued); Major Andres Vazquez, Jr., JA; Captain Michael A. Gold, JA (on brief); Lieutenant Colonel Melissa R. Covolessky, JA; Captain Katherine L. DePaul, JA; Captain Michael A. Gold, JA (on reply brief); Captain Katherine L. DePaul, JA; Captain Michael A. Gold, JA (on supplemental brief).

For Appellee: Captain Tara O'Brien Goble, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie, III, JA; Major Anne C. Hsieh, JA; Major Steve T. Nam, JA (on brief); Major Michael E. Korte, JA.

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

**Opinion by:** PENLAND

### Opinion

#### MEMORANDUM OPINION ON FURTHER REVIEW

PENLAND, Judge:

In this decision, prompted by appellant's motion to reconsider, we conclude appellant's trial defense team rendered ineffective assistance of counsel, where the

team did not move to [\*2] suppress evidence obtained pursuant to a search warrant.

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, [10 U.S.C. § 934 \(2012\)](#) [hereinafter UCMJ].<sup>1</sup> The military judge sentenced appellant to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved only so much of the adjudged sentence as provided for a dishonorable discharge, confinement for twenty-three months, forfeitures of all pay and allowances, and reduction to the grade of E-1. Appellant was credited with sixty days against the sentence of confinement.

This case is before us pursuant to appellant's motion to reconsider our summary disposition in [United States v. Close, ARMY 20140984, 2017 CCA LEXIS 175](#) (Army Ct. Crim. App. 22 Mar. 2017) (summ. disp.).<sup>2</sup> In their reconsideration motion, appellate defense counsel alleged ineffective assistance of counsel for the first time, writing:

Reconsideration is appropriate in light of the Court of Appeals for the Armed Forces [CAAF] decision in [United States v. Nieto, \[76 M.J. 101 \(C.A.A.F. 2017\)\]](#). Trial defense counsel's failure to move to suppress [\*3] all of the evidence seized and subsequently examined from appellant's off-post residence as an unlawful search and seizure is a material legal and factual matter that was not previously briefed and was overlooked by this court in conducting its review under Article 66(c), Uniform Code of Military Justice (UCMJ).

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<sup>1</sup> Specification 1 involved appellant's laptop and Specification 2 involved appellant's digital card. Additionally, appellant was acquitted of rape and forcible sodomy of a child under the age of twelve and two specifications of indecent acts with a child.

<sup>2</sup> We directed oral argument, which we heard on 24 May 2017.

## BACKGROUND

On 29-30 November 2012, appellant and Sergeant (SGT) AD were in the battalion area watching movies on appellant's laptop computer, which was connected to a projector. As appellant was called away for another duty, he allowed SGT AD to continue using the laptop to watch another movie. While he looked for movies, SGT AD stumbled upon file labels indicating their associated files contained child pornography (one of which started with "9-year-old . . ."). Sergeant AD stopped what he was doing without viewing the content of the files and alerted his leaders, who in turn referred the matter to law enforcement investigators.

In a 30 November 2012 sworn statement to a Criminal Investigation Command (CID) agent, SGT AD relayed what he had seen on appellant's laptop.<sup>3</sup> CID Special Agent JH also interviewed appellant, but he did not examine the laptop. Based on SGT AD's statement [\*4] and appellant's interview, SA JH prepared an affidavit on 30 November 2012 requesting a search warrant for appellant's residence in Lawton, Oklahoma. A federal magistrate judge issued the warrant the same day.<sup>4</sup> In pertinent part, the affidavit stated:

This office interviewed SGT [AD] . . . who stated he and [appellant] were watching a movie on [appellant's] laptop when [appellant] was instructed to report to the [First Sergeant]. SGT [AD] stated he finished the movie and attempted to find another movie to watch from [appellant's] hard drive and found a folder with "disturbing" names. SGT [AD] stated he believed the files contained child pornography based off of their names and subsequently notified his platoon sergeant. (See attached Sworn Statement of SGT [AD])

This office interviewed [appellant] who stated he knew he had "illegal pornography" on his computer but thought he deleted it all. [Appellant] stated he was living with Ms. [AM] when she told him she downloaded "illegal child pornography" onto his laptop in order to blackmail him for \$700. [Appellant] stated he searched his computer and found what he believed to be thousand's of files including pictures and videos of "illegal [\*5]

pornography" containing girls "under 10 years old". [Appellant] stated he moved the files to a folder named "wipe" and deleted them through a program called "C Cleaner," which deletes and overwrites files but must have missed some of the "torrents".

This office was granted consent by [appellant] to conduct a digital forensic examination of his personal Hewlett Packard laptop. However, [appellant] did not consent to the collection and search of digital media at his quarters or on his person. [Appellant] invoked his legal rights and requested a lawyer.

During the course of the interview, [appellant] stated that he currently resides in a trailer house located at 40 NE 25th Street, Lot #61, Lawton, 73507. He also stated during the interview that he is the only person residing in the trailer house located at 40 NE 25th Street, Lot #61, Lawton, 73507. During the interview [appellant] demonstrated a vast knowledge of computer technology and he even stated that he was "technically inclined".

Based on my experience as a CID Special Agent, suspects treat their Child Pornographic media as prized possessions and rarely delete or destroy the media. Further, based on my experience Forensic Computer [\*6] Examiners have great success in recovering images, which have been deleted by the user from the unallocated space of a hard drive utilizing forensic software. Suspects are also known to keep images and/or videos on numerous external devices for the ease of viewing the child pornography on different computers or devices.

It is imperative to the conclusion of this allegation that authorization be granted to conduct a search of computer systems including central processing units; internal and peripheral storage devices such as fixed disks, external hard disks, floppy disk drives and diskettes, optional storage devices or other memory storage devices; compact disc, digital versatile discs; and all other digital media storage devices collected from [appellant's] living quarters.

And the seizure of: Computers, hard drives, CD's, DVD's, thumb drives, SD cards, cameras, PDA's, cellular phones, all other digital storage devices for text, graphics, images, multimedia files, electronic mail messages, and other data including deleted files and folders, containing material related to the sexual exploitation of minors; and/or material depicting apparent or purported minors engaged in

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<sup>3</sup> We granted government appellate counsel's motion to attach SGT AD's statement.

<sup>4</sup> We granted defense appellate counsel's motion to attach the affidavit and warrant.



sexually explicit [\*7] conduct; and data and/or information used to facilitate access to, possession, distribution, and/or production of such materials.

Special Agent JH seized appellant's laptop pursuant to appellant's consent and searched his residence pursuant to the warrant. Special Agent JH seized from the residence "everything that was capable of storing digital media files." This included a Liteon desktop computer and a secure digital card [card] from a PlayStation device. Digital forensic examination (DFE) of the laptop and card revealed images and videos of child pornography; similar examination of the desktop computer yielded numerous images of erotic child anime and significant download activity over a long period of time with respect to these images (in other words, it was clear the numerous images had been obtained via some sort of deliberate downloading).

In April 2013, before the DFE was complete, CID interviewed Ms. AM, who described seeing child pornography in the spring of 2012 on appellant's desktop computer, which was located in a residence they previously shared. Ms. AM described the desktop as follows:

Regarding the desk-top computer on which I found the kid porn, like I said, [appellant] [\*8] built it and it did not have side panels on it. It did have a giant . . . external storage device attached to the computer. The tower might have been a Dell, and [appellant] took it with him when he got his stuff and moved out. I have no idea where it is or what was ever done with it.<sup>5</sup>

Though appellant was not charged with possessing child pornography on the desktop computer, the government notified appellant on 15 August 2014 of its intent to introduce this evidence at trial under Military Rule of Evidence [hereinafter Mil. R. Evid.] 404(b). On 28 August 2014, appellant's trial defense counsel filed a pretrial motion seeking to exclude this evidence of uncharged misconduct. The military judge acknowledged the motion and government counsel's response during a pretrial session on 15 September 2014; however, at the parties' request, he deferred ruling until trial was underway. The pleadings make clear Ms. AM's expected testimony would be the source of this disputed evidence.

In another pretrial session on 27 October 2014, appellant stated his desire to be represented by his newly-retained civilian defense counsel, JW, who was present and announced his qualifications. The military judge repeated his intent to [\*9] decide the uncharged misconduct issues "as those arise in trial, if they arise in trial." Ultimately though, while she was included on the government's witness list, Ms. AM did not testify at the trial approximately six weeks later. Her absence essentially mooted the defense's uncharged misconduct motion.

The prosecution's case was relatively straightforward, consisting largely of chain-of-custody testimony and forensic testimony regarding items found on appellant's laptop, card, and desktop. The laptop and card contained images and videos of child pornography, while the desktop computer contained numerous images of child anime. The child pornography on the laptop was downloaded at approximately 1540 hours, 29 November 2012.

The military judge considered the evidence from the laptop and card without any evidentiary limitation. In contrast, he considered the evidence from the desktop computer for limited purposes: the anime images, which "may be viewed as improper or [] somewhat similar to child pornography, the procedures for downloading such images is likely similar to the procedures of download[ing] or accessing child pornography;" and found their presence on the desktop computer "highly probative [\*10] as to whether [appellant] wrongfully possessed images on his devices."

The trial defense team did not challenge the search, and neither the warrant nor its associated affidavit were admitted at trial.

We granted appellate defense counsel's motion to attach an affidavit from appellant's trial defense counsel, Captain (CPT) JK, who wrote in pertinent part:

. . . I have been unable to speak to the civilian defense counsel, Mr. [JW] . . . Although we contemplated raising the issue of an unreasonable search and seizure with respect to [SGT AD]'s initial search, I do not remember identifying any issues, or preparing any motion to suppress regarding the federal magistrate's search warrant of appellant's home or the underlying affidavit submitted by Special Agent [JH]. Our trial strategy . . . was to show that the government failed to prove that the possession was knowing and wrongful. Had we identified any issues with or thought to make a

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<sup>5</sup> We granted government appellate counsel's motion to attach Ms. AM's statement.



motion to suppress the evidence obtained from the appellant's home based on the federal magistrate's warrant and underlying affidavit we would have done so.

We granted appellate government counsel's motion to attach an affidavit from appellant's civilian defense [\*11] counsel, JW, who prepared an affidavit after CPT JK's and wrote in pertinent part:

. . . I have spoken to military defense counsel, CPT [JK] In reviewing my case file, I found a document that was titled "to do list" which included numerous motions, to include a motion to suppress the search of the home based on the search warrant issued on November 30, 2012. It is my recollection that myself and CPT [JK], in considering the motion to suppress the search of the house based on the search warrant, also took into consideration other evidence and statements that had been gathered by the investigation to include, most importantly, the statement from [AM] taken on April 11, 2013. Within that statement Ms. [AM] had stated that in the spring of 2012, before the accused moved out, he had allowed Ms. [AM] to use an extra phone he had. Ms. [AM] stated that when she went to clean off the phone she discovered numerous messages and other items that had been saved on the phone, to include what appeared to be numerous folders inside of folders in the phone. Upon opening the phone she discovered what appeared to be suspicious pictures, some labeled "RAWR" containing what appeared to be hundreds, maybe [\*12] even thousands, of pictures of young children who were naked and were posing or engaging in sex-like acts of sexual intercourse. Based on the additional evidence that had been discovered, to include the potential testimony of Ms. [AM], myself and CPT [JK] decided that the motion to suppress might be successful but that the evidence would have been inevitably discovered through the testimony presented by Ms. [AM]. Therefore it is clear from our notes and the list of motions indicated that it was discussed between myself and CPT [JK] that we do a motion to suppress the search of the house but decided not to based on other evidence that would have led to discovery of the same evidence that had been seized through the warrant.

"Claims of ineffective assistance of counsel are reviewed de novo." [\*United States v. Gooch\*, 69 M.J. 353, 362 \(C.A.A.F. 2011\)](#) (internal citations omitted).

In evaluating allegations of ineffective assistance of counsel, we apply the standard set forth in [\*Strickland v. Washington\*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 \(1984\)](#). In *Strickland*, the Supreme Court found that the [\*Sixth Amendment\*](#) entitles criminal defendants to the "effective assistance of counsel"—that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." [\*13] [\*Strickland\*, 466 U.S. at 686](#). Specifically in a case like appellant's where a search and seizure occurred:

Where defense counsel's failure to litigate a [\*Fourth Amendment\*](#) claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his [\*Fourth Amendment\*](#) claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

[\*Kimmelman v. Morrison\*, 477 U.S. 365, 376, 106 S. Ct. 2574, 91 L. Ed. 2d 305 \(1986\)](#).

Inquiry into an attorney's representation must be "highly deferential" to the attorney's performance and employ "a strong presumption" that counsel's conduct falls within the wide range of professionally competent assistance. [\*Id.\* at 688-89](#); see [\*Premo v. Moore\*, 562 U.S. 115, 123, 131 S. Ct. 733, 178 L. Ed. 2d 649 \(2011\)](#) ("The Court of Appeals was wrong to accord scant deference to counsel's judgement. . . ."). Our superior court has applied this standard to courts-martial, noting that to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate: 1) that his counsel's performance was deficient; and 2) that this deficiency resulted in prejudice. [\*United States v. Green\*, 68 M.J. 360, 361-62 \(C.A.A.F. 2010\)](#) (citing [\*Strickland\*, 466 U.S. at 687](#); [\*United States v. Mazza\*, 67 M.J. 470, 474 \(C.A.A.F. 2009\)](#)).

We judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. [\*Strickland\*, 466 U.S. at 690](#). In making that determination, we consider [\*14] the totality of the circumstances, bearing in mind "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work . . . [and] recognize that counsel is

## LAW AND DISCUSSION

strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

By not filing a motion to suppress the evidence described above, the trial defense team waived a complaint regarding its admissibility. Rule for Courts Martial [hereinafter R.C.M.] 905(b)(3) (motions to suppress evidence shall be made before entry of pleas); R.C.M. 905(e) (failure to timely file a motion to suppress evidence constitutes waiver, absent good cause shown to the military judge, who may grant relief from the waiver).

Appellate defense counsel indicated at oral argument that *Nieto's* publication prompted their focus on the search issue in this case. On the related issue of whether *Nieto* broke new ground in search and seizure jurisprudence, appellate defense counsel essentially conceded that it did not. We agree and emphasize that, had *Nieto* established a new legal principle in 2017, it would be manifestly unreasonable to upend the result of a criminal trial [\*15] because trial defense counsel did not account for that yet-unknown principle in 2014. Instead, just as the trial defense team failed to correctly identify the constitutional issues presented by the search warrant in this case, so too did the appellate defense team until our superior court reminded practitioners of extant fundamental constitutional protections against unreasonable search and seizure. Specifically, as in this case, "a [law enforcement officer's] profile alone without specific nexus to the person concerned cannot provide the sort of articulable facts necessary to find probable cause to search[.]" *Nieto*, 76 M.J. at 106 (quoting *United States v. Macomber*, 67 M.J. 214, 220 (C.A.A.F. 2009)).

Mindful of our duty to give great deference to reasoned, tactical decisions of defense counsel at trial,<sup>6</sup> we can find no sound rationale in either CPT JK's or JW's affidavit. Captain JK does not recall identifying an issue with the search warrant. JW's affidavit, on the other hand, offers a rather muddled and ultimately unhelpful recollection of his reason for not filing a suppression motion. His affidavit seems to conflate the concept of inevitable discovery—which the record in this case does not support—with the idea that the factfinder was going to hear Ms. AM's [\*16] testimony anyway. In fact, Ms. AM's testimony in this case was far from inevitable. First, the defense moved to exclude it; and, second, the

government did not call her to testify. Considering these affidavits in light of the warrant application's lack of showing any particularized "nexus" between appellant's laptop and his other digital media devices, we conclude the trial defense team was deficient.

We further conclude appellant has carried his burden in establishing a reasonable probability that, absent the deficiency, his trial would have yielded a substantially more favorable result with respect to the second child pornography specification. Based on fundamental [Fourth Amendment](#) principles, including the requirement that a search warrant must be anchored in probable cause to find evidence of a crime in the place to be searched,<sup>7</sup> we are confident the military judge would have granted a defense motion to suppress the results of the search and seizure in this case. See [United States v. Jameson](#), 65 M.J. 160 (C.A.A.F. 2007) ("[T]he decisional issue is whether Appellant has carried his burden to show that his counsel would have been successful if he had filed a timely motion preventing the admission of [the evidence]."). However, we disagree with appellate [\*17] defense counsel's argument to the effect that, without the evidence gained from the search of his home, appellant would have likely been acquitted of knowingly and wrongfully possessing child pornography on his laptop, which was downloaded the day before the search occurred.

## CONCLUSION

The finding of guilty of Specification 2 of Charge III is set aside and that Specification is DISMISSED. The remaining finding of guilty is affirmed.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in [United States v. Winckelmann](#), 73 M.J. 11, 15-16 (C.A.A.F. 2013) and [United States v. Sales](#), 22 M.J. 305 (C.M.A. 1986). We are confident that based on the entire record and the child pornography appellant knowingly and wrongfully possessed on his laptop, the military judge would have imposed a sentence of at least that which was approved by the convening authority and accordingly we AFFIRM

<sup>6</sup> See [Premo](#), 562 U.S. at 123.

<sup>7</sup> See [United States v. Hester](#), 47 M.J. 461, 463 (C.A.A.F. 1998); [United States v. Clayton](#), 68 M.J. 419, 424 (C.A.A.F. 2010).

the sentence.

We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside [\*18] by our decision, are ordered restored.

Senior Judge CAMPANELLA and Judge HERRING concur.

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## United States v. Pullings

United States Court of Appeals for the Armed Forces

November 8, 2022, Argued; April 14, 2023, Decided

No. 22-0123

### Reporter

2023 CAAF LEXIS 212 \*; \_\_\_ M.J. \_\_\_

UNITED STATES Appellee v. Travis D. PULLINGS,  
Staff Sergeant United States Air Force, Appellant

**Notice:** THIS OPINION IS SUBJECT TO EDITORIAL  
CORRECTION BEFORE FINAL PUBLICATION

**Prior History:** [\*1] Crim. App. No. 39948. Military  
Judge: Jason M. Kellhofer.

[United States v. Pullings, 2021 CCA LEXIS 648, 2021  
WL 5626313 \(A.F.C.A., Nov. 30, 2021\)](#)

**Counsel:** For Appellant: Major David L. Bosner  
(argued); Major Jarett F. Merk (on brief); Major Eshawn  
R. Rawlley and Mark C. Bruegger, Esq.

For Appellee: Major Brittany M. Speirs (argued); Colonel  
Naomi P. Dennis, Lieutenant Colonel Matthew J. Neil,  
and Mary Ellen Payne, Esq. (on brief); Lieutenant  
Colonel Thomas J. Alford and Major Jay S. Peer.

**Judges:** Judge MAGGS delivered the opinion of the  
Court, in which Chief Judge OHLSON, Judge SPARKS,  
and Senior Judge STUCKY joined. Judge HARDY filed  
a separate opinion concurring in the judgment.

**Opinion by:** MAGGS

### Opinion

Judge MAGGS delivered the opinion of the Court.

Appellant asked the United States Air Force Court of  
Criminal Appeals (AFCCA) for sentence relief on  
grounds that he suffered cruel and unusual punishment,  
in violation of [Article 55, Uniform Code of Military Justice  
\(UCMJ\), 10 U.S.C. § 855 \(2018\)](#), and the [Eighth  
Amendment of the Constitution](#), during a period of post-  
trial confinement in a civilian jail. [United States v.  
Pullings, 2021 CCA LEXIS 648, at \\*2-3, 2021 WL  
5626313, at \\*1-2 \(A.F. Ct. Crim. App. Nov. 30, 2021\)](#)  
(unpublished). The AFCCA, however, rejected

Appellant's allegations of cruel and unusual punishment  
and affirmed his approved sentence. [Id. at \\*2, 2021 WL  
5626313, at \\*1](#). Appellant now asks us to reverse the  
AFCCA and remand the case for the AFCCA to  
reassess his sentence. Applying the test announced in  
[United States v. Lovett, 63 M.J. 211, 215 \(C.A.A.F.  
2006\)](#), we conclude that Appellant has not  
established [\*2] that he suffered cruel and unusual  
punishment. Accordingly, we affirm the AFCCA.

In reaching this decision, we neither accept nor reject  
the Government's argument that we should overrule  
precedents in which this Court has considered matters  
outside the record when reviewing claims of cruel and  
unusual punishment. See, e.g., [United States v. Pena,  
64 M.J. 259 \(C.A.A.F. 2007\)](#); [United States v. Erby, 54  
M.J. 476, 477 \(C.A.A.F. 2001\)](#). Because overruling  
these precedents would not affect the outcome of this  
case, we leave the issue of whether the Court should  
overrule them for another time.

### I. Background

A military judge, sitting as a general court-martial, found  
Appellant guilty, consistent with his pleas, of two  
specifications of sexual assault of a child and three  
specifications of sexual abuse of a child, in violation of  
[Article 120b, UCMJ, 10 U.S.C. § 920b \(2012\)](#). The  
military judge sentenced Appellant to confinement for  
thirteen years, reduction to the grade of E-1, "total  
forfeitures,"<sup>1</sup> and a dishonorable discharge. In

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<sup>1</sup> The AFCCA addressed the "total forfeitures" portion of the  
sentence as follows:

In his sentence, the military judge announced "total  
forfeitures," and not that Appellant was to "forfeit all pay  
and allowances." See *Manual for Courts-Martial, United  
States* [\*3] (2016 ed.), Appendix 11. As the convening  
authority did not approve adjudged forfeitures, we need  
not determine whether the adjudged forfeitures were for  
both pay and allowances.

accordance with a pretrial agreement, the convening authority approved only eight years of confinement and disapproved the "total forfeitures."

#### A. Appellant's Post-Trial Confinement Conditions<sup>2</sup>

The Lowndes County Jail (LCJ) is a civilian confinement facility in Lowndes County, Georgia. The Air Force pays the LCJ to detain military "personnel who are awaiting transfer to a military penitentiary, serving a sentence where a transfer to a military facility is impractical, or being held for pre-trial confinement." A Memorandum of Agreement (MOA) between the Air Force and the LCJ specifies the duties of the LCJ when incarcerating military prisoners and the compensation from the Air Force for its services. Pursuant to this MOA, the LCJ confined Appellant from May 27, 2020, until January 29, 2021.

On December 15, 2020, and January 25, 2021, with the assistance of counsel, Appellant sent two complaints regarding his confinement conditions to the commander of his unit. These complaints alleged that the LCJ failed to provide edible food and drinkable water, sanitary living quarters, prescription medicine, and adequate medical care. He asserted that these failures [\*4] constituted cruel and unusual punishment in violation of [Article 55, UCMJ](#), and the [Eighth Amendment](#).<sup>3</sup> Appellant requested relief under [Article 138, UCMJ, 10 U.S.C. § 938 \(2018\)](#).

Appellant supported his allegations of deficient conditions in a sworn declaration. Appellant asserted that the LCJ gave him contaminated drinking water and moldy "expired food" with "various bugs, body hair, and flakes of rust" in it. Appellant alleged he suffered from food poisoning and that he lost thirty pounds as a result of the rations he consumed during his incarceration at the LCJ. Appellant further asserted that sewage water leaked into his cell from a broken toilet on the floor

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[Pullings, 2021 CCA LEXIS 648, at \\*1 n.3, 2021 WL 5626313, at \\*1 n.3](#). We agree with AFCCA's treatment of this matter.

<sup>2</sup> Information about Appellant's post-trial confinement conditions comes from materials that the AFCCA considered and that are included in the Joint Appendix filed in this Court. We address below the arguments of the parties about whether we may consider this information.

<sup>3</sup> Appellant also alleged that the LCJ put him at an increased likelihood to contract COVID-19, improperly charged him for medical care, and denied him confidential communications and unmonitored phone calls with his attorney, but he no longer presses those contentions in this appeal.

above; that the leaking sewage disabled the only light fixture in his cell; that insects crawled out of the drains in his cell; and that other inmates had broken toilets or sinks and had to use the toilet in a cell other than their own. Appellant also asserted that he could not clean up the dirt, mold, and mildew in his cell because cleaning supplies were provided only early in the morning, and he had no alarm clock or other means to wake himself up in time to use them.

Appellant additionally asserted that the LCJ never permitted him to go outside; that "the only sunlight that [he] received was from [\*5] a small skylight on the roof of the day-room"; that he received no opportunity for exercise; and that he could only walk in the dayroom. Appellant further declared that the LCJ took away his lawfully prescribed medicine when he arrived; that he did not see a physician for almost a month; that the LCJ withheld pain medication for the rehabilitation of his Achilles tendon; that the LCJ also denied him access to his previously issued medication for depression and anxiety;<sup>4</sup> and that the LCJ did not provide him with an extra blanket to alleviate the symptoms of a medical condition called Raynaud's Syndrome.

In addition to the complaints that he sent to his commander, Appellant also submitted numerous complaints to LCJ officials. An "Inmate Grievance/Request Record" dated September 17, 2020, shows that Appellant made the following statement:

THERE IS SO MUCH WATER DRIPPI[N]G THAT WE HAVE TO HAVE A MOP BUCKET UNDER THE LEAK AND HAVE TO EMPTY IT TWICE A DAY. THE PROBLEM IS THAT THE TOILET IS CLOGGED IN C222 AND IS CONTINUING TO OVERFLOW ON TO THE FLOOR OF THE CELL. THE WATER HAS MADE ITS WAY THROUGH THE CRACKS OF [THE] FLOOR[] [OF] C222, AND DISABLED THE LIGHTING OF C133. THERE IS ALSO WATER [\*6] FLOWING DOWN THE EXTERIOR WALL OF CELL 133 AND FLOWING BACK INTO THE CELL.

The record further indicates, without additional detail, that this issue was resolved four days later.

An official from the Lowndes County Sheriff's Office who was responsible for administering the LCJ responded to Appellant's complaints in two sworn declarations. In the first declaration, dated December

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<sup>4</sup> Appellant acknowledges that the LCJ did provide him with a two-week dosage of his prescribed medicine at one point.



31, 2020, the official stated in relevant part:

All drink coolers are cleaned daily by the Food Service Management Company, Trinity Food Service, under the supervision of contract kitchen staff; any incidents of mold or mildew are addressed immediately. Our kitchen is graded by Lowndes County Health inspectors just like public dining establishments and we consistently pass these inspections.

Tap water is dispensed through the toilet/sink appliance as it is in most other correctional facilities throughout the United States. These fixtures are in common use and commonly accepted as standard water dispensing appliances by numerous detention facilities.

Concerning the appearance of vermin in the facility we have two full-time sanitation crews who clean all common areas of the facility daily and dispense cleaning supplies [\*7] to inmate[s] to clean their own rooms. . . . [A]ll inmates are expected to clean their room and shower areas daily. Our sanitation crews' supervisors, shift supervisors, and jail staff are there to make sure that this is done.

Ace Pest Control comes to our facility once a month and dispenses pest control chemicals to common areas of the jail, the jail kitchen, and periodically the inmate housing areas.

I have no knowledge that Inmate Pullings has ever made these complaints to a staff member and our records indicated th[at] Inmate Pullings has only filed one grievance since his incarceration began and it was regarding the theft of property by another inmate.

In the second declaration, dated July 19, 2021, the same official wrote in pertinent part:

5. The jail follows health and safety guidelines regarding food services. The jail has a contract cleaning service that cleans common areas, and the jail provides cleaning supplies for inmates to clean their own cells. I cannot provide any further specifics on instances of mold that Inmate Pullings has referenced because he did not file any complaints. I have no knowledge of Inmate Pullings making informal complaints regarding these issues.

6. [\*8] Inmates receive 3 hours of recreation time, weekly. The recreation yard is a sealed yard under a roof, with one open air window that allows in fresh air and sunlight. The window is approximately 5 feet by 10 feet. This recreation yard complies with Georgia standards.

7. Inmates must get approval from our medical provider in order [to] bring in medication that was not prescribed to them from our medical personnel.

8. Regarding the maintenance for the leaking cell, the jail had to replace the entire roof in order to fix the leak. While we were repairing the leak, we transferred the inmates in the affected cells to other cells that were not leaking.

A nurse affiliated with the Lowndes County Sheriff's Office also provided a declaration. She asserted that Appellant did not report that he was taking any prescription medication on intake; that he reported he was on prescription medicine on June 29, 2020; that physicians saw him shortly afterward and provided him with medicine; and that when he complained of the symptoms of Raynaud's Syndrome, he was prescribed medication to alleviate these symptoms.

#### B. The AFCCA's Opinion and Our Grant of Review

The AFCCA assessed Appellant's claim of cruel [\*9] and unusual confinement conditions using the test that this Court announced in [Lovett, 63 M.J. at 215](#). [Pullings, 2021 CCA LEXIS 648, at \\*22-23, 2021 WL 5626313, at \\*9](#). To establish a violation of [Article 55, UCMJ](#), or the [Eighth Amendment](#), [Lovett](#) requires an appellant to show:

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

[63 M.J. at 215](#) (alteration in original) (footnote omitted) (internal quotation marks omitted) (citation omitted).

Addressing Appellant's nonmedical complaints, the AFCCA held that Appellant had not satisfied the second [Lovett](#) requirement. [Id. at \\*24-25, 2021 WL 5626313, at \\*10](#). The AFCCA explained:

Regarding Appellant's complaints regarding food and water, the conditions of his cell, and lack of outdoor time and recreation facilities, Appellant has neither claimed nor demonstrated a culpable state of mind on the part of prison officials. Moreover, we conclude from our review of the declarations from prison officials that they were not indifferent to Appellant's health or safety. Thus, Appellant has not satisfied all three prongs of [Lovett](#) for these

complaints.

*Id.*, 2021 CCA LEXIS 648, 2021 WL 5626313, at \*10 (footnote [\*10] omitted). The AFCCA further asserted: "For example, prison officials knew that water was leaking into cells due to a roof leak. They rehoused inmates in the affected cells and replaced the roof." *Id.* at \*25 n.18, 2021 WL 5626313, at \*10 n.18.

Addressing Appellant's complaint about his medical care, the AFCCA held "Appellant does . . . imply a culpable state of mind in relation to his complaint regarding inadequate medical care." *Id.* at \*25, 2021 WL 5626313, at \*10. But the AFCCA held that Appellant had not satisfied the first requirement of the *Lovett* test because he had not shown a sufficiently serious act or omission by LCJ officials. *Id.*, 2021 CCA LEXIS 648, 2021 WL 5626313, at \*10. The AFCCA explained:

We find the conduct of prison officials as alleged by Appellant did not constitute "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Appellant has not demonstrated that prison officials understood Appellant's needs to be significantly serious and that they ignored those needs with deliberate indifference. Moreover, Appellant does not allege he suffered harm, nor was at substantial risk of serious harm, from any of these issues. While we can presume these issues caused Appellant some discomfort and distress, more is required before we can find violations of the [\*11] *Eighth Amendment* and *Article 55, UCMJ*.

*Id.* at \*25-26, 2021 WL 5626313, at \*10 (footnote omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

In applying the *Lovett* test, the AFCCA determined that it did not need to order a *DuBay* hearing to obtain relevant findings of fact. 2021 CCA LEXIS 648, at \*24, 2021 WL 5626313, at \*10; see *United States v. DuBay*, 17 C.M.A. 147, 149, 37 C.M.R. 411, 413 (1967). The AFCCA reasoned that even if the documentary evidence submitted contained inconsistencies, resolving the factual disputes in Appellant's favor would not result in relief to Appellant. *Id.*, 2021 CCA LEXIS 648, 2021 WL 5626313, at \*10.

This Court granted review of two assigned issues:

I. In addition to prison officials, can the decisions of military personnel satisfy the "deliberate indifference" aspect of the cruel and unusual

punishment test when they repeatedly send military inmates to a local civilian confinement center with a history of inhumane living conditions for inmates?

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

*United States v. Pullings*, 82 M.J. 372, 372-73 (C.A.A.F. 2022) (order granting review). As we explain below, we answer both questions in the negative.

## II. Consideration of Matters Outside the Record

Before reaching the merits of the assigned issues, we must first discuss a procedural question. Appellant did not raise the conditions of his post-trial confinement in any post-trial submissions to the convening authority, so the [\*12] issue was not "raised by materials in the record." *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020); cf. *United States v. Johnson*, 81 M.J. 451, 452 (C.A.A.F. 2021) (summary disposition) (explaining that a Court of Criminal Appeals should "consider additional information about . . . post-trial confinement conditions" when the matter is raised in a "clemency response to the convening authority"). The Government argues that in deciding this appeal, we should not consider any matters outside the record. Accepting the Government's argument would prevent us from looking at any of the declarations and exhibits concerning Appellant's post-conviction confinement conditions because all these documents were created after the completion of Appellant's trial and posttrial proceedings.

In *Jessie*, this Court held that a Court of Criminal Appeals could not consider materials outside the record in deciding whether a prison policy violated a prisoner's *First Amendment* rights. 79 M.J. at 444. In support of the decision, the Court cited precedents that had interpreted *Article 66, UCMJ*, 10 U.S.C. § 866 (2018), to require the Courts of Criminal Appeals to decide appeals upon the record. 79 M.J. at 440-41. But in reaching its conclusion, the Court recognized that its precedents were not entirely consistent. Specifically, the Court has considered materials outside the record when deciding whether post-trial [\*13] confinement conditions violate the prohibitions against cruel and unusual punishment in *Article 55, UCMJ*, and the *Eighth Amendment*. *Id.* at 442-43 (citing *Pena*, 64 M.J. 259, and *Erby*, 54 M.J. 476).

Because the litigation in *Jessie* did not involve a claim of

cruel and unusual punishment, and because the government had not asked the Court to overrule those precedents, the Court in Jessie eschewed any consideration of the validity of these differing precedents. Id. at 445. The Court explained:

Consistent with the Government's proposal for accommodating the discordant precedents, all we must decide today is that the practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment. We may decide in a future case whether these holdings with respect to such claims should be overruled, modified, or instead allowed to stand as "aberration[s]" that are "fully entitled to the benefit of stare decisis" because they have become established.

*Id.* (alteration in original) (quoting Flood v. Kuhn, 407 U.S. 258, 282, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)).

This case, unlike Jessie, involves a claim of cruel and unusual punishment. The Government therefore asserts that we should take the opportunity to address the continuing validity of Pena, Erby, and any other cases that have considered materials outside the record when adjudicating claims [\*14] of cruel and unusual punishment. The Government further argues that we should overrule these precedents because they are inconsistent with Article 66, UCMJ, and Article 67, UCMJ, 10 U.S.C. § 867 (2018), which in conjunction define the appellate jurisdiction of the Courts of Criminal Appeals and this Court.

Although both parties have briefed the question of whether we should overrule Pena and Erby, we decline to reconsider these precedents in this case. As discussed below, our review of the materials outside the record leads us to conclude that the AFCCA correctly decided the case in the Government's favor. Consequently, the result of this case would be the same regardless of whether we consider materials outside the record. We therefore need not decide the continued validity of Pena and Erby at this time.

### III. Standards of Review

In United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997), we explained several principles about how appellate courts should address claims that depend on the truth of factual assertions in post-trial affidavits

rather than on findings of fact by a military judge. One of these principles is that "if the facts alleged in the affidavit[s] allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on [\*15] that basis." *Id.* Like the AFCCA, we find no disagreements in the post-trial documents submitted by the parties that are relevant to our resolution of the issues before us. Accordingly, following Ginn, we accept the relevant allegations of Appellant and the uncontroverted allegations of the Government's witnesses as true. We have no need to order a DuBay hearing for further factfinding. And after accepting the parties' relevant allegations as true, we will "determine whether the facts alleged constitute cruel and unusual punishment de novo." Lovett, 63 M.J. at 215.

### IV. Discussion

Appellant must prove three elements to establish his claim that his confinement conditions were cruel and unusual. First, Appellant must prove that an "objectively, sufficiently serious act or omission result[ed] in the denial of necessities." *Id.* Second, Appellant must prove "a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety." *Id.* Third, Appellant must prove that he "exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ." *Id.* (alteration in original) (internal quotation marks omitted) (citation omitted).

Appellant has grouped his complaints [\*16] regarding LCJ prison conditions into four categories: (1) insufficient food and water, (2) poor cell conditions and lack of sanitation, (3) lack of air and recreation, and (4) insufficient medical care. In his briefs, Appellant asserts that the post-trial documents included in the Joint Appendix establish each of the three Lovett elements with respect to each of these four categories. In contrast, the Government contends that Appellant can show none of the three Lovett elements with respect to any prison conditions.

As described above, the AFCCA concluded that Appellant had not satisfied the Lovett test because he had not shown that prison officials were deliberately indifferent to his *nonmedical* needs. Additionally, the AFCCA concluded that even if prison officials were deliberately indifferent to his medical needs, Appellant could not show that his unmet *medical needs* were "serious." We reach the same conclusions. We further



hold that Appellant cannot prevail based on his new argument that Air Force officials violated the prohibition against cruel and unusual punishment by sending him to the LCJ with knowledge of the poor conditions of the facility.

#### A. Appellant's Nonmedical Needs

Under [Lovett](#), the question [\*17] of whether LCJ prison officials were *deliberately indifferent* to his nonmedical needs depends on two factual questions: (1) "what the officials knew," and (2) whether "they disregarded known risks to inmate safety." [63 M.J. at 216](#). Appellant addresses these factual questions with a general assertion that "LCJ prison officials responded with deliberate indifference to Appellant's confinement conditions, as evidenced by their failure to remedy any of [his alleged] denials of necessities for a significant amount of time, if at all."

We cannot agree with Appellant in connection with his complaints about the food and water in the LCJ. Appellant has failed to make the necessary showings with respect to what prison officials knew and whether they disregarded known risks to inmate safety. Appellant does not identify in his briefs or extra-record documents any instances in which he told anyone at the LCJ that he believed his food was expired, that there were improper items in his food, or that the water coolers were moldy. The evidence also indicates that the LCJ took actions to avoid such problems. An uncontradicted declaration, quoted above, explains that a contractor called Trinity Food Service cleaned [\*18] the water coolers daily and immediately addressed issues of mold and that the LCJ consistently passed inspection by Lowndes County inspectors.<sup>5</sup>

Further, we cannot agree that Appellant has shown that LCJ officials acted with deliberate indifference with respect to his cell conditions and the lack of sanitation. Here, LCJ officials clearly knew of the problem of the leaking toilet because Appellant filed a complaint. But the record of the complaint does not suggest that the officials disregarded inmate safety. Rather, it reveals

that Appellant was given a mop and bucket to capture some of the dripping water. The uncontroverted facts in the LCJ official's affidavit also show that the LCJ officials eventually remedied the problem by replacing the roof and moving the affected inmates.

In contrast, Appellant did "not set forth specific facts" showing that he had complained about the mold, dirt, and pests, but instead makes only a "conclusory" allegation that he had notified LCJ officials about them. [Ginn, 47 M.J. at 248](#). And with respect to these conditions, the documents quoted above do not suggest LCJ officials disregarded inmate safety. Appellant admitted that prison officials provided him with cleaning supplies [\*19] for an hour and a half each day, and the LCJ's administrator declared that the jail hired a pest control service to address vermin.

Finally, we cannot agree that Appellant has shown prison officials were deliberately indifferent with respect to his allegations concerning fresh air and exercise. Appellant has not alleged that he made anyone aware of his complaints about the lack of fresh air and exercise and therefore has not established the requisite level of knowledge. In addition, Appellant has not established that the LCJ officials disregarded inmate safety. Appellant has alleged that "the only sunlight that [he] received was from a small skylight on the roof of the dayroom." But even accepting this statement as true, the statement does not contradict the sworn declaration of the LCJ's administrator that an open five-foot by ten-foot window provided a recreation room with fresh air. In sum, Appellant has not shown prison officials were deliberately indifferent to any of his nonmedical needs.

#### B. Serious Medical Needs

In [Estelle, 429 U.S. at 104](#), the Supreme Court explained that not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the [Eighth Amendment](#)." Instead, the Supreme [\*20] Court ruled that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." [Id. at 106](#). Appellant contends that he has met the [Estelle](#) standard by showing that LCJ officials took away his prescribed medicine when he first arrived at the jail in May 2020; that he did not see a physician for almost a month even though he had "chronic orthopedic, mental health, and autoimmune conditions and diseases"; that they withheld pain medication and doctors' visits for rehabilitation despite a recent surgery to repair his Achilles tendon; and that prison officials denied medication for depression and anxiety and denied him

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<sup>5</sup>Appellant's allegation that he sometimes received moldy, contaminated, or expired food or that the water coolers were unclean does not contradict the LCJ official's assertion that the LCJ hired Trinity Food Service to address "any incidents of mold or mildew" or that the kitchen "consistently pass[es]" Lowndes County health inspections. The uncontroverted facts in the LCJ official's affidavit show that the LCJ officials were not deliberately indifferent to the cleanliness or safety of the LCJ's food and water.

an extra blanket to alleviate his Raynaud's Syndrome. The Government responds that Appellant has not met the [Estelle](#) standard because he has not alleged *specific serious harms* resulting from the actions and omissions of LCJ officials.

We agree with the AFCCA and the Government that Appellant does not allege that he suffered, or was put at risk of suffering, serious harm. We thus cannot conclude that he has alleged deliberate indifference to a "serious medical need[]" within the meaning of [Estelle](#). In addition, even if his unmet medical needs [\*21] caused some harm, to apply the [Lovett](#) test, we must determine what the prison officials knew and how they responded. Here, the nurse's declaration indicates that Appellant only told LCJ officials about some of his medication conditions, and that LCJ officials did not disregard his safety with respect to the ones he disclosed. And Appellant has not shown that prison officials understood the Appellant's other medical needs or ignored them.

#### C. Deliberate Indifference by Air Force Officials

Appellant argues that regardless of whether LCJ officials were deliberately indifferent, "the actions or inactions of Air Force officials *alone* are sufficient for an appellant to meet the 'deliberate indifference' burden" under [Lovett](#). He contends that Air Force officials—"whether it be the security forces commander, staff judge advocate, or wing commander"—showed deliberate indifference because they continued to send prisoners to the LCJ despite its history of deficient conditions. Appellant clarifies that he is not "request[ing] a *per se* rule that if prisoners are confined at the LCJ then they are able to meet their deliberate indifference burden" but is instead "only requesting this Court acknowledge the basic [\*22] legal principle that the actions of one actor can be attributed to another actor by virtue of a legal relationship and tethering between the two." The Government responds that expanding the test to Air Force officials who send incarcerated military personnel to a specific prison would make the test unmanageable. The Government explains that it would be difficult to decide how many abuses must have occurred in the past, whether the abuses must have been similar, how substantiated past abuses have been, and what level of knowledge prison officials must have had, and other similar questions.

Appellant's argument, as we understand it, might be rephrased in the form of a syllogism. The major premise of this syllogism would be that Air Force officials violate [Article 55, UCMJ](#), if they send a prisoner to a civilian

facility that they know has a history of cruel and unusual conditions. The minor premise would be that Air Force officials knew that the LCJ is a civilian facility with a history of cruel and unusual conditions. The conclusion would be that Air Force officials therefore violated [Article 55, UCMJ](#), and the [Eighth Amendment](#) when they sent Appellant to the LCJ.

We cannot accept either the major or minor premises of this syllogism [\*23] and are therefore unpersuaded by Appellant's argument. Although the major premise of this syllogism might be true in some cases, it is not always true. For example, even if Air Force officials send a prisoner to a civilian facility that they know has a history of past abuses, no violation of [Article 55, UCMJ](#), and the [Eighth Amendment](#) can occur unless the prisoner in fact suffers ill treatment within the facility and files a grievance and [Article 138, UCMJ](#), petition about it.<sup>6</sup>

The minor premise is also unfounded. We have insufficient information about the number and nature of past problems or the culpability of prison officials to draw specific conclusions about the LCJ's history of violations or Air Force officials' knowledge of them. All the sworn declarations and other materials included in the Joint Appendix concern Appellant's confinement conditions, but they provide scant information about the LCJ's history. And Appellant's references to other litigation concerning conditions at the LCJ are insufficient to prove that the LCJ is a civilian facility with a consistent history of cruel and unusual conditions. For these reasons, we must reject Appellant's arguments that he has shown that Air Force officials acted with "deliberate indifference" [\*24] under [Lovett](#).

#### V. Conclusion

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

**Concur by:** HARDY

#### Concur

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Judge HARDY concurring in the judgment.

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<sup>6</sup> Perhaps the major premise could be qualified in some way and restated so that it would be generally true, but we cannot discern what it would be from Appellant's briefs.

Appellant seeks sentence reassessment based on the theory that the allegedly cruel or unusual conditions he experienced during his post-conviction confinement unlawfully increased the severity of his adjudged sentence. Both in its brief and at oral argument, the Government expressly challenged this Court's precedents endorsing that legal theory, arguing that those cases were wrongly decided and that the fundamental issue presented in this case—whether Appellant suffered cruel or unusual punishment during his post-conviction confinement—falls beyond this Court's authority to act under *Article 67(c), Uniform Code of Military Justice (UCMJ)*, 10 U.S.C. § 867(c). In the alternative, the Government also argued that Appellant did not establish that he suffered cruel or unusual punishment and is not entitled to relief.

Agreeing with the Government's alternative argument, the Court affirms Appellant's findings and sentence without reaching or deciding its primary one. I concur with the Court's judgment affirming Appellant's findings and sentence, but I write separately to express my view that this Court lacks the authority [\*25] to order the Court of Criminal Appeals (CCA) to reassess Appellant's sentence based on his claim that he suffered cruel or unusual punishment during post-conviction confinement. For that reason—and as explained in more detail below—I would overrule this Court's decision in *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001), and deny Appellant relief on that ground. Because the Court has specifically invited argument about whether *White* and its progeny should be overruled, I anticipate that we soon will see this important issue again.

## I. Introduction

As relevant to this case, Congress has authorized this Court to act with respect to one, and only one, thing: "the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Article 67(c)(1)(A), UCMJ*. The entry of judgment—as affirmed by the CCA below—sentenced Appellant to a dishonorable discharge, confinement for eight years, and reduction to the grade of E-1. *United States v. Pullings*, 2021 CCA LEXIS 648, at \*1-2, 2021 WL 5626313, at \*2, \*10 (A.F. Ct. Crim. App. Nov. 30, 2021) (unpublished). All parties agree that Appellant's sentence as "set forth in the entry of judgment" and as affirmed by the CCA was lawful at

the time it was adjudged.<sup>1</sup> Nevertheless, Appellant asks us to order the CCA to reassess his adjudged sentence (since we have no authority to grant [\*26] any other relief) because he claims that he suffered cruel or unusual punishment during his post-conviction confinement. What, one might reasonably ask, does this claim have to do with Appellant's adjudged sentence, as set forth in the entry of judgment and affirmed by the CCA? The simple answer is nothing. Whether Appellant suffered cruel or unusual punishment during his post-conviction confinement has no bearing on the only question that this Court is authorized to consider: whether the sentence adjudged by his court-martial and affirmed by the CCA was lawful.

As legislatively created Article I courts, this Court and the CCAs are courts of "narrowly circumscribed" jurisdiction. *Clinton v. Goldsmith (Goldsmith II)*, 526 U.S. 529, 535, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999).<sup>2</sup> Nevertheless, over time, both our predecessor Court and then this Court came to view themselves as having "broad jurisdiction under the Uniform Code of Military Justice to correct injustices." *Goldsmith v. Clinton (Goldsmith I)*, 48 M.J. 84, 91 (C.A.A.F. 1998) (Sullivan, J., concurring). For example, in *United States v. Frischholz*, our predecessor Court expressed its view that its authority was not defined solely by *Article 67, UCMJ*, but also extended to "the protection and preservation of the Constitutional rights of persons in the armed forces." 16 C.M.A. 150, 151-52, 36 C.M.R. 306, 307-08 (1966). The following [\*27] year the Court further explained its belief that *Article 67, UCMJ*, "indicates the intent of Congress to confer upon this Court a general supervisory power over the administration of military justice." *Gale v. United States*, 17 C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967). In short, the Court believed that—regardless of the limitations

<sup>1</sup> Appellant's counsel conceded at oral argument that Appellant's sentence was lawful at the time of entry of judgment. Oral Argument at 10:58:15-10:58:25, *United States v. Pullings* (C.A.A.F. Nov. 8, 2022) (No. 22-0123).

<sup>2</sup> "Courts created by statute can have no jurisdiction but such as the statute confers." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (internal quotation marks omitted) (quoting *Sheldon v. Sill*, 49 U.S. 441, 449, 12 L. Ed. 1147 (1850)); see also *Ctr. for Const. Rts. v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013) ("In particular, this Court, and courts-martial in general, being creatures of Congress created under the Article I power to regulate the armed forces, must exercise their jurisdiction in strict compliance with authorizing statutes.").



placed on our authority by *Article 67, UCMJ*—"an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary." *United States v. Bevilacqua*, 18 C.M.A. 10, 11-12, 39 C.M.R. 10, 11-12 (1968).

This expansive view of our purpose and authority eventually culminated in a decision from our Court, *United States v. White*, in which this Court held that we have a duty to consider, as part of our *Article 67* review on direct appeal, any claims by an appellant that his post-conviction confinement conditions violate the *Eighth Amendment* or *Article 55, UCMJ*, 10 U.S.C. § 855. 54 M.J. at 472 (holding that this Court has "jurisdiction under *Article 67(c)* to determine on direct appeal if the adjudged and approved sentence is being executed in a manner that offends the *Eighth Amendment* or *Article 55*"). I cannot go along with such a fundamental and unauthorized expansion of this Court's power that has no statutory basis. Instead, for the reasons explained below, I would hold that this Court has no authority to entertain Appellant's post-conviction confinement [\*28] *Eighth Amendment* and *Article 55* claims and deny relief on that ground.

## II. *White* and Its Progeny Contradict the Text of Articles 66 and 67, UCMJ

In recent years, this Court has repeatedly expressed doubt about its holding in *White*, as well as its holding in *United States v. Erby*, 54 M.J. 476, 478 (C.A.A.F. 2001), a second case released the same day in which this Court held that the CCA's are similarly empowered to hear post-conviction confinement cruel or unusual punishment claims under *Article 66, UCMJ*, 10 U.S.C. § 866. Our recent opinions have recognized what was obvious from the start: *Erby* and *White* contradict the plain text of *Articles 66 and 67, UCMJ*. In *United States v. Jessie*, we acknowledged that we "may decide in a future case whether [*Erby* and *White*] should be overruled, modified, or instead allowed to stand as 'aberration[s]' that are 'fully entitled to the benefit of stare decisis' because they have become established." 79 M.J. 437, 445 (C.A.A.F. 2020) (second alteration in original) (citation omitted). In *United States v. Guinn*, we recognized that it "may be argued that this Court's precedents regarding the scope of a CCA's responsibilities under *Article 66(c)* are not properly predicated on the plain language of that statute," but failed to reach the merits of that question because the government did not ask us to overturn our precedents.

81 M.J. 195, 204 (C.A.A.F. 2021); see also *id.* at 205 (Maggs, [\*29] J., concurring) (opining that a party could ask this Court to reconsider its precedents in a future case such that this Court could evaluate the merits of such an argument at that time). Most recently, in *United States v. Willman*, we once again noted that arguments can be made that this Court's decisions in these post-conviction confinement conditions cases are not properly predicated on the plain language of *Articles 66 and 67, UCMJ*. 81 M.J. 355, 360 (C.A.A.F. 2021).

In this case, the Government accepted the invitation that this Court extended in *Guinn* by challenging our authority to hear Appellant's claims and requesting that we overturn our cases holding otherwise. See Brief for Appellee at 18, *United States v. Pullings*, No. 22-0123 (C.A.A.F. Jul. 29, 2022) (asking this Court to overrule its line of cases in which it asserted authority over claims that are based on post-trial confinement conditions); see also *id.* at 25 ("This Court should hold that it and the CCAs have no jurisdiction to review post-trial confinement conditions that were not part of the sentence entered into judgment.").

Appellant's challenge to his sentence is the type of case that falls squarely within this Court's jurisdiction under *Article 67(a)(3), UCMJ*: a case "reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good [\*30] cause shown, the Court of Appeals for the Armed Forces has granted a review." But *Article 67(a), UCMJ*, does not impose the only restriction on our authority. As relevant here, *Article 67(c)(1)(A)* further states that this Court may act only with respect to "the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." (emphasis added). Accordingly, this Court routinely hears challenges to the lawfulness of an appellant's adjudged sentence. See, e.g., *United States v. Dinger*, 77 M.J. 447, 448 (C.A.A.F. 2018) (holding that a court-martial is not prohibited from adjudging a punitive discharge to a retiree); *United States v. Christian*, 63 M.J. 205, 206 (C.A.A.F. 2006) (holding that life without eligibility for parole was an authorized court-martial sentence for the crime of forcible sodomy of a child under twelve years of age during the relevant time period).

But I agree with the Government that the cases beginning with *White* that extended our *Article 67(c)* authority to include review of whether the appellant's adjudged and approved sentence is being executed in a manner that offends the *Eighth Amendment* or *Article 55, UCMJ*, violate the plain language of *Articles 66 and*

67, *UCMJ*. As relevant here, *Article 66(d)(1)(A), UCMJ*, authorizes a CCA to "act only with respect to the findings and sentence as entered into the record." Similarly, pursuant to *Article 67(c)(1)(A), UCMJ*, this [\*31] Court may act only with respect to "the findings and sentence" as affirmed or set aside by the CCA. Post-conviction confinement conditions are not part of the "findings and sentence" with respect to which this Court or the CCAs are authorized to act.<sup>3</sup> Findings consist of: (1) a summary of each charge and specification; (2) the pleas of the accused; and (3) the finding or other disposition of each charge and specification. Rule for Courts-Martial (R.C.M.) 1101(a)(1) (2019 ed.). The sentence consists of: (1) the sentence of the court-martial; (2) the date the sentence was announced; and (3) the amount of credit, if any, applied to the sentence for pretrial confinement or other reasons.<sup>4</sup> R.C.M. 1101(a)(2).

Based on the plain language of these provisions (and as a matter of logic and common sense), post-conviction confinement conditions cannot be part of the findings or sentence of a court-martial unless those conditions are specified by the court-martial and entered in the record. See *Guinn*, 81 M.J. at 206 (Ryan, S.J., dissenting) (treating post-conviction confinement conditions as obviously outside the bounds of *Article 66*'s "findings and sentence" requirement). But, on a more fundamental level, it is temporally impossible for post-conviction confinement conditions to be part [\*32] of a sentence under the implementing provisions in the *Manual for Courts-Martial, United States (Manual)*. A court-martial sentence is executed and takes effect when the judgment is entered into the record under R.C.M. 1111. R.C.M. 1102(a)(1). The judgment consists of the court's findings and sentence. R.C.M. 1111(b). Judgments are final upon entry, *and cannot be altered*, unless the military judge corrects a clerical error within fourteen days of its entry, the Judge Advocate General or a military appellate court modifies the judgment in performance of their duties, or a military judge modifies

<sup>3</sup> Given the CCA's broad and unique authority under *Article 66, UCMJ*, I would leave for another time the question whether the CCAs have jurisdiction to hear post-conviction confinement claims. That said, post-conviction confinement claims are not part of the findings and sentence, and the CCAs cannot assert jurisdiction over such claims under *Article 66(d)(1)(A), UCMJ*.

<sup>4</sup> R.C.M. 1101(a)(2) includes additional components of a sentence if the accused was convicted of more than one offense, none of which can be reasonably construed to apply to post-conviction confinement conditions.

a judgment consistent with the limited purposes of a remand from a higher court. R.C.M. 1111(c). Given that the sentence is a component of a court-martial's judgment, it cannot be modified outside the bounds of R.C.M. 1111(c) because any change in the sentence would necessarily modify the judgment.

Accordingly, if an accused's sentence is lawful at the time of the entry of judgment, events that occur after the entry of judgment cannot be considered as part of the sentence such that its legality or appropriateness is affected. In other words, but for the exceptions enumerated in R.C.M. 1111(c), a sentence is fixed upon the entry of judgment and post-conviction confinement conditions [\*33] cannot retroactively alter the sentence. Perhaps in recognition of this fact, Appellant has not challenged the lawfulness of his sentence as adjudged by his court-martial.<sup>5</sup> Instead, Appellant specifically seeks a reduction in his adjudged sentence as a remedy for cruel or unusual punishment that he allegedly suffered during his post-conviction confinement in a civilian jail. The plain language of *Article 67, UCMJ*, does not confer authority on this Court to hear Appellant's claim.

### III. White Flouted the Supreme Court's Decision in *Clinton v. Goldsmith*

In *Goldsmith I*, Major James Goldsmith sought to enjoin the President's order dropping Goldsmith from the rolls of the Air Force two years after Goldsmith was convicted of various offenses by a general court-martial.<sup>6</sup> 48 M.J. at 85-86. Like Appellant [\*34]

<sup>5</sup> This Court granted review of two questions, both solely related to Appellant's claim that he suffered cruel or unusual punishment in post-conviction confinement:

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

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

*United States v. Pullings*, 82 M.J. 372, 372-73 (C.A.A.F. 2022) (order granting review).

<sup>6</sup> In the then recently enacted National Defense Authorization Act for Fiscal Year 1996, Congress had authorized the

here, Goldsmith did not challenge the lawfulness of the findings of guilt or the sentence adjudged by his court-martial. Instead, Goldsmith sought extraordinary relief from our Court, arguing that the President's action dropping him from the rolls of the Air Force violated the [Ex Post Facto](#) and [Double Jeopardy Clauses of the Constitution](#). *Id.* at 89-90. Consistent with its belief that "Congress intended for this Court to have broad responsibility with respect to administration of military justice," this Court held that it had jurisdiction over Goldsmith's case under the [All Writs Act, 28 U.S.C. § 1651\(a\)](#) even though he was not challenging the findings or sentence from his court-martial. [Goldsmith I, 48 M.J. at 86-87](#).

In a brief, unanimous opinion, the Supreme Court reversed. [Goldsmith II, 526 U.S. at 540](#). In doing so, the Supreme Court expressly rejected both this Court's majority view that Congress intended C.A.A.F. "to have broad responsibility with respect to the administration of military justice," *id.* at 534 (quoting [Goldsmith I, 48 M.J. at 86-87](#)), as well as Judge Sullivan's "more emphatic" view that this Court "should use our broad jurisdiction under the [UCMJ] to correct injustices," *id.* at 534 n.6 (alteration in original) (quoting [Goldsmith I, 48 M.J. at 91](#) (Sullivan, J., concurring)). The Supreme Court then explained that based on the plain language of *Articles 66 and 67, UCMJ*, the President's action dropping Goldsmith from [\*35] the rolls was an executive action—not a finding or sentence that was imposed by Appellant's court-martial—and was thus "straightforwardly" beyond this Court's jurisdiction. *Id.* at 535. Even though Goldsmith's conviction and sentence was a but-for cause of the President's later action, this Court had no authority to hear Goldsmith's constitutional claims because they fell "outside of the CAAF's express statutory jurisdiction." *Id.* at 540.

That logic applies with equal force here. All the actions that form the basis of Appellant's cruel or unusual punishment claim are also post-conviction executive actions, rather than a finding or sentence that was imposed by his court-martial. Both the Georgia prison administrators at Lowndes County Jail (LCJ) and the Air Force officers responsible for issuing the Memorandum of Agreement authorizing Appellant's confinement at

LCJ are independent executive agents acting outside the military justice system. Any actions taken by them that affected the execution of Appellant's sentence are exactly the kinds of actions that the Supreme Court declared outside of our authority to review in *Goldsmith II*.

[Goldsmith II](#) cannot be distinguished on the basis that this Court invoked [\*36] the All Writs Act in granting Goldsmith relief. In its opinion, the Supreme Court *first* concluded that the President's action dropping Goldsmith from the rolls of the Air Force was beyond this Court's authority to review, and *then* separately rejected the argument that this Court had jurisdiction under the All Writs Act because this Court's action enjoining the President "protected and effectuated the sentence meted out by the court-martial." *Id.* at 535-36. The Supreme Court could not have been more clear when it held that "CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Id.* at 536. That statement remains just as true now as it did then, and this Court erred when it held otherwise in [White](#).

#### IV. The Stare Decisis Factors Do Not Support Maintaining *White*

Having concluded that *Article 67, UCMJ*, denies this Court authority to hear Appellant's [Eighth Amendment](#) and [Article 55](#) claims, I further believe that the doctrine of stare decisis does not support maintaining [White](#). When this Court considers whether to overturn our precedent, we consider four factors: (1) whether the prior decision was poorly reasoned or has proven to be unworkable; (2) any [\*37] intervening events; (3) the reasonable expectations of servicemembers; and (4) the risk of undermining public confidence in the law. [United States v. Blanks, 77 M.J. 239, 242 \(C.A.A.F. 2018\)](#). Although there have not been any intervening events that require the abrogation of [White](#), the other stare decisis factors provide compelling reasons to abandon that precedent.

##### A. *White* Was Poorly Reasoned

This Court's decision in [White](#), and the earlier separate opinions upon which that decision relied, were poorly reasoned because they disregarded the plain text of *Article 67, UCMJ*, in pursuit of a well-intentioned but

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President to drop from the rolls of the armed forces any servicemember who, like Goldsmith, had been sentenced by court-martial to more than six months of confinement and had served at least six months. [Goldsmith II, 526 U.S. at 532](#) (citing [10 U.S.C. § 1161\(b\)](#) and [10 U.S.C. § 1167 \(1994 & Supp. III 1998\)](#)).



unlawful desire to exercise a general supervisory power over all aspects of military justice. In [White](#), this Court asserted—without any analysis beyond citations to a prior concurrence and dissent—that *Article 67(c)*, *UCMJ*, authorized this Court not only to determine whether an appellant's sentence as adjudged by his court-martial was lawful, but also the "authority to ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials, and to ensure that the sentence is executed in a manner consistent with [Article 55](#) and the Constitution." [54 M.J. at 472](#). Even the prior separate opinions cited by this Court in [White](#) provide little additional explanation. They did not [\*38] wrestle with the text of *Article 67*, *UCMJ*, or explain how post-conviction confinement conditions could be considered part of "the findings and sentence set forth in the entry of judgment." *Article 67(c)(1)(A)*, *UCMJ*; see Part II, *supra*. Instead, they merely asserted that because [Article 55](#), *UCMJ*, prohibits the infliction of cruel or unusual punishment upon any servicemember, any allegation of such punishment "is unquestionably a matter of codal concern." [United States v. Sanchez](#), [53 M.J. 393](#), [398 \(C.A.A.F. 2000\)](#) (Sullivan, J., dissenting).

In other words, this Court seemed to have believed that because [Article 55](#), *UCMJ*, prohibits cruel or unusual punishment, this Court must have authority to hear any case alleging such violations, regardless of the limitations placed on this Court by *Article 67*, *UCMJ*. But neither the [Eighth Amendment](#) nor [Article 55](#), *UCMJ*, provides any legal basis for extending this Court's narrowly circumscribed *Article 67* authority to all purportedly unlawful—or even unconstitutional—executive actions that are arguably related to the administration of military justice.

In [White](#) this Court casually brushed aside the argument that the Supreme Court's decision in *Goldsmith II* foreclosed our jurisdiction to consider post-conviction confinement claims. In only two sentences of analysis, this Court concluded *Goldsmith II* did not control the outcome for two reasons, neither of which [\*39] justified this Court's deviation from the plain language of *Articles 66* and *67*, *UCMJ*. First, the Court noted that the statute that authorized the President to drop *Goldsmith* from the rolls was not part of the *UCMJ*, and thus "not within this Court's jurisdiction." [White](#), [54 M.J. at 472](#). But this Court's authority is not determined by where a federal statute appears in the United States Code, but by the text of *Article 67*, *UCMJ*, which, as relevant here, limits our authority to act to "the findings and sentence set forth in the entry of judgment." Moreover, even if this

argument had any relevance, it would apply even more forcefully here where the conditions at a Georgia jail are a matter of state rather than federal law.

The second reason given by this Court in [White](#)—that the case involved "the imposition of a punishment under the *UCMJ*" in a case that was before this Court on direct review, *id.*—is equally unpersuasive. This logic ignored the Supreme Court's reproach in *Goldsmith II* that this Court has no authority "to act as a plenary administrator even of criminal judgments it has affirmed." [526 U.S. at 536](#). Nor does it make any difference that the case in [White](#) was before this Court on direct review rather than as an extraordinary writ. As the Supreme Court explained [\*40] in *Goldsmith II*, and as the text of the All Writs Act itself makes clear, the All Writs Act is not an independent source of jurisdiction. [Goldsmith II](#), [526 U.S. at 534-35](#) (quoting [28 U.S.C. § 1651\(a\)](#)) and explaining that the All Writs Act "authorizes employment of extraordinary writs . . . 'in aid of the issuing court's jurisdiction' but does not 'enlarge that jurisdiction'". Whether this Court is reviewing a case on direct or collateral review, our authority remains the same: we may only act with respect to "the findings and sentence set forth in the entry of judgment." This Court's decision in [White](#) offered no justification for disregarding this fundamental limitation.

## B. [White](#) Is Unworkable

This Court's decision in [White](#) has also proven to be unworkable. Because the facts relevant to post-conviction cruel or unusual punishment claims all occur after the entry of judgment, none of those facts appear in the record of trial. Unsurprisingly—given the restriction placed on this Court's authority by *Article 67*, *UCMJ*—neither the *UCMJ* nor the *Manual* accommodates our review of such claims. Our response to this procedural challenge has been to allow appellants raising [Eighth Amendment](#) or [Article 55](#), *UCMJ*, claims to present additional, outside-the-record evidence to support their claims. See [Jessie](#), [79 M.J. at 444](#) (describing our practice). But as we have previously [\*41] noted, our "discordant precedents" authorizing this practice never addressed the language in *Article 66(c)*, *UCMJ*, limiting the CCA's review to the "entire record" or our prior precedents strictly enforcing that limitation. [Id. at 444-45](#).

The extra-statutory accommodations that this Court has imposed to enable the review of post-conviction confinement [Eighth Amendment](#) and [Article 55](#) claims

have repeatedly led to additional questions for which there are no easy or satisfying solutions. Essentially, those cases have asked whether, having deviated so far from the UCMJ and the *Manual* to review [Eighth Amendment](#) and [Article 55](#) claims in [White](#), should we also do so for other reasons? In *Guinn*, for example, a divided Court held that the CCA erred when it declined to consider whether an appellant's post-conviction confinement conditions violated his [First](#) or [Fifth Amendment](#) rights, even if those conditions did not amount to cruel or unusual punishment. [81 M.J. at 201](#). This Court expressly disclaimed that it intended to turn the CCAs into clearinghouses for military prisoners' post-conviction confinement complaints, *id.* [at 203](#), but there is no limiting principle to this Court's logic. If [White](#) and its progeny authorize the CCAs to review [Eighth Amendment](#) and [Article 55](#) claims, then why not [First](#) and [Fifth Amendment](#) claims? And if [First](#) and [Fifth Amendment](#) claims are reviewable, then why not something [\*42] else? See [Jessie](#), [79 M.J. at 444](#) (explaining that the lack of any limiting principle in our post-conviction confinement conditions cases threaten to render the limiting language in *Article 66(c)* superfluous).

Even when this Court has declined to further extend *White*'s logic, the result is an odd paradigm of seemingly contradictory precedents. In *Jessie*, this Court decided—over two dissents—that the CCAs do not have the authority to consider completely outside-the-record materials to determine whether an appellant's post-conviction confinement conditions violated his [First](#) or [Fifth Amendment](#) rights. [79 M.J. at 438](#). Similarly, in *Willman*, we decided—again with two judges in dissent—that the CCAs do not have the authority to consider outside-the-record materials submitted to the court in support of an [Eighth Amendment](#) or [Article 55](#) claim when performing sentence appropriateness review. [81 M.J. at 356-57](#). This Court admitted that its ruling created an "odd paradigm" where a CCA could consider outside-the-record materials for some reasons but not for others but concluded that the oddness was justified by our reluctance to deviate even farther from the text of the UCMJ. *Id.* [at 360](#).

No matter how well intentioned this Court's decision in [White](#) might have been, that opinion sent us down a difficult path of trying to [\*43] solve alleged injustices without any foundation in the UCMJ for so doing. Despite our best efforts, we have left in our wake a series of seemingly arbitrary and conflicting lines of precedent to apply in post-conviction confinement cases. This Court's decision in [White](#) was wrong from

the start, and we should stop making additional bad decisions on the inertial force of our prior mistakes.

### C. There Are No Reliance Interests to Undermine by Overturning *White*

[White](#) and its progeny allow incarcerated servicemembers to ask the military appellate courts to reduce their adjudged sentence as a remedy for allegedly unlawful post-conviction confinement conditions. If this Court overruled [White](#) and eliminated this judicially created scheme—which has no parallel in the civilian courts—servicemembers would find themselves in the same position as every other federal prisoner in the country.<sup>7</sup> They could still seek injunctions or damages as a remedy for the allegedly unlawful confinement conditions in the federal district courts, two remedies that the military appellate courts are generally powerless to impose.

In the past, some observers have implied that there might be reliance interests in this [\*44] Court's assertion of jurisdiction over post-conviction confinement [Eighth Amendment](#) and [Article 55, UCMJ](#), claims due to the limitations of the *Feres* doctrine. See, e.g., [Jessie 79 M.J. at 447 n.1](#) (Ohlson, J., dissenting) (noting that claims that federal civilian courts can award damages to military prisoners "offers false hope given that the *Feres* doctrine prohibits lawsuits by military prisoners against the federal government"). But legitimate concerns about the *Feres* doctrine do not justify maintaining [White](#) and its progeny.

The Federal Tort Claims Act (FTCA) renders the United States liable to all persons, including servicemembers,

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<sup>7</sup> As an aside, it bears mentioning that [White](#) and its progeny only allow the military appellate courts to hear [Eighth Amendment](#) and [Article 55](#) claims on *direct* review. Incarcerated servicemembers who allegedly suffer cruel or unusual punishment after their direct appeals under *Article 66* and *67, UCMJ*, have been completed are already in the same situation as civilian prisoners. This Court once suggested in dicta that we also have the authority to review a collateral attack on conditions of confinement, see [White, 54 M.J. at 472](#) (expressing confidence that *Goldsmith II* would not preclude this Court from doing so), but this Court never subsequently held that it had that authority. As a result—and in yet another example of the absurdity of the [White](#) line of precedent—servicemembers can only seek sentence reductions for unconstitutional confinement conditions that occur before their direct appeals become final.



injured by the negligence of federal government employees subject to several exceptions. [28 U.S.C. §§ 2671-2680](#) (outlining the procedure for bringing tort claims against the federal government). One of those exceptions applies to "[a]ny claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, *during time of war*." *Id.* [§ 2680\(j\)](#) (emphasis added). In *Feres v. United States*, the Supreme Court interpreted that exception as barring all claims for injuries suffered by servicemembers during any activity incident to their military service, regardless of the type of activity from which the injury arose or whether [\*45] the injury was suffered during wartime. [340 U.S. 135, 146, 71 S. Ct. 153, 95 L. Ed. 152 \(1950\)](#). As noted by Justice Scalia, "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." [United States v. Johnson, 481 U.S. 681, 700-01, 107 S. Ct. 2063, 95 L. Ed. 2d 648 \(1987\)](#) (Scalia, J., with whom Brennan, J., Marshall, J., and Stevens, J., joined, dissenting) (internal quotation marks omitted) (citation omitted).

Nevertheless, *Feres* remains good law, leading courts to hold that tort claims against the federal government for injuries suffered by incarcerated servicemembers are barred under the *Feres* doctrine. See, e.g., [Walden v. Bartlett, 840 F.2d 771, 774 \(10th Cir. 1988\)](#) (holding that confinement in a military facility is part of a uniquely military relationship such that it is incident to the servicemembers military service under *Feres*); see also [Schnitzer v. Harvey, 389 F.3d 200, 203, 363 U.S. App. D.C. 412 \(D.C. Cir. 2004\)](#) (collecting cases). One can only hope that recent cases refusing to apply the *Feres* doctrine will convince the Supreme Court to reconsider its interpretation of the FTCA. See, e.g., [Spletstoser v. Hyten, 44 F.4th 938, 959 \(9th Cir. 2022\)](#) (affirming the district court's refusal to dismiss tort claims against the federal government brought by a servicemember who alleges that she was sexually assaulted by a superior officer); see also [Doe v. United States, 141 S. Ct. 1498, 1499, 209 L. Ed. 2d 743 \(2021\)](#) (Thomas, J., dissenting from the denial of certiorari) (urging his fellow justices to abandon the *Feres* doctrine [\*46] if they cannot find a way to "rein it in").

But even if confined servicemembers remain barred from recovering money damages from the federal government by the *Feres* doctrine, that does not justify a judicially created scheme to circumvent the doctrine by compensating servicemembers for unlawful confinement conditions by reducing their adjudged sentences. Besides violating the limits of our narrowly circumscribed authority, the scheme reeks of judicial

lawmaking. Congress never gave this Court the authority to ensure that a servicemember's lawfully adjudged and approved sentence was being executed in a manner that does not offend the [Eighth Amendment](#) or [Article 55, UCMJ](#). And Congress never gave any federal court the authority to reduce a lawfully adjudged and approved sentence as compensation for cruel or unusual punishment. There cannot be any legitimate reliance interests in such a scheme.

### D. Overturning *White* Would Not Undermine Public Confidence in the Law

The final factor in our stare decisis analysis asks whether public confidence in this Court will be undermined if we overturn our prior precedent. Here, I believe that maintaining *White* and its progeny does more to undermine public confidence than overturning it does. [\*47] As noted above, this Court has repeatedly cast doubt on the legitimacy of *White* while simultaneously struggling to reconcile and accommodate the extra-statutory duties that those cases have imposed on the military appellate courts.

This Court originally started down this path to effectuate its belief that it possessed a "broad responsibility with respect to the administration of military justice." [Goldsmith I, 48 M.J. at 86-87](#). But, to my knowledge, this Court has never granted relief based on violations of an appellant's [Eighth Amendment](#) or [Article 55](#) rights based on post-conviction confinement conditions, so it is questionable how effective this fool's errand has been. Indeed, there is a good argument to be made that servicemembers would be better off presenting their cruel or unusual punishment claims to a federal district court in the first instance. In my view, it would only improve the public confidence in the law if we admitted our mistake, overturned *White*, and abandoned the practice of hearing post-conviction confinement cruel or unusual punishment claims raised on direct review.

### V. Conclusion

Because I believe that *White* and its progeny contravene the text of [Articles 66 and 67, UCMJ](#), and that this Court has no authority to hear claims based on post-conviction confinement [\*48] conditions, I would affirm Appellant's findings and sentence without reaching the merits of either granted issue.

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**CERTIFICATE OF SERVICE, U.S. v. JARLEGO (20210389)**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil* on the 26th day of April, 2023.



Senior Paralegal Specialist  
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