IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Staff Sergeant (E-6)
JONATHAN MARIN,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20210375

Tried at Fort Carson, Colorado, on 12 November 2020, 2 February 2021, and 1 and 22-24 June 2021, before a general court-martial convened by the Commander, Headquarters, Fort Carson, Colonel Steven C. Henricks (arraignment, motions, and *DuBay* hearing) and Colonel John M. Bergen (merits and sentencing), Military Judges, presiding.

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

Assignments of Error

I.

THE EVIDENCE SUPPORTING THE CONVICTIONS WAS NOT FACTUALLY SUFFICIENT.

II.

THE PROSECUTION VIOLATED APPELLANT'S RIGHTS UNDER *BRADY V. MARYLAND* AND RULE FOR COURTS-MARTIAL 701(a)(2)(A).

PANEL NO. 4

III.

THE PROSECUTION VIOLATED APPELLANT'S RIGHTS UNDER *JENCKS V. UNITED STATES* AND RULES FOR COURTS-MARTIAL 914 AND 701(a)(6).

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Statement of the Case

On 12 November 2020, 2 February 2021, 1 June 2021, and 22-24 June 2021, at Fort Carson, Colorado, a general court-martial composed of officer members convicted appellant, contrary to his pleas, of one specification of rape and one specification of sexual assault, charged in the alternative, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. (R. at 425, 431; Statement of Trial Results [STR]; Charge Sheet). The military judge conditionally dismissed the specification of sexual assault, conditioned upon the specification of rape surviving appellate review. (R. at. 432). The military judge sentenced appellant to be confined for 12 years and to be discharged with a dishonorable discharge. (R. at 459; STR). On 30 July 2021, the convening authority took no action on the findings and sentence, disapproved appellant's request to defer the automatic reduction in rank, and approved appellant's request to waive the automatic forfeitures. (Action). The military judge entered judgment on 7 August 2021. (Judgment).

Statement of Facts

A. Private First Class [redacted] Meets Appellant during Deployment.

Private First Class (PFC) [redacted] was one of the first female cavalry scouts assigned to the Fourth Squadron, Tenth Cavalry Regiment, Third Armored Brigade Combat Team, Fort Carson. (R. at 236). She aspired to become the first female

cavalry scout noncommissioned officer (NCO) and to attend Ranger School. (R. at 237). In March 2019, when PFC [redacted] was 18 years old, she deployed with her unit to Erbil, Iraq. (R. at 237–38). She was excited for the deployment. (R. at 237). Appellant was one of PFC [redacted]'s NCOs during her deployment in Erbil. (R. at 240). Appellant was a mechanic who would inspect the unit's vehicles. (R. at 240). Private First Class [redacted] met appellant while he inspected and assisted in servicing her Bradley Fighting Vehicle. (R. at 241). During PFC [redacted]'s first encounter with appellant, she expressed apprehension about her ability to conduct a call for fire for an upcoming spur ride. (R. at 241). Private First Class [redacted] felt compelled to succeed during the spur ride because "[she is] a female and [she] just got [to Erbil] and [she] wanted to prove . . . [that she] can do this. And [she] can keep up with the males." (R. at 241–42). She wanted to get her spurs. (R. at 242). Appellant told PFC [redacted] that he was "pretty good" at call for fire and offered to help her. (R. at 242). Private First Class [redacted] figured that appellant could be helpful because he was "an NCO who's got a Ranger tab who's been through Ranger [School]." (R. at 242). Private First Class [redacted] looked up to appellant and viewed him as someone who could offer her advice and she could learn from so that she could thrive in her career. (R. at 242–43).

Appellant and PFC [redacted] met during lunch at a Chinese restaurant where they went over appellant's notes about how to conduct call for fire. (R. at 242).

Appellant offered PFC [redacted] other professional advice about volunteering for tasks and attending schools in the Army. (R. at 243). On another occasion, PFC [redacted] and appellant went to the movie theater with other individuals to see the film "Aquaman." (R. at 243). The rest of the group "strayed off to different areas [of the movie theater]," and appellant and PFC [redacted] ended up sitting together. (R. at 243).

B. Appellant rapes Private First Class [redacted].

On 10 July 2019, PFC [redacted] was "hanging out" at the Strike Transient Cafe on Erbil with appellant, PFC DD, and Sergeant (SGT) P. (R. at 244–45). In accordance with the general rules of the base, PFC [redacted] left her weapon in the male tent where another individual secured it while she was at the cafe. (R. at 245). Appellant offered for PFC [redacted] and PFC DD to taste an "orange drink" containing alcohol. (R. at 245). Private First Class [redacted] declined, but PFC DD tasted it. (R. at 245). When PFC [redacted] decided to leave the cafe, someone reminded her that she needed to retrieve her weapon. (R. at 246). Appellant accompanied PFC [redacted] to retrieve her weapon. (R. at 246). To walk to the male tents, PF [redacted] and appellant were required to walk around a metal "CONEX" building. (R. at 247, 250). The building obstructed the view of the male tents from the cafe. (R. at 247). Along the backside of the male tents was a parking lot. (R. at 248).

As they walked through the parking lot, appellant gripped PFC [redacted]'s left wrist with his right arm and stopped. (R. at 251). Private First Class [redacted] turned around to see why appellant stopped. (R. at 251). Appellant tried to kiss her, but she pushed him away. (R. at 251). However, appellant would not let go of her wrist, and he pulled her towards the troop bus that was parked in the parking lot. (R. at 251). Private First Class [redacted] protested by saying, "I [don't] want to," "[n]o," and "[s]top" as appellant continued to pull her by the wrist. (R. at 251–52). She tried to keep traction, but the ground was dirt and "[her effort was not] going anywhere." (R. at 252). The tent generators and air conditioning made a loud humming noise that would have made it difficult for anyone to hear PFC [redacted]'s protests. (R. at 256). Appellant pulled PFC [redacted] to the driver side of the bus, while still tightly gripping her wrist, appellant opened the driver side door. (R. at 252–54). Appellant cornered PFC [redacted] in the door. (R. at 252). She had nowhere to go except for in the bus. (R. at 258).

Once in the bus, appellant let go of PFC [redacted]'s wrist. (R. at 258). Private First Class [redacted] stood facing appellant and facing the front of the bus. (R. at 258). She feared appellant and tried to create distance between them. (R. at 255–58). She kept backing up, but appellant continued to walk towards her. (R. at 258). Private First Class [redacted] looked for a way to get past appellant, but there was no way. (R. at 258). She considered crawling under the seats, climbing over the seats, or

pushing past him. (R. at 258). However, the aisle was too small, and appellant would have been able to grab her. (R. at 258). Eventually, PFC [redacted]'s legs hit the back of the bus. (R. at 258–59). She continued to tell appellant "[s]top," and "I don't want to," but he ignored her. (R. at 259). Appellant pushed her down onto the seat on her back. (R. at 259). When PFC [redacted] tried to prop herself up, appellant pushed her shoulder back down and would not let her get back up. (R. at 259–60). After appellant pushed PFC [redacted] back down, she "gave up. There was no point in fighting any more[.] [PFC [redacted]] shut down." (R. at 260). Private First Class [redacted] does not recall how, but her shorts came off, and appellant penetrated her vulva with his penis. (R. at 261). Appellant ejaculated on her, and she wiped it off with her shorts. (R. at 262). Private First Class [redacted] cried and appellant told her, "[c]ome on, you know it's not like that." (R. at 263). They exited the bus, and appellant retrieved PFC [redacted]'s weapon from the male tent. (R. at 262). Private First Class [redacted] returned to her tent. (R. at 262).

C. Private First Class [redacted] immediately reports that she was raped and calls her mother.

As soon as PFC [redacted] returned to her tent, she tried to call SGT JD to inquire how to report a "SHARP incident," because she was in "a new setting." (R. at 263). Sergeant JD did not answer the phone, so PFC [redacted] went to the smoke shack and he ended up being there. (R. at 263, 300). Private First Class [redacted] was "close to a panic attack." (R. at 263, 300). She told SGT JD that she needed a SHARP

representative, and he told her he would get back to her with the information. (R. at 263, 299). Private First Class [redacted] went to shower, and she called her mother, "hysterically crying," and told her mother that she was raped. (R. at 263, 296–97). Private First Class [redacted] put her shorts containing appellant's ejaculate in a plastic bag and gave them to a Sexual Assault Medical Forensic Examiner at the hospital in Erbil in July 2019. (R. at 269, 309–11). She did not undergo a sexual assault forensic examination because she understood that there was a low likelihood of "find[ing] anything" because she had showered, and she "[d]idn't want a stranger down there." (R. at 270). A forensic biologist, Ms. CK, with the United States Army Criminal Investigation Laboratory, tested PFC [redacted]'s shorts and confirmed the presence of appellant's semen on the inside crotch of the shorts. (R. at 327–28, 332–36).

In the days following the rape, PFC [redacted] reluctantly reported appellant. (R. at 265–70). She feared that males in her unit, who did not want females in the cavalry scout position, would think that she fabricated the rape because she did not want to be deployed. (R. at 265). Although her Platoon Leader in Erbil, First Lieutenant (1LT) LM, suggested that PFC [redacted] go to Kuwait, PFC [redacted] heard that appellant was in Kuwait, and she did not want to leave her team. (R. at 265–68, 340). According to 1LT LM, "[u]ntil practically the day [PFC [redacted]] left [Erbil]. She did not want to leave. And she expressed to [1LT LM] thoroughly that she

wanted to stay with the platoon." (R. at 340). Private First Class [redacted] remained at Erbil for approximately two more months, redeploying to Fort Carson in September 2019. (R. at 266). The rest of her unit redeployed in either October or November 2019. (R. at 268).

At trial, defense presented the testimony of three soldiers regarding PFC [redacted]'s character for truthfulness. First, Staff Sergeant (SSG) PS testified that she met PFC [redacted] in Kuwait in July 2019. (R. at 348). She interacted with PFC [redacted] a "handful" of times while playing volleyball. (R. at 350–51). In her opinion, PFC [redacted] is untruthful. (R. at 349). However, SSG PS conceded that she did not know PFC [redacted] personally, but rather professionally. (R. at 351).

Second, Mr. AT, formerly a soldier assigned to PFC [redacted]'s platoon in Iraq, opined that PFC [redacted] was a "habitual liar." (R. at 363). Mr. AT elaborated that, after PFC [redacted] was raped, "[s]he kind of distanced herself a bit. And when she left [Iraq], we kind of never heard from her again." (R. at 364).

Third, Mr. ZM, formerly a soldier assigned to Fort Carson, met PFC [redacted] when she redeployed in August 2019. (R. at 373). Private First Class [redacted] dated one of Mr. ZM's friends. (R. at 374). In the year that Mr. ZM knew PFC [redacted], they "[hung] out frequently," and he formed the opinion that she has an untruthful character. (R. at 374). However, on cross-examination, Mr. ZM agreed that he

previously stated that PFC [redacted] "[w]as sometimes truthful and sometimes untruthful." (R. at 375).

Additionally, defense presented the testimony of two impeachment witnesses. Private First Class DD testified that appellant did not offer him an alcoholic drink in Erbil in July 2019, contrary to PFC [redacted]'s testimony. (R. at 245, 372). Sergeant WA, a brigade paralegal who sat in during a pre-trial interview on 6 March 2020 between the trial counsel and PFC [redacted], testified that PFC [redacted] stated that she "was there for [appellant] as a friend." (R. at 356).

Lastly, defense presented the testimony of three witnesses regarding PFC [redacted]'s desire to leave Iraq. Mr. AT testified that PFC [redacted] stated that she wanted to end her deployment early while they were in Iraq. (R. at 363). Sergeant MW, who was deployed with PFC [redacted] in Erbil and escorted her during her redeployment, testified that PFC [redacted] "was ready to come back home," and she "[s]eem[ed] relieved to be home." (R. at 347). Specialist (SPC) RD testified that while deployed to Iraq with PFC [redacted], she would often state that "she hates it here." (R. at 353). Specialist RD also admitted that there were times when he wished he was somewhere else other than Iraq. (R. at 354).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR THE SPECIFICATIONS OF THE CHARGE.

Standard of Review

Military appellate courts conduct a de novo review of factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *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) (citations and internal quotation marks omitted) (emphasis in original); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate role, the court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. Proof beyond a reasonable doubt does not require that the evidence be free from all conflict. *United States v. Trigueros*, 69 M.J. 604, 612 (Army Ct.

Crim. App. 2010) (quoting *United States v. Rankin*, 63 M.J. 552, 557 (N. M. Ct. Crim. App. 2006)). "In sum, to sustain appellant's conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005).

The elements of rape, as charged in Specification 1 of The Charge are as follows: (1) appellant committed a sexual act upon PFC [redacted] by penetrating PFC [redacted]'s vulva with his penis; and (2) appellant used unlawful force against PFC [redacted]. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*, 2019], pt. IV, § 60.a.(a)(1). The elements of sexual assault, as charged in Specification 2 of The Charge, are as follows: (1) appellant committed a sexual act upon PFC [redacted] by penetrating PFC [redacted]'s vulva with his penis; and (2) PFC [redacted] did not consent to the sexual act. *MCM* 2019, pt. IV, § 60.a.(b)(2)(A). The military judge defined "force" for the panel as "[t]he use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to cause or compel submission by the victim." (R. at 385); *see also MCM* 2019, pt. IV, § 60.g.(4). The military judge defined "consent" for the panel as

> [A] freely given agreement to the conduct at issue by a competent person. An expression of lack of consent

> through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent.

(R. at 386); *see also MCM* 2019, pt. IV, § 60.g.(7)(A).

Appellant's factual sufficiency argument is two-fold. First, appellant alleges that the specifications of The Charge are factually insufficient because PFC [redacted]'s description of appellant forcing her into the bus was "not plausible." (Appellant's Br. 20). Second, appellant contends that his conviction "rested solely" upon PFC [redacted]'s "unreliable" testimony. (Appellant's Br. 21–23). At bottom, appellant claims that PFC [redacted] consented to the sexual act charged. (Appellant's Br. 20–23). As discussed below, appellant's challenges to the factual sufficiency of his convictions are meritless.

A. Private First Class [redacted] compellingly testified that appellant used physical force and she repeatedly told him to stop.

Turning first to appellant's assertion that PFC [redacted]'s testimony was not "plausible," appellant argues that PFC [redacted]'s description of being forced into the bus was "physically impossible," and would have "[c]aus[ed] serious injury and induc[ed] screams of pain." (Appellant's Br. 20). However, appellant's argument amounts to nothing more than an attempt to muddy PFC [redacted]'s testimony. In contrast to appellant's argument, a plain reading of PFC [redacted]'s testimony clearly describes appellant forcing her into the bus. (R. at 251–61). Specifically, PFC [redacted]

testified that appellant grabbed her left wrist with a tight combatives grip and tried to kiss her. (R. at 251). From the outset, PFC [redacted] explicitly expressed her lack of consent. She pushed appellant way and told him, "[n]o," "[she] didn't want to." (R. at 251). Appellant "dragged" and "pulled" PFC [redacted] toward the bus. (R. at 251). She tried to break her wrist free, but appellant would not let go. (R. at 251). Appellant pulled PFC [redacted] to the driver's side of the bus, opened the door of the bus, and cornered her between himself and the door. (R. at 252).

Appellant suggests that PFC [redacted] did not state that she climbed into the bus until asked on cross-examination. (Appellant's Br. 20). However, appellant's argument is belied by the record. Private First Class [redacted] did in fact explain during direct examination that she had nowhere else to go but into the bus. She could either "climb up" or "fall over and scramble trying to get in [the bus]." (R. at 254, 258). Private First Class [redacted] compellingly described her fear of appellant because he was a Ranger, had more Army experience, and was bigger than her. (R. at 255). She further explained that she did not want to do anything that would upset him because she feared he would harm her. (R. at 256). Stated differently, it is of no consequence that PFC [redacted] climbed into the bus. Indeed, she climbed into the bus because she had no other escape route and feared appellant. Simply put, there is nothing implausible about PFC [redacted]'s description of appellant forcing her into the bus.

Once in the bus, appellant forced PFC [redacted] to retreat to the back of the bus and pushed her down on a seat. (R. at 258). Private First Class [redacted] continued to protest her lack of consent and tried to sit up; however, appellant pushed her back down. (R. at 259–60). "As soon as [appellant] pushed [PFC [redacted]] back down, [she] gave up." (R. at 260). According to PFC [redacted], "[t]here was no point in fighting any more, [she] just shut down." (R. at 260).

Importantly, PFC [redacted]'s testimony sufficiently satisfies the elements of rape and sexual assault. In particular, and as outlined above, PFC [redacted] described appellant using physical force by tightly grabbing her wrist, pulling her, dragging her, cornering her, pushing her onto the seat of the bus, and pushing her down again when she tried to sit up. (R. at 251–60). Thus, appellant used physical strength sufficient to overcome PFC [redacted]. *See MCM* 2019, pt. IV, § 60.g.(4). Likewise, PFC [redacted] testified that from the moment appellant tried to kiss her, while he dragged her to the bus, cornered her, and pushed her down on the seat twice, she continued to try to pull away, resisted, and repeatedly told him "[n]o," "to stop," and "[she] didn't want to." (R. at 251–60). The record is indisputable that PFC [redacted] expressed lack of consent to appellant through words and conduct. *See MCM* 2019, pt. IV, § 60.g.(7)(A).

Likewise, appellant's claim that "[t]he prosecution could not cogently explain how PFC [redacted]'s version of events could not have been heard by nearby

soldiers," is meritless. (Appellant's Br. 21). In essence, appellant argues that had PFC [redacted] not consented, then she would have screamed loudly for others to hear. However, PFC [redacted]'s own testimony explained that she feared appellant and did not want to anger him. (R. at 256). Further, she testified that she did not believe anyone could hear her on the bus because the generators for the tents make a loud humming noise all hours of the day. (R. at 256). Thus, this court should readily reject appellant's attempt to undermine the sufficiency of his convictions merely because PFC [redacted] did not attempt to scream.

Similarly, appellant points to PFC [redacted]'s lack of memory of how her shorts were removed to support his theory that she consented. (Appellant's Br. 21) (R. at 260). But PFC [redacted] explained that after appellant pushed her down on the seat, she tried to get up, he pushed her back down, and then she "gave up." (R. at 260). She acknowledged that she did not recall how her shorts came off and stated that she "[j]ust shut down." (R. at 260). Considering appellant's use of physical force and his disregard for PFC [redacted]'s lack of consent, it is believable that PFC [redacted], overwhelmed with fear, shut down and stopped remembering details.

B. Private First Class [redacted]'s testimony was credible and corroborated.

With respect to appellant's contention that his convictions rested on PFC [redacted]'s unreliable testimony, he overlooks several weaknesses in the opinion testimony of defense witnesses. (Appellant's Br. 21–23). In support of appellant's

argument, he points to the testimony of three defense witnesses, SSG PS, Mr. ZM, and Mr. AT, who opined that PFC [redacted] had a character for untruthfulness. (Appellant's Br. 21). However, appellant ignores that SSG PS conceded that she only interacted with PFC [redacted] a "handful" of times while playing volleyball. (R. at 350–51). Indeed, SSG PS greatly diminished the impact of her own opinion when she clarified that she did know PFC [redacted] personally. (R. at 351). In other words, the basis of SSG PS's opinion stems from a handful of impersonal interactions while playing volleyball. Such a basis for a character for truthfulness opinion is unreliable and certainly not sufficient to overturn appellant's convictions.

In a similar vein, Mr. AT's opinion that PFC [redacted] was a "habitual liar" suffered from bias. (R. at 363). In particular, Mr. AT described being offended that PFC [redacted] distanced herself from the Platoon a bit after she was raped, and that when she left Iraq, "[w]e kind of never heard from her again." (R. at 364). In essence, Mr. AT judged PFC [redacted]'s opinion during a period when she was enduring the aftermath of being raped while deployed.

Additionally, Mr. ZM's opinion that PFC [redacted] has a character for untruthfulness was seriously undermined by his bias and vacillation regarding his ultimate opinion. As to bias, PFC [redacted] had previously dated Mr. ZM's friend. (R. at 374). Naturally, Mr. ZM would side with his friend and not endorse PFC [redacted]. But even Mr. ZM was not steadfast in his opinion. He ultimately agreed that PFC

[redacted] "[w]as sometimes truthful and sometimes untruthful." (R. at 375). Further, appellant highlights PFC DD's testimony that appellant did not offer him an alcoholic drink in Erbil in July 2019, contrary to PFC [redacted]'s testimony. (Appellant's Br. 22) (R. at 245, 372). However, it is unsurprising that PFC DD would deny drinking alcohol while deployed. In short, the testimony of SSG PS, Mr. AT, Mr. ZM, and PFC DD did little to impugn PFC [redacted]'s credibility.

Appellant also charges that PFC [redacted] fabricated the rape because she "[h]ated Iraq and wanted to leave." (Appellant's Br. 22–23). However, appellant overstates the testimony supporting his argument. Although Mr. AT testified that PFC [redacted] stated that she wanted to end her deployment early while they were in Iraq, he also described being offended that she left and the unit never heard from her again. (R. at 363–64). Sergeant MW's testimony that PFC [redacted] "was ready to come back home," and she "[s]eem[ed] relieved to be home" falls far short of demonstrating a motive to fabricate. (R. at 347). Specialist RD's testimony that PFC [redacted] would often state that "she hates it here," was quickly put into context when he also admitted that there were times when he wished he was somewhere else other than Iraq. (R. at 353–54).

Furthermore, contrary to appellant's assertion that PFC [redacted] "minimize[ed] her social interactions with appellant," PFC [redacted] was forthright regarding her interactions with appellant. (Appellant's Br. 23). She described viewing appellant

as a mentor, meeting with him during lunch to learn how to conduct call for fire, going to the see a movie together, and hanging out at the cafe on 10 July 2019. (R. at 242–45). Private First Class [redacted]'s statement during a pre-trial interview that she "was there for [appellant] as a friend," followed by her reluctance to categorize appellant as a friend during her testimony does not necessarily arise to a lie (R. at 272, 356); rather, what matters is that PFC [redacted] testified regarding the circumstances of her interactions with appellant and left for the factfinder to consider whether those interactions made appellant's theory of the case believable. Critically, appellant does not point to any evidence that tends to paint their relationship as good friends, or even romantically involved, beyond these few limited interactions.

Lastly, defense presented the testimony of three witnesses regarding PFC [redacted]'s desire to leave Iraq. Mr. AT testified that PFC [redacted] stated that she wanted to end her deployment early while they were in Iraq. (R. at 363). Sergeant MW, who was deployed with PFC [redacted] in Erbil and escorted her during her redeployment, testified that PFC [redacted] "was ready to come back home," and she "[s]eem[ed] relieved to be home." (R. at 347). Specialist (SPC) RD testified that while deployed to Iraq with PFC [redacted], she would often state that "she hates it here." (R. at 353). Specialist RD also shared that there were times when he wished he was somewhere else other than Iraq. (R. at 354). Notably, appellant minimizes 1LT

LM's testimony that PFC [redacted] did not want to leave Iraq because 1LT LM was her superior. (R. at 340). However, 1LT LM supported PFC [redacted]'s decision to report appellant. (R. at 341–43). Because 1LT LM supported PFC [redacted], her statement to 1LT LM that she did not want to leave Iraq was likely more genuine than any statements she made to Mr. AT, SGT MW, and SPC RD. In any event, PFC [redacted] redeployed from Iraq at the end of August 2019, just a couple of months earlier than the rest of her unit, undermining appellant's entire theory. (R. at 268, 341).

While appellant points to various theories to attempt to attack PFC [redacted]'s credibility, he largely sidesteps PFC [redacted]'s immediate report to her mother and request for help from SGT JD. Indeed, within 10 minutes of returning to her tent after appellant raped her, PFC [redacted] sought out SGT JD at the smoke pit to ask him for the unit SHARP representative. (R. at 262–64). Sergeant JD described PFC [redacted] as "crying, "in distress," "looking over her shoulder," and "in panic." (R. at 300). He testified that PFC [redacted] "[h]ad mentioned to [him] that something along the lines of asking to stop . . . [b]ut they wouldn't or didn't." (R. at 301). His description of PFC [redacted] immediately after the rape supports PFC [redacted]'s testimony that she feared appellant, she did not consent, and he used physical force. Simply put, SGT JD's description of PFC [redacted] was not consistent with a consensual sexual encounter, as appellant claims. Importantly, defense's cross-examination of SGT JD did not question that PFC [redacted] immediately reported to him. (R. at 303–04).

Approximately 20 or 30 minutes after speaking to SGT JD, and within an hour of the rape, PFC [redacted] called her mother. (R. at 264–65). Her mother, [redacted], described PFC [redacted] as "hysterically crying," "hyperventilating," and "trying to catch her breath." (R. at 296–97). Once [redacted] was able to calm her daughter down, PFC [redacted] stated, "Mommy, a sergeant just pulled me on a bus and raped me." (R. at 297). Importantly, PFC [redacted] had no reason to lie to her mother. There is only one reason PFC [redacted] would immediately call her mother after the rape—because she was scared. In sum, [redacted] and SGT JD, two witnesses who do not know each other, strongly corroborated PFC [redacted]'s testimony, both describing PFC [redacted] in a similar state of panic and distraught almost immediately after appellant raped her. *See United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim App. 2016) (considering the victim's immediate report as weighing favor of appellant's guilty).

Accordingly, this court should reject appellant's challenges to the factual sufficiency of his convictions and conclude that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," and the court itself should be "convinced of appellant's guilt [of the specifications of The Charge] beyond a reasonable doubt." *Rosario*, 76 M.J. at 117; *see also Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Turner*, 25 M.J. at 325 ("[h]aving weighed the evidence in the record of trial and having made allowances for not having

personally observed the witnesses, [the court is] convinced of [the appellant's] guilt beyond a reasonable doubt and find his convictions factually sufficient.").

Assignment of Error II

WHETHER THE PROSECUTION VIOLATED APPELALNT'S RIGHTS UNDER *BRADY V. MARYLAND* AND RULE FOR COURTS-MARTIAL 701(a)(2)(A).

Additional Facts

A. Appellant's Motion for Evidentiary Hearing

On 4 April 2022, appellant filed a motion requesting an evidentiary hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). (Def. Mot. Evid. Hearing). Appellant alleged that the lead trial counsel in his court-martial, Captain (CPT) BM, violated his duty to disclose a recorded interview with 1LT LM. (Def. Mot. Evid. Hearing). Appellant asserted that the recorded interview with 1LT LM "[i]ncluded comments affecting the credibility of [PFC [redacted]] and the weight her testimony deserved." (Def. Mot. Evid. Hearing at 4). Appellant claimed that this recorded interview was required to be disclosed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and Rules for Courts-Martial (R.C.M.) 701(a)(2)(A), 701(a)(6), and 914. (Def. Mot. Evid. Hearing). Appellant also submitted the defense's request for discovery and production at trial which "[r]espectfully note[d] the [government's] obligation to disclose the existence of

any evidence that is either known by the trial counsel or should be known to the trial counsel through the exercise of due diligence . . . that reasonably tends to negate the guilt of the accused. . . ." (*DuBay* App. Ex. XXXVII at 3). The defense discovery request also requested "[a]ny prior statement of a witness, whether written or not, that the trial counsel intends to examine the witness concerning." (*DuBay* App. Ex. XXXVII at 3). Appellant also submitted the government's response to the defense discovery request which indicated that the requested evidence and witness statements had been provided "to the extent that [they] exis[t]." (*DuBay* App. Ex. XXXVIII at 1).

B. Major BT's 31 March 2022 Affidavit

In support of appellant's motion, he submitted an affidavit from Major (MAJ) BT, the Senior Defense Counsel in the Hawaii Field Office. (*DuBay* App. Ex. XXXI). Major BT's Senior Defense Paralegal is SGT MS, who was formerly a government paralegal in appellant's court-martial. (*DuBay* App. Ex. XXXI at 1). In July 2021, while MAJ BT was discussing R.C.M. 914 with SGT MS, SGT MS stated that "[a]t his last job as a brigade paralegal at Fort Carson, he was part of an interview for a significant outcry witness who later testified at court-martial." (*DuBay* App. Ex. XXXI at 1). Sergeant MS stated to MAJ BT that he recorded part of the interview at the trial counsel's request. (*DuBay* App. Ex. XXXI at 1). According to MAJ BT, SGT MS stated that "[d]uring the interview, the witness

began to criticize [PFC [redacted]] and describe her having engaged in inappropriate behavior. After this, [CPT BM] looked at [SGT MS] and silently gave him the 'kill' sign." (*DuBay* App. Ex. XXXI at 1). Major BT stated that SGT MS told him that he turned off the recording and the interview continued for several more minutes. (*DuBay* App. Ex. XXXI at 1). After the interview, CPT BM told SGT MS that they would no longer record interviews. (*DuBay* App. Ex. XXXI at 1). MAJ BT stated that SGT MS was confident that the recording was not disclosed to the defense. (*DuBay* App. Ex. XXXI at 1). Concerned, MAJ BT told SGT MS to contact CPT BM and recommend he file a post-trial disclosure. (*DuBay* App. Ex. XXXI at 1). "From time to time," MAJ BT would ask SGT MS if he reached out to CPT BM, and SGT MS would assure MAJ BT that he would. (*DuBay* App. Ex. XXXI at 1–2). On 4 October 2021, SGT MS, e-mailed CPT BM. (*DuBay* App. Ex. XXXI at 2). After several months passed without a response from CPT BM, MAJ BT contacted the Chief of the Army Defense Appellate Division with the details he learned from SGT MS. (*DuBay* App. Ex. XXXI at 2).

C. Sergeant MS's 29 April 2022 Affidavit

On 14 April 2022, the court ordered the government to obtain an affidavit from SGT MS. On 29 April 2022, SGT MS submitted an affidavit. (*DuBay* App. Ex. XXXII). In relevant part, SGT MS stated that he took notes during an interview of 1LT LM between August and October 2020. (*DuBay* App. Ex.

XXXII at 1). He stated that the interview was recorded on a handheld recording device. (*DuBay* App. Ex. XXXII at 2). According to SGT MS, "[d]uring the interview [CPT BM] directed [SGT MS] to cease the recording by giving [SGT MS] the silent kill it hand gesture. . . . When [1LT LM] was giving us information about [PFC [redacted]'s] behavior, conduct and/ or demeanor following the alleged assault that took place in Erbil,[1] Iraq; [SGT MS] was directed to stop the recording." (*DuBay* App. Ex. XXXII at 1). Sergeant MS added that the interview with 1LT LM continued for "several minutes." (*DuBay* App. Ex. XXXII at 1). Following the interview, CPT BM told SGT MS that they would no longer record interviews. (*DuBay* App. Ex. XXXII at 1). Further, SGT MS declined to "[f]ormally state whether the information [that 1LT LM] provided [during the interview] was positive or negative for the government case." (*DuBay* App. Ex. XXXII at 2). Sergeant MS stated that the recorded interview was never provided to the defense. (*DuBay* App. Ex. XXXII at 2).

D. The Court's Order for an Evidentiary Hearing

On 26 May 2022, the court ordered an evidentiary hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) "to resolve material inconsistencies in [MAJ BT's and SGT MS's] post-trial affidavits and develop the facts necessary to resolve appellant's claim that the trial counsel

[1] The *DuBay* transcript references "Irbil," which is an alternate spelling of Erbil.

violated his duty to disclose materials to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and [R.C.M.] 701(a)(2)(A), 701(a)(6), and 914 in appellant's court-martial." (*DuBay* App. Ex. XXVI at 3).

On 29 August 2022, an evidentiary hearing was held at Fort Leavenworth, Kansas. (*DuBay* Tr. at 1). The government submitted a memorandum for record (MFR) from a paralegal NCO at Fort Carson who indicated that the Third Armored Brigade's Legal Office was unable to recover the recording of 1LT LM's interview. (*DuBay* App. Ex. 35). Appellant's trial defense counsel testified that they never received a recording of 1LT LM's interview with trial counsel. (*DuBay* Tr. at 23, 27). However, appellant's trial defense counsel acknowledged receiving in discovery PFC [redacted]'s administrative separation packet, which included a character statement from 1LT LM. (*DuBay* Tr. at 31; *DuBay* App. Ex. XXXIV). Relevant here, 1LT LM's character statement described a decline in PFC [redacted]'s performance after the rape. (*DuBay* App. Ex. XXXIV at 1).

1. Major BT's Testimony

Major BT testified that in July 2021, while serving as a Senior Defense Counsel in Hawaii, he conducted R.C.M. 914 training with his office. (*DuBay* Tr. at 34–36). During the training, SGT MS stated "[s]o in my last job, as the government paralegal, we recorded this interview of an outcry witness, and we didn't turn that recording over." (*DuBay* Tr. at 37). According to MAJ BT, SGT MS stated

"[s]omething about [1LT LM] commenting negatively on the character of [PFC [redacted]], and saying something about basically her sexual behavior at around the time of the incident. And that was sort of the triggering point when [CPT BM] looked over to [SGT MS] and kind of directed him with this sort of 'slashing the hand across the throat' movement to cut the recording." (*DuBay* Tr. at 37). Although MAJ BT testified that he was unsure specifically what was said, he stated that "[I] know at least two parts were commenting negatively on the character of [PFC [redacted]]. I believe the word used was that . . . she was acting shady or something to that effect, and then the sexual behavior, promiscuity, or something to that effect around the time of the incident." (*DuBay* Tr. at 37–38, 41).

2. Sergeant MS's Testimony

Sergeant MS testified that he assisted CPT BM with the interview of 1LT LM. (*DuBay* Tr. at 82–83). They were the only three individuals present during the interview. (*DuBay* Tr. at 83). Captain BM requested that SGT MS record the interview. (*DuBay* Tr. at 83–84). The interview lasted 20 minutes. (*DuBay* Tr. at 91). Towards the end of the interview, CPT BM signaled for SGT MS to "kill the recording." (*DuBay* Tr. at 91). After SGT MS stopped the recording, 1LT LM drew a diagram of Erbil on a whiteboard to provide a better idea of the layout of the installation. (*DuBay* Tr. at 93). Sergeant MS took a photo of 1LT LM's

drawing and he and CPT BM used it as a reference. (*DuBay* Tr. at 93). The picture of 1LT LM's drawing was not disclosed to defense. (*DuBay* Tr. at 119).

Sergeant MS also took notes during the interview, but not everything was captured in his notes. (*DuBay* Tr. at 87). When asked whether 1LT LM provided any information that was critical of PFC [redacted], SGT MS replied that he "[t]ruly do[es] not remember what was said." (*DuBay* Tr. at 89). Sergeant MS explained that MAJ BT's R.C.M. 914 training prompted him to mention to MAJ BT that the government failed to disclose the recording of 1LT LM. (*DuBay* Tr. at 89–90). Sergeant MS elaborated that when MAJ BT mentioned recording interviews, "[i]t kind of sparked like, oh, shoot, we did a recording . . . [a]nd we never turned it over, type a thing. It was nothing case related, it was more of a procedural concern, like, hey, we had a discovery obligation." (*DuBay* Tr. at 114–15).

Sergeant MS "vaguely" remembered 1LT LM discussing PFC [redacted]'s "sexual promiscuity," but then clarified that he remembered "that topic being discussed with other witnesses more than [with 1LT LM]." (*DuBay* Tr. at 94). In regards to negative information, SGT MS recalled that 1LT LM testified that PFC [redacted]'s work ethic changed after the rape and she "[s]tarted . . . getting away with certain things." (*DuBay* Tr. at 117, 126). Sergeant MS also recalled 1LT LM "perhaps" discussing PFC [redacted]'s "sexual reputation throughout the unit." (*DuBay* Tr. at 118). However, SGT MS could not recall whether the recording was stopped in close

proximity to the discussion regarding PFC [redacted]'s work ethic and sexual reputation. (*DuBay* Tr. at 118). Although SGT MS recalled telling MAJ BT that 1LT LM characterized PFC [redacted] as promiscuous, SGT MS did not recall telling MAJ BT that 1LT LM stated that PFC [redacted] "was acting shady." (*DuBay* Tr. at 125).

After 1LT LM's interview, CPT BM told SGT MS that they would not record any more interviews. (*DuBay* Tr. at 94). Sergeant MS did not recall whether he drafted an MFR after the interview with 1LT LM. (*DuBay* Tr. at 97–102). To SGT MS's knowledge, the fact that the interview was recorded was not disclosed to the defense. (*DuBay* Tr. at 103). After prompting from MAJ BT, SGT MS e-mailed CPT BM, but he never replied. (*DuBay* Tr. at 105).

3. Captain BM's Testimony

Captain BM testified that prior to 1LT LM's interview, SGT MS stated that he would record the interview. (*DuBay* Tr. at 140). During the first minute or few minutes of the interview, CPT BM told SGT MS to stop recording because it was unnecessary. (*DuBay* Tr. at 140–41). Captain BM explained that 1LT LM mentioned something that he felt triggered Mil. R. Evid. 412 and PFC [redacted]'s sexual orientation. (*DuBay* Tr. at 142). Captain BM did not recall any other "negative" information discussed during the interview, and did not recall 1LT LM discussing PFC [redacted]'s "promiscuity." (*DuBay* Tr. at 144–45). However, CPT BM did recall that 1LT LM had a "high opinion" of PFC [redacted]'s character. (*DuBay* Tr. at 145). He

believes the interview lasted 10 minutes. (*DuBay* Tr. at 147). Captain BM did not remember whether an MFR was drafted after the interview. (*DuBay* Tr. at 147–49). As to the recording of the interview, CPT BM stated that he did not believe that the existence of the recording was disclosed to anyone beyond 1LT LM and SGT MS. (*DuBay* Tr. at 152). Captain BM acknowledged receiving SGT MS's email regarding this case, but as CPT BM had just transferred to a new assignment, he did not find the time to respond. (*DuBay* Tr. at 153).

4. First Lieutenant LM's Testimony

First Lieutenant LM recalled that CPT BM informed her that the interview would be recorded. (*DuBay* Tr. at 158). At the outset of the interview, CPT BM told 1LT LM that PFC [redacted]'s sexual orientation was not relevant. (*DuBay* Tr. at 159). She recalled that she was asked a question "that seemed aimed at" PFC [redacted]'s sexual promiscuity, but that she replied that she "[d]idn't concern herself with the rumors." (*DuBay* Tr. at 160). With respect to PFC [redacted]'s character, 1LT LM recalled stating that she "[a]lways knew [PFC [redacted]] to have good character, and that she had a good reputation as a hard worker." (*DuBay* Tr. at 161). After PFC [redacted] was raped, 1LT LM recalled telling CPT BM that "[PFC [redacted]'s] behavior changed because it was everything I knew of PTSD and trauma response. It was very evident that she was deteriorating." (*DuBay* Tr. at 161). First Lieutenant LM specifically denied ever characterizing PFC [redacted] as having anything close to a

"shady" character. (*DuBay* Tr. at 161). In regards to negative information, 1LT LM stated that she "[d]idn't purposefully say anything that [she] thought would be derogatory towards [PFC [redacted]]. [She] thought [she] was advocating as best [she] could, based on what [she] knew," and it was not 1LT LM's intent to "disparage [PFC [redacted]] in any way." (*DuBay* Tr. at 167).

According to 1LT LM, the recording was stopped after she had been there "quite a while," and she began talking about possibly joining the Judge Advocate General's (JAG) Corps someday. (*DuBay* Tr. at 162–63). After the recording stopped, she drew a diagram of the layout of Erbil on a whiteboard. (*DuBay* Tr. at 163). She guessed the interview lasted one hour. (*DuBay* Tr. at 163).

E. Military Judge's Findings of Fact and Conclusions of Law

In comparing the testimony of CPT BM, 1LT LM, and SGT MS, the military judge determined that 1LT LM "[p]ossesse[d] the best memory of what occurred during her interview" and accepted her testimony as "factual." (*DuBay* Findings at 1, 3). The military judge reasoned that CPT BM and SGT MS recalled the interview in general terms, whereas 1LT LM recalled the interview specifics. (*DuBay* Findings at 1). Based upon the testimony from CPT BM and SGT MS, the military judge identified "four general areas of possible negative information provided by 1LT [LM] during the interview: (1) poor duty performance, (2) sexual

promiscuity, (3) poor character (unspecified) opinion, and (4) that the victim was 'shady.'" (*DuBay* Findings at 1–2).

The military judge considered 1LT LM's testimony regarding each of these areas. (*DuBay* Findings at 2–3). Regarding PFC [redacted]'s duty performance, the military judge found that 1LT LM commented on PFC [redacted]'s duty performance to highlight that she believed that the rape caused her duty performance to thereafter decline. (*DuBay* Findings at 1, 2). The military judge noted that the government disclosed PFC [redacted]'s declining duty performance in pre-trial discovery. (*DuBay* Findings at 2). With respect to PFC [redacted]'s sexual promiscuity, poor character, or "shadiness," however, the military judge found that 1LT LM made no such statements during her interview:

> First Lieutenant [LM] further persuasively testified that she provided no information during the interview concerning sexual promiscuity by the victim. . . . Concerning poor character and "shady" behavior or opinions, 1LT [LM] again persuasively testified that she's never held a poor opinion of the victim's character and would never (and did not) describe the victim as shady.

(*DuBay* Findings at 2).

Concerning the circumstances surrounding the stopping of the recording, the military judge found 1LT LM's account more credible than that of CPT BM and SGT MS. (*DuBay* Findings at 3). Here, 1LT LM testified that the interview was essentially over when CPT BM directed SGT MS to stop the recording. (*DuBay*

Findings at 3). The military judge found that the recording was stopped as the discussion veered toward 1LT LM's interest in the JAG Corps. (*DuBay* Findings at 3). The military judge found that appellant's defense counsel were neither informed that the recorded interview occurred, nor provided a copy. (*DuBay* Findings at 3). Based upon CPT BM's testimony, the military judge concluded that CPT BM "never decided not to produce the recording or inform the defense of the recording's existence;" rather, "he simply forgot to do so." (*DuBay* Findings at 3–4). After considering CPT BM's and SGT MS's testimony regarding an MFR, the military judge found that an MFR of 1LT LM's interview was never drafted. (*DuBay* Findings at 4).

Turning to the military judge's conclusions, the military judge found that the government did not violate *Brady* or R.C.M. 701(a)(2)(A). (*DuBay* Findings at 6–7). In reaching this conclusion, the military judge acknowledged that 1LT LM's statement during her interview, that PFC [redacted] became a problem soldier after the rape, may have been favorable to the defense, and was consistent with the defense theme at trial that PFC [redacted] wanted to redeploy from Iraq early. (*DuBay* Findings at 7). However, that same information had already been provided to the defense in the form of a character statement from 1LT LM, dated 29 April 2020. (*DuBay* Findings at 7; *DuBay* App. Ex. XXXIV). Thus, the military judge concluded the information was not material, and the failure to produce it was harmless beyond a

reasonable doubt. (*DuBay* Findings at 7). For similar reasoning, the military judge found that the government's failure to produce the recording did not violate R.C.M.701(a)(2)(A) because it lacked materiality. (*DuBay* Findings at 8).

Standard of Review

This court reviews a military judge's findings of fact at *DuBay* hearings under a clearly erroneous standard and the conclusions of law de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). Findings of fact are "clearly erroneous" when the reviewing court "is left with the definite firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).

The Court of Appeals for the Armed Forces (CAAF) has recognized "two categories of disclosure error" subject to different standards of review. *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013). First, for "cases in which the defense either did not make a discovery request or made only a general request for discovery," this court applies the harmless error standard. *Id.; United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990); *see United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012). Secondly, for "cases in which the defense made a specific request for the undisclosed information," this court applies the heightened constitutional harmless beyond a reasonable doubt standard. *Coleman*, 72 M.J. at 187; *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004); *Hart*, 29 M.J. at

410. Similar to *Brady*, R.C.M. 701(a)(2) requires a showing of materiality. *United States v. Shorts*, 76 M.J. 523, 531 (Army Ct. Crim. App. 2017).

Law and Argument

Under *Brady v. Maryland*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). *Brady* does not require a prosecutor "to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. . . ." *United States v. Bagley*, 473 U.S. 667, 675 (1985).

To establish a *Brady* violation, a defendant must make each of the three following showings: (1) the evidence at issue is "favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) the government suppressed the evidence, "either willfully or inadvertently;" and (3) the information was material in that "prejudice . . . ensued." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In addition to *Brady*, R.C.M. 701(a)(2)(A) provides that, upon defense request, "[t]he Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities, and . . . relevant to defense preparation of the

defense . . . ."[2] When a *Brady* analysis concludes that evidence not disclosed is not relevant, then there is also no violation of R.C.M. 701(a)(2)(A). *See Shorts*, 76 M.J. at 534–35.

In this case, the military judge properly found that no *Brady* violation or violation of R.C.M. 701(a)(2)(A) occurred as a result of the Government's failure to disclose 1LT LM's interview because the evidence was not relevant and the failure to produce it was harmless beyond a reasonable doubt. (*DuBay* Findings at 6–9). As an initial matter, the military judge reasonably determined that 1LT LM's testimony was the most reliable. (*DuBay* Findings at 1). Although appellant appears to argue that MAJ BT's testimony was the most credible (Appellant's Br. 26), MAJ BT's testimony carries very little value because he was not present during the interview and heard about it secondhand from SGT MS at least nine months after the interview took place. (*DuBay* App. Exs. XXXI, XXXII). First Lieutenant LM's recollection is certainly more reliable than MJ BT's testimony. Arguably, CPT BM's testimony was self-interested because he was accused of a discovery violation. (*DuBay* Tr. at 140–53). Meanwhile, SGT MS's testimony

[2] The Miliary Justice Act of 2016 amended R.C.M. 701(a)(2)(A) to broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case. *See MCM* 2019, A15-9. The military judge appears to have applied the prior version of R.C.M. 701(a)(2)(A), which requires a showing of materiality. However, because the military judge's findings satisfy both the materiality and relevancy standards, the amended language of the rule has no impact on the assigned error.

suffered from uncertainty and lack of specifics. (*DuBay* Tr. at 82–126). In contrast, the military judge aptly observed that 1LT LM possessed "[t]he best memory of what occurred during her interview." (*DuBay* Findings at 1). According to LM, she stated during the interview that PFC [redacted]'s duty performance declined after the rape. (*DuBay* Tr. at 161). Importantly, 1LT LM did not make any statements regarding PFC [redacted]'s character, describe her as "shady," or make any statements regarding PFC [redacted]'s sexual promiscuity. (*DuBay* Tr. at 159–67).

Turning to the question of relevancy, it is helpful to first consider the defense case theory. Here, as the military judge recognized, the defense theory at trial was that PFC [redacted] fabricated the rape because she wanted to redeploy from Iraq early. (*DuBay* Findings at 2). The military judge further acknowledged that 1LT LM's statements during the interview arguably advanced the defense theory because evidence that PFC [redacted] became a poor duty performer was consistent with the defense theory that she wanted to redeploy early. (*DuBay* Findings at 7).

Critically, the defense already possessed this exact information in the form of 1LT LM's character statement that was provided to defense pretrial. (*DuBay* App. Ex. XXXIV). First Lieutenant LM's character statement detailed her interactions and observations of PFC [redacted] from the start of the deployment until her redeployment in August 2019. (*DuBay* App. Ex. XXXIV). Specifically, "[PFC [redacted]] started showing up late frantic and apologetic, and would often start shaking

and breaking into tears in the middle of shift." (*DuBay* App. Ex. XXXIV at 1). Additionally, "[1LT LM] noticed that, while [PFC [redacted]] never showed any disrespect to [1LT LM], she bristled at male authority and was, at times, [was] insubordinate to them." (*DuBay* App. Ex. XXXIV at 1). Indeed, the information 1LT LM provided during her recorded interview entirely overlaps with her character statement that was provided to defense pretrial. *See United States v. Gonzalez*, 62 M.J. 303, 307 (C.A.A.F. 2006) (noting that the overlapping nature of the evidence undercuts an argument that the failure to disclose was a Brady violation); *see also United States v. Agurs*, 427 U.S. 97, 114 (1976) (no *Brady* violation where the undisclosed evidence did not contradict any evidence already admitted and was similar to other evidence in the record).

Although appellant generally contends that failure to disclose 1LT LM's interview was not harmless because "[i]mpeachment of [PFC [redacted]] was of vital importance," he does not elaborate further on how the outcome of his trial would have been different. (Appellant's Br. 27). Appellant does not explain how 1LT LM's interview would have impeached PFC [redacted] in a manner in which defense was not already capable of doing based upon 1LT LM's character statement. Appellant apparently favors MAJ BT's testimony because MAJ BT testified that SGT MS told him that 1LT LM commented negatively on PFC [redacted]'s character during the interview. (Appellant's Br. 26–28). However, SGT MS did not recall 1LT LM

making such a statement. (*DuBay* Tr. at 126). More importantly, 1LT LM specifically denied ever stating that PFC [redacted] had a "shady" character. (*DuBay* Tr. at 161). At bottom, appellant's relevancy argument lacks any support in the record and certainly fails to rise to level of clear error.

In sum, failure to provide defense the recording of 1LT LM's interview did not deprive appellant of any information that he did not already possess. Had the defense possessed the recording of 1LT LM's interview, it would not have made the "likelihood of a different result . . . great enough to 'undermine[] confidence in the outcome of the trial." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (quoting *Smith v. Cain*, 565 U.S. 73, 76 (2012)). Thus, there was no clear error in the military judge's finding that the recorded interview of 1LT LM was not relevant to the preparation of the defense. Consequently, there was no *Brady* violation or violation of R.C.M. 701(a)(2)(A).

Assignment of Error III

WHETHER THE PROSECUTION VIOLATED APPELLANT'S RIGHTS UNDER JENCKS V. UNITED STATES AND RULES FOR COURTS-MARTIAL 914 AND 701(a)(6).

Additional Facts

Appellant also claims that the recorded interview of 1LT LM was required to be disclosed pursuant to R.C.M. 914 and 701(a)(6). (Appellant's Br. 28–35). The military judge noted that R.C.M. 701(a)(6) does not contain a materiality

requirement. (*DuBay* Findings at 8). As the recording contained information "arguably consistent with, and therefore favorable to, the defense's theory of the case," the military judge concluded that the government violated R.C.M. 701(a)(6). (*DuBay* Findings at 8). Further, the military judge concluded that the government violated R.C.M. 914(a). (*DuBay* Findings at 8–9). Specifically, the military judge reasoned that the recorded interview meets the definition of "statement;" 1LT LM testified for the government at trial; the defense's pre-trial discovery request and the government's response either satisfied the defense's motion requirement or precluded the government from arguing the motion requirement was not met; the government possessed the recording of the interview; and the recording relates to the subject matter concerning which 1LT LM testified. (*DuBay* Findings at 9). The military judge noted that the good faith loss doctrine was not applicable here because the government's negligence caused the loss. (*DuBay* Findings at 9).

Standard of Review

This court reviews a military judge's findings of fact at *DuBay* hearings under a clearly erroneous standard and the conclusions of law de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). Findings of fact are "clearly erroneous" when the reviewing court "is left with the definite firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001). This Court conducts a de novo review when determining

whether an appellant was prejudiced by an R.C.M. 914 violation. *United States v. Clark*, 79 M.J. 449, 455 (C.A.A.F. 2020). "In the context of nonconstitutional errors, courts consider whether there is a '*reasonable probability* that, but for the error, the outcome of the proceedings *would have been different*.'" *United States v. Tovarchavez*, 78 M.J. 458, 472 n.5 (C.A.A.F. 2019) (citing *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)) (emphasis in original).

Law and Argument

As a threshold matter, appellee does not contest that the government violated R.C.M. 914 and the Jencks Act. Thus, the sole issue before the Court is whether appellant was prejudiced. As will be discussed below, the government's failure to disclose the recording of 1LT LM's interview did not prejudice appellant.

A. History and purpose of the Jencks Act and R.C.M. 914.

The Jencks Act "'further[s] the fair and just administration of criminal justice' by providing for disclosure of statements for impeaching government witnesses." *United States v. Muwwakkil*, 74 M.J. 187, 190 (C.A.A.F. 2015) (quoting *Goldberg v. United States*, 425 U.S. 94, 107, (1976)). The Jencks Act was Congress's reaction to the Supreme Court's opinion in *United States v. Jencks*, which held:

> [A] criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's

> inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.

353 U.S. 657, 672 (1957), *superseded by statue*, 18 U.S.C. § 3500; *Palermo v. United States*, 360 U.S. 343, 346 (1959).

The Jencks Act strikes a balance between preventing the inherent injustice of the government invoking governmental privilege to deny a defendant of the same information that it used to secure his conviction and protecting the government from evidentiary fishing expeditions. *See Palermo*, 360 U.S. at 349; *United States v. Graves*, 428 F.2d 196, 199 (5th Cir. 1970) ("The Act does not authorize fishing expeditions by the defendant, however, and use of statements under the Act is restricted to impeachment"). Rule for Courts-Martial 914 "tracks the language of the Jencks Act," and "[g]iven the similarities in language and purpose between R.C.M. 914 and the Jencks Act, [this Court] conclude[d] that [its] Jencks Act case law and that of the Supreme Court informs [its] analysis of R.C.M. 914 issues." *Muwwakkil*, 74 M.J. at 190–91.

B. No relief is required for an error without prejudice.

Rule for Courts-Martial 914 states that "the military judge shall order that the testimony of the witness be disregarded . . . or, . . . declare a mistrial if required in the interest of justice," if the government elects not to comply with the military

judge's order to produce an R.C.M. 914 statement. This Court and the Supreme Court interpret the Government's loss or destruction of an R.C.M. 914 statement as an election not to comply.[3] *Muwwakkil*, 74 M.J. at 192–94 (citing *United States v. Augenblick*, 393 U.S. 348, 355 (1969)).

Nevertheless, specific facts of a case may justify deviation from R.C.M. 914's weighty sanctions. Relevant here, courts refrain from providing relief when the prejudice stemming from the Government's non-compliance with R.C.M. 914's mandates is inconsequential. *See* Article 59(a), UCMJ; *Killian*, 368 U.S. at 243; *Clark*, 79 M.J. at 455; *United States v. Emor*, 573 F.3d 778, 785 (D.C. Cir. 2009) (finding no prejudice where withheld materials "would have assisted [appellant] only in further impeaching an already impeached witness); *United States v. Riley*, 189 F.3d 802, 805–06 (9th Cir. 1999) (noting "we have not required that testimony be stricken where a substitute for the missing statement was available").

C. Appellant has failed to demonstrate prejudice.

For a nonconstitutional R.C.M. 914 violation, the court determines if the error had a substantial influence on the findings. *United States v. Sigrah*, 82 M.J. 463, 467 (C.A.A.F. 2022) (citing *Clark*, 79 M.J. at 455); *see also United States v.*

[3] For the sake of brevity, references to R.C.M. 914 impliedly encompass its civilian counterpart, the Jencks Act, unless otherwise specified.

Kohlbek, 78 M.J. 326, 333 (C.A.A.F. 2019). The CAAF recently reiterated that the test for prejudice when there is a nonconstitutional R.C.M. 914 violation was set forth in *Kohlbek* and requires the court to weigh "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Sigrah*, 82 M.J. at 467 (citing *Clark*, 79 M.J. at 455; *Kohlbek*, 78 M.J. at 333).

As a threshold matter, despite appellant's attempts to inflate the materiality of the recorded interview, 1LT LM adamantly testified that she did not make any statements regarding PFC [redacted]'s character, describe her as "shady," or make any statements regarding PFC [redacted]'s sexual promiscuity. (*DuBay* Tr. at 159–67). In fact, 1LT LM insisted that she did not state anything derogatory about PFC [redacted] during the interview and that she "[w]as advocating as best [as 1LT LM] could, based on what [1LT LM] knew." (*DuBay* Tr. at 167). Likewise, defense also had an adequate substitute for 1LT LM's diagram. In particular, any of the several other witnesses present on the deployment who testified at trial likely could have drawn a diagram indicating the proximity of the tents to the bus (i.e., SPC RD, Mr. AT, and SPC DD).

Applying the *Kohlbek* framework to appellant's case, had 1LT LM's testimony been stricken at trial, the strength of the Government's case would have remained strong; the defense case would have remained weak; 1LT LM's

interview was not material; and the quality of her interview was not high. Specifically, at trial, 1LT LM was called as a government witness and testified that PFC [redacted] was "opposed" to redeploying early from Iraq. (R. at 340). During cross-examination, 1LT LM agreed that she referred to appellant as "the perpetrator," and she told PFC [redacted] that she had the right to seek justice. (R. at 341–42). Additionally, 1LT LM agreed with defense counsel that she observed that appellant "had a huge ego because of his Ranger tab," and that she had heard appellant "ma[ke] comments about females." (R. at 342–43). In essence, defense counsel sought to diminish the credibility of 1LT LM's testimony based on her bias against appellant and in favor of PFC [redacted]. Meanwhile, the most her testimony achieved for the government was rebut the defense theory that PFC [redacted] fabricated the sexual assault so that she could redeploy early. (R. at 340–43).

However, the defense witnesses were unconvincing regarding PFC [redacted]'s alleged motive. Specifically, Mr. AT's testimony that PFC [redacted] stated that she wanted to end her deployment early while they were in Iraq was undermined by his taking offense to PFC [redacted] departing Iraq early and him never hearing from her again. (R. at 363–64). Sergeant MW's testimony that PFC [redacted] "was ready to come back home," and she "[s]eem[ed] relieved to be home" is unsurprising considering PFC [redacted] had just been raped, and soldiers generally feel relief when redeploying. (R. at 347). Specialist RD's testimony that PFC [redacted] would often state that "she

hates it here," was similarly deflated when he also admitted that there were times when he wished he was somewhere else other than Iraq. (R. at 353–54). Thus, the defense case theory was scarcely supported by record testimony. Had 1LT LM not testified, the government's case would have been just as strong. Moreover, in the absence of 1LT LM's testimony, the panel would have heard PFC [redacted] convincingly testify that she was excited for the deployment and motivated to excel as a cavalry scout. (R. at 236–43).

Notably, the only prejudice appellant asserts is that he was denied "[a]n opportunity to challenge the credibility of the accusing witness . . . ." (Appellant's Br. 30-31). However, as previously discussed, 1LT LM's recorded interview did not contain impeachment evidence that defense was not already aware of. Stated differently, 1LT LM's interview statements regarding PFC [redacted]'s poor duty performance would not have diminished her credibility. Indeed, perhaps defense counsel did not elicit testimony regarding PFC [redacted]'s poor duty performance because they recognized that the evidence carried little value for the defense case. (R. at 341–43). Arguably, evidence of PFC [redacted]'s poor duty performance would have enhanced the government's case because PFC [redacted] was so traumatized by the rape that she became despondent at work.

To the extent appellant argues the government committed another RCM 914 violation for failing to disclose 1LT LM's drawing on a whiteboard, such a claim

similarly lacks the requisite prejudice. (Appellant's Br. 31–32). As appellant highlights, the diagram would have shown that there were living quarters near the bus. (Appellant's Br. 31). However, appellant overlooks that PFC [redacted]'s testimony established that there were tents by the bus, but that the tent generators were loud. (R. at 256). In other words, 1LT LM's diagram was of such little value that it would not have moved the needle in favor of defense or government.

As the CAAF recognized in *Sigrah*, the court may also consider whether the defense had access to the same information as contained in the undisclosed evidence. 82 M.J. at 467–68 (citing *Rosenberg v. United States*, 360 U.S. at 371; *Clark*, 79 M.J. at 455). Such an adequate substitute would further support a finding of no prejudice. *Id*. Here, appellant's defense team possessed "substantially the same information"—1LT LM's character statement for PFC [redacted]—as he would have gleaned from 1LT LM's recorded interview. *United States v. Strand*, 21 M.J. 912, 915 (N.M.C.M.R. 1986). As already discussed, 1LT LM testified during the *DuBay* hearing that she stated during the interview that PFC [redacted]'s duty performance declined after the rape. (*DuBay* Tr. at 161). First Lieutenant LM's character statement, provided to defense pretrial, similarly described PFC [redacted]'s poor duty performance after the rape. (*DuBay* App. Ex. XXXIV); *see United States v. Marsh*, 21 M.J. 445, 452 (C.M.A. 1986) (finding no prejudice where appellant possessed a summarized transcript of the lost witness

recordings); *Clark*, 79 M.J. at 455 (recognizing that even though appellant did not have the "very same information," his possession of "sufficient information" mitigated against a finding of prejudice); *United States v. Anthony*, 565 F.2d 533, 537 (8th Cir. 1977) (finding harmless error where appellant possessed grand jury transcripts which contained "substantially the same evidence" as that contained in an undisclosed letter); *United States v. Derrick*, 507 F.2d 868, 871 (4th Cir. 1974) (finding harmless error where the appellant already had nearly the same information as was contained in an undisclosed statement); *cf Muwwakkil*, 74 M.J. at 193-94 (finding the military judge appropriately granted the appellant's R.C.M. 914 request in part because of the lack of an adequate substitute for the lost witness recording).

The nature of the undisclosed evidence in appellant's case was not of the type that the CAAF has found prejudicial. For example, in *Sigrah*, the Government's failure to disclose the recorded interviews of the victim and two material witnesses had a substantial influence on the findings. 82 M.J. at 468. In *Sigrah*, the CAAF reasoned that had the testimony of the victim and the two witnesses been struck at trial, "there would have been no independently admissible evidence to prove appellant's guilt." *Id*. In stark contrast, absent 1LT LM's testimony, the Government had the compelling testimony of PFC [redacted], which was largely corroborated by SGT JD and [redacted]. Thus, appellant's case is more akin to

Clark, where the non-disclosure of the accused's recorded CID interview was non-prejudicial because it contained damning admissions and the defense otherwise had access to the same information via the accused. 79 M.J. at 455. Accordingly, the failure to disclose 1LT LM's recorded interview and the diagram did not have a substantial influence on the findings. *See id.*

Assignment of Error IV

WHETHER, IN LIGHT OF *RAMOS V. LOUISIANA*, APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE NON-UNANIMOUS VERDICT IN THIS CASE.

Additional Facts

Before trial, defense moved the military to judge "[t]o require a unanimous verdict for any finding of guilty and to modify the instructions accordingly." (Gov't App. Ex 1) (R. at 26–27). Defense asserted that in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Sixth Amendment, the Fifth Amendment's Due Process Clause, and the Fifth Amendment right to equal protection all required a unanimous verdict in trials by court-martial by members. (Gov't App. Ex. 1). The government opposed the defense motion, arguing that the Sixth Amendment's right to a jury trial does not apply to courts-martial. (Gov't App. Ex. 2; R. at 27). The military judge orally denied defense's motion for a unanimous verdict "[f]or the reasons stated in the government's pleading." (R. at 27).

The panel convicted appellant of one specification of rape and one specification of sexual assault, charged in the alternative, in violation of Article 120, UCMJ, 10 U.S.C. § 920, as described above. The vote of the panel members was not disclosed.

Standard of Review

This court reviews the constitutionality of a statute de novo. *United States v. Begani*, 81 M.J. 273, 280 (CAAF 2021); *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012). The party alleging a violation of equal protection has the burden of proving purposeful discrimination. *United States v. Boie*, 70 M.J. 585, 590 (A.F. Ct. Crim. App. 2011) (citing *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987)). Whether a panel was properly instructed is reviewed de novo. *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015).

Law and Argument

The statute at issue in this case is Article 52, UCMJ, 10 U.S.C. § 852, which requires at least three-fourths of the members present to convict of an offense in a general or special court-martial. Appellant generally asserts that Article 52, UCMJ, conflicts with the constitutional guarantees provided in the Sixth Amendment, Fifth Amendment Due Process Clause, and the Fifth Amendment Equal Protection Clause. (Appellant's Br. 36–37). As demonstrated below,

Article 52, UCMJ, does not violate the Sixth or Fifth Amendments, and survives the Fifth Amendment Equal Protection Clause's rational basis review.

As a threshold matter, the Supreme Court and the CAAF have long recognized that constitutional rights may apply differently to members of the armed forces than they do to civilians. *See Burns v. Wilson*, 346 U.S. 137, 140 (1953) (recognizing that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty"); *United States v. Easton*, 71 M.J. 168, 174– 75 (C.A.A.F. 2012) (explaining that the Bill of Rights apply to members of the armed forces except when military necessity requires otherwise). Although Congress is required to adhere to the Constitution when passing legislation concerning military affairs, the Supreme Court has held that Congress is afforded deference under its authority to regulate land and naval forces. *See Weiss v. United States*, 510 U.S. 163, 176 (1994). Specifically, Article I, Section 8 of the Constitution provides, "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces." Indeed, "[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Solorio v. United States*, 483 U.S. 435, 447, (1987) (alteration in original) (internal quotation marks and citations omitted); *see*

also Loving v. United States, 517 U.S. 748, 768 (1996) ("[W]e give Congress the highest deference in ordering military affairs.").

Appellant's argument for a unanimous jury verdict implicates three constitutional rights: (1) the Sixth Amendment, (2) the Fifth Amendment Due Process Clause, and (3) the Fifth Amendment Equal Protection Clause. (Appellant's Br. 36–37). In considering an alleged violation of the Fifth and Sixth Amendment rights, the key question is whether the right is "[s]o extraordinarily weighty as to overcome" Congress' "[b]alancing the rights of servicemen against the needs of the military." *Weiss v. United States*, 510 U.S. 163, 178–79 (1994) (citing *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

Beginning with appellant's Sixth Amendment challenge, the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." However, the Supreme Court has held that there is no Sixth Amendment right to trial by jury in courts-martial. *See Ex Parte Quirin*, 317 U.S. 1, 39 (1942); *see also Whelchel v. McDonald*, 340 U.S. 122, 127 (1950); *Begani*, 81 M.J. at 280 n.2; *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018); *Easton*, 71 M.J. at 175; *Wiesen*, 57 M.J. 48, 50. Appellant contends that the Supreme Court's decision in *Ramos* dictates that courts-martial must require a unanimous verdict to convict. (Appellant's Br. 36–

37). Although *Ramos* held that the Sixth Amendment's guarantee of the right to trial "by an impartial jury" required a unanimous verdict in state as well as federal criminal trials, the decision did not make any mention of extending the scope of the Sixth Amendment right to a jury trial to courts-martial. 140 S. Ct. at 1396–97. Thus, this court remains bound by the Supreme Court's and the CAAF's precedent holding that the Sixth Amendment right to a jury trial does not apply to courts-martial. *See United States v. Anderson,* No. ACM 39969, 2022 CCA LEXIS 181 at *55–56 (A.F. Ct. Crim. App. Mar. 25, 2022) ("[a]fter *Ramos*, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in *Ramos*), review granted, 82 M.J. 440 (C.A.A.F. 2022); *see also United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) ("[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

Turning to appellant's Fifth Amendment Due Process Clause challenge, the Due Process clause of the Fifth Amendment provides that no person shall "[b]e deprived of life, liberty, or property, without due process of law." However, the Supreme Court has held that courts-martial are exempt from the Fifth

Amendment's trial by jury requirements. *See O'Callahan v. Parker*, 395 U.S. 258, 261–62 (1969) (citing *Ex Parte Quirin*, 317 U.S. at 40), overruled on other grounds by *Solorio*, 483 U.S. 435. In so holding, the Supreme Court reasoned that Article I, Section 8 of the Constitution recognizes "[t]hat the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in [Article III] trials need apply." *Id.*; *see also Parker v. Levy*, 417 U.S. 733, 743 (1974) (explaining that the military is "by necessity, a specialized society separate from civilian society"). Notably, appellant's brief does not identify any "extraordinarily weighty" reasons to overcome Congress' determination that a three-fourths vote is the correct balance of competing considerations in the administration of military justice. *Weiss v. United States*, 510 U.S. 163, 178–79 (1994) (further citation omitted). Thus, this court should reject appellant's Fifth Amendment Due Process claim. *See Anderson*, 2022 CCA LEXIS 181 at *56 (finding a similar due process challenge unavailing).

Lastly, appellant's equal protection argument lacks merit. A law violates equal protection when it discriminates in its treatment of similarly situated individuals or groups. *See Begani,* 81 M.J. at 280 (citing *United States v. Gray,* 51 M.J. 1, 22 (C.A.A.F. 1999)). Accordingly, the threshold inquiry is whether appellant has been treated differently than a similar group. *Id.* at 280

(citing *Nordlinger v. Hahn,* 505 U.S. 1, 10, (1992)). Members of two groups are similarly situated for equal protection purposes if they are "in all relevant respects alike." *Id.* "Similarly situated" does not demand they be identical, "but there should be a reasonably close resemblance of facts and circumstances." *Lizardo v. Denny's, Inc.,* 270 F.3d 94 (2d. Cir. 2001) (citing *Graham v. Long Island R.R.,* 230 F.3d 34, 40 (2d Cir. 2000); *see also McGuinness v. Lincoln Hall,* 263 F.3d 49 (2d Cir. 2001).

This court recently rejected a similar equal protection argument in *United States v. Pritchard*, 82 M.J. 686, 692–93 (Army Ct. Crim. App. 2022). In *Pritchard*, this court found that military servicemembers at courts-martial are not similarly situated to a civilian accused. *Id*. at 692 (citing *Levy*, 417 U.S. at 743; *Akbar*, 74 M.J, at 406). Thus, this court should deny appellant's equal protection challenge outright "[b]ecause the government cannot violate equal protection where the groups in question are not similarly situated." *Id*.

Even assuming *arguendo* that a military accused is similarly situated as a civilian accused, as this court assumed in *Pritchard*, appellant fails to demonstrate an equal protection violation. "When no suspect class or fundamental right is involved, . . . the [Supreme] Court requires only a demonstration of a rational basis as support for the law." *United States v. Wright*, 48 M.J. 896, 901 (A.F. Ct. Crim. App. 1998) (citing *Romer v. Evans*, 517 U.S. 620 (1996)). "Under the rational

basis test, the burden is on the appellant to demonstrate that there is no rational basis for the rule he is challenging. The proponent of the classification 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" *Heller v. Doe*, 509 U.S. at 320 (1993). "As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." *Id.* at 320; *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). Aside from a conclusory statement that "[t]here is no rational basis for military members to not have panel unanimity required to convict," appellant's brief does not offer any argument as to why there is no plausible reason for Article 52, UCMJ, to treat miliary accused differently than a civilian accused. (Appellant's Br. 37).

This court held in *Pritchard* that "[C]ongress determined that unanimous verdicts would unduly impede the efficiency of military operations." *Pritchard*, 82 M.J. at 694. In other words, military efficiency provides a rational basis for the non-unanimity requirement of Article 52, UCMJ. *Id.*; (citing *United States v. Mayo*, ARMY 20140901, 2017 CCA LEXIS 239, at *22 (Army Ct. Crim. App. 7 Apr. 2017)). Accordingly, to the extent Article 52, UCMJ, is subject to rational basis review, this court should find that appellant has failed to meet his burden to demonstrate no plausible rational reason exists for the three-fourths provision. *See United States v. Paulk*, 66 M.J. 641, 644 (A.F. Ct. Crim. App. 2008) (the fact

that the Army and Coast Guard have provided for fixed terms for military judges and the Air Force has not, did not deprive the Air Force appellant of equal protection).

Conclusion

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE,
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I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 16th day of May 2023.

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