

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20210389

v.

Private First Class (E-3)

JOHN K. JARLEGO

United States Army,

Appellant

Tried at Fort Bliss, Texas on 24 July 20, 9-10 September 20, 14 December 20, 28-29 June 2021, and 18 October 2021, before a general court-martial appointed by the Commander, Headquarters, 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

Assignment of Error¹

I.

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

II.

**WHETHER APPELLANT'S CONFRONTATION
RIGHTS WERE VIOLATED.**

III.

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

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this Court consider the matters raised in the Appendix.

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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Introduction

Appellant, deprived of a meaningful opportunity for forum selection, was convicted of the rape and sexual abuse of a child in violation of his right to confrontation and the rule against hearsay, in a general court-martial rendered fundamentally unfair by the military judge's nondisclosure of grounds for challenge. Appellant, then twenty years old, began an online chat with a certain Ms. [REDACTED] ([REDACTED]) whose profile indicated she was eighteen years old. During the chat, Ms. [REDACTED] told appellant she was actually sixteen years old. Appellant and Ms. [REDACTED] met in person and had sex. Appellant never saw her again.

Later, law enforcement agents identified a certain Ms. [REDACTED] ([REDACTED]) as an eleven year-old female that allegedly had sex with appellant. This Ms. [REDACTED] refused to participate and did not testify at trial.

At trial, the government attempted to prove the element of age through an affidavit created for trial by the county clerk's office. This legally insufficient evidence referenced yet another Ms. [REDACTED] ([REDACTED]). Additionally, none of the government witnesses ever met [REDACTED] in person. Ultimately, the government failed to link the [REDACTED] that appellant met to be the same person as the [REDACTED] that other, non-testifying law enforcement agents identified, and also failed to link either [REDACTED] or [REDACTED] to be the same person as [REDACTED] who was mentioned in the county

clerk's affidavit.² Without dispositively linking these three separate personae together, the government failed to prove its case beyond a reasonable doubt.

Statement of the Case

On 28 June 2021, a military judge sitting as a general court-martial found appellant, Private First Class (E-3) John K. Jarlego, contrary to his pleas, guilty of two specifications of rape of a child and one specification of sexual abuse of a child by indecent communication, in violation of Article 120b, Uniform Code of Military Justice [UCMJ]. (R. at 383; Statement of Trial Results). The military judge sentenced appellant to reduction to the grade of E-1, confinement for 48 months³, forfeiture of all pay and allowances, and a dishonorable discharge. (R. at 490; STR). On 30 June 2021, the convening authority approved the adjudged findings and sentence. (Action). The military judge entered judgment on 22 November 2021. (Judgment of the Court).

Statement of Facts

Appellant met [REDACTED] through an online dating application. (R. at 355). [REDACTED] listed her Snapchat handle on her bio on the dating application, so appellant added

² The names presented for [REDACTED] and [REDACTED] all vary, with mismatching first name spellings and no consistent middle names. Analogizing to pseudonyms, [REDACTED] (PE 2) states [REDACTED], [REDACTED] (charge sheet) states [REDACTED] [REDACTED], and [REDACTED] (birth verification) states [REDACTED].

³ The military judge sentenced appellant to be confined for 48 months, 36 months, and 11 months, respectively, for Specification 1, Specification 2, and Specification 3 of the Charge, all periods of confinement to run concurrently. (R. at 490).

her on Snapchat. (R. at 355). [REDACTED]'s age on her online profile was 18 years old. (PE 2). Appellant and [REDACTED] chatted on Snapchat and arranged to go on a date. (R. at 355). [REDACTED] told appellant in the chat that she was actually 16 years old. (R. at 366). Appellant and [REDACTED] went out to eat and then had sex near a park. (R. at 356).

Around that time, in July 2019, law enforcement authorities seized a phone from a certain Ms. [REDACTED] ([REDACTED] (R. at 323). At some later point, SA [REDACTED] from the Army Criminal Investigation Division was assigned to investigate a case of aggravated sexual assault of a child, involving [REDACTED] whose phone had been previously seized. (R. at 322).

On 29 October 2019, appellant waived his rights and spoke with CID. (PE 5). During the interview, appellant stated that he had sex with a Ms. [REDACTED] ([REDACTED] who he met on a dating application. (R. at 355). He told the interviewing special agent he believed [REDACTED] was 16 years old. (R. at 366). At the end of his interview, the special agent collected his cell phone. (R. at 358). Subsequently, the government charged appellant with two specifications of rape of a child and one specification of sexual abuse of a child ([REDACTED] (Charge Sheet). Specifications 1 and 2 alleged that the alleged victim's age was not yet 12 years and Specification 3 alleged that the alleged victim's age was not yet 16 years.

None of the three special agents who testified for the government at trial had seen [REDACTED] from the investigation in person. Additional facts are stated below.

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

Statement of Facts

In attempting to prove that [REDACTED] was 11 years old, the government moved to admit a birth verification form created on 13 April 2021, referencing [REDACTED] (R. at 315; PE 1). The verification form stated, “[t]his document serves as confirmation that a birth record search was conducted in the El Paso County Clerk’s Vital Statistics Division: RECORD FOUND: YES.” (PE 1). The form listed the name, date of birth, place of birth, sex, mother’s name, file number, and file date. (PE 1). Attached to this form was an “Affidavit of Business Records” executed by an employee of the El Paso County Clerk’s office, Mr. [REDACTED]. (PE 1). Mr. [REDACTED] certified his capacity and authority to certify “the attached records.” (PE 1). Further, “[t]he attached official record contains the certified verification of record of birth for [REDACTED], which verifies an original, official record in my custody.” (PE 1). Additionally, the affidavit stated:

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.

(PE 1).

Other than this form, the government did not offer any evidence that [REDACTED] was 11 years-old.

The defense objected on grounds of hearsay, hearsay within hearsay, the best evidence rule, and relevance. (R. at 316). Inter alia, the defense argued that the affidavit did not satisfy Military Rule of Evidence [Mil. R. Evid.] 803(6), that the affidavit violated Mil. R. Evid. 805, that the verification violated Mil. R. Evid. 1002 because it was not a copy or the original birth certificate or the original birth certificate itself, that the verification did not establish the person named in it was the alleged victim ([REDACTED]) and the verification failed the prejudice analysis under Mil. R. Evid 403. (R. at 319).

The government responded that the verification met the hearsay exception under Mil. R. Evid 803(9), that it “clearly meets the business records exception” (presumably under Mil. R. Evid 902), and that the verification was relevant to prove the alleged victim’s birth, and therefore her age. (R. at 320). The government additionally provided a cursory response to the Mil. R. Evid. 403 and 1002 objections:

With regards to the 403 argument, Your Honor, it has no merit. It’s completely baseless. They’re just throwing

something against the wall, hoping that it'll stick. The best evidence rule, a birth verification is perfectly reasonable evidence that a birth took place. And the fact that it's a copy and not the original, again, that's what 902(11) is for. They had an opportunity to object to that prior to trial. Raising it now is just in violation of the rule. Thank you, Your Honor.

(R. at 320-21).

Immediately following this, the military judge ruled, "The defense's objections are overruled. Prosecution Exhibit 1 for identification is admitted as Prosecution Exhibit 1 under 803(c)(9)." (R. at 321). This was the entirety of the military judge's ruling, with no additional analysis or findings of fact.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (internal quotation marks omitted)). A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law. *Id.* (internal quotation marks omitted) (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)).

Law

Mil. R. Evid. 902(11) requires:

The original or a copy of a domestic record that meets the requirements of Mil. R. Evid. 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, or at a later time that the military judge allows for good cause, 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. 803(6)(A)-(C) requires:

A record of an act, event, condition, opinion, or diagnosis 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[.]

Military Rule of Evidence 803(9) provides, “a record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty” is an exception to the rule against hearsay.

Military Rule of Evidence 1002 requires an original writing, recording, or photograph in order to prove its content unless these rules, this Manual, or a federal statute provides otherwise.

Argument

A. Prosecution Exhibit 1 is not a self-authenticating document under Mil. R. Evid. 902(11).

First of all, because the military judge denied the defense's objection without making any findings of fact or conclusions of law for the 803(6) basis of challenge, there is no deference this court can assign to his ruling. In order for a document to be self-authenticating under Mil. R. Evid. 902(11), it must first meet the requirements of 803(6)(A)-(C). There are two ways to view the birth verification in PE 1. First, 803(6)(A)-(C) may be applied to the birth verification itself as the "record" referenced in the rule. In such a case, under 803(6)(A), Mr. [REDACTED], who had the requisite knowledge of the county's records system, created the birth verification to verify that on 13 April 2021, *at least one* of a different kind of document existed within the control of the government, i.e. the birth record of some person with the initials [REDACTED], who was born on 11 August 2007 ([REDACTED]). However, the birth verification fails 803(6)(B) because it was not kept in the course of regularly conducted activity. There is no indication that the El Paso County Clerk's office periodically and with broad application verifies the existence of the birth records within its control. In fact, the birth verification fails 803(6)(C) precisely because the making of the birth verification was *not* a regular practice of any activity. On the contrary, it appears that PE1 was created for the sole purpose of prosecuting appellant, which falls outside the scope of 803(6).

As the defense counsel argued at trial, the verification was created on 13 April 2021, with an eye towards trial. (R. at 317). Appellant's case was referred on 10 July 2020. (Charge Sheet). Trial was held on 28 June 2021. (R. at 307). On 13 April 2021, Mr. [REDACTED] created this verification specifically for the upcoming trial in appellant's case in order to prove the element of the alleged victim's age. A self-authenticating record under 803(6)(B)-(C) does not encompass a document like this verification, expressly created to become evidence at a specific pending trial.

Additionally, a document that simply references a different birth record that would otherwise meet the self-authentication requirements of 803(6) does not also become self-authenticating by incorporation. Military Rule of Evidence 902(4)(A) further supports that in a situation like this, an exact copy of the birth *certificate* should be offered as evidence. 902(4)(A) states, "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-if the copy is certified as correct by the custodian or another person authorized to make the certification" is self-authenticating. If the government intended to prove the alleged victim's age with a self-authenticating record, they needed to provide a birth record, such as a birth certificate, in compliance with 803(6) or an alternate subsection under 902. Because the birth verification (PE 1) is not the actual birth certificate, it does not comply with Mil. R. Evid. 803(6) and fails to

meet the requirements of Mil. R. Evid. 902(11). The birth verification actually fails to meet any subsection under 902 and the military judge erred in admitting it.

B. Prosecution Exhibit 1 fails to meet the hearsay exception under Mil. R. Evid. 803(9).

The military judge did not provide any analysis for his ruling. Because the birth verification and the affidavit do not meet 803(9), the military judge erred in admitting PE 1 under that basis. The military judge admitted the birth verification under “803(c)(9)” by which he presumably meant Mil. R. Evid. 803(9). However, this is an erroneous admission because the birth verification does not meet the plain language of the rule: the verification is not a record of a birth that is reported to a public office in accordance with a legal duty. The verification is purported to prove that a different record, such as a birth *certificate*, is not excludable by the rule against hearsay. The exception under 803(9) does not encompass documents like the verification and the affidavit of the clerk, which are merely his *statements* about his observations about some birth record. On the contrary, these are exactly the kind of out-of-court statements, presented to prove the truth of the matter asserted, that are prohibited by the general rule against hearsay. This is not at all the same thing as a public record of vital statistics covered by 803(9). 803(9)

covers documents, not statements.⁴ The verification cannot meet the clear requirements of 803(9).

C. Prosecution Exhibit 1 fails to meet the requirements of Mil. R. Evid. 1002.

The military judge did not make any findings or provide analysis on the Best Evidence Rule issue. Because the government did not meet the requirements of Mil. R. Evid 1002-1004, the military judge erred in admitting Prosecution Exhibit 1.

If the birth verification is offered in any relational way to the underlying birth record, it violates Mil. R. Evid. 1002, a.k.a. the Best Evidence Rule. The government must produce the original underlying birth record or an authentic duplicate thereof (Mil. R. Evid. 1003). Alternatively, one of the four exceptions under Mil. R. Evid. 1004(a)-(d) must be met. Here, there is no indication that the original birth record is lost or destroyed. (Mil. R. Evid. 1004(a)). The government could have reasonably obtained the alleged victim's birth certificate. Nor is there any indication that the original birth record is not obtainable by any available judicial process. (Mil. R. Evid. 1004(b)). The facts indicate the exact opposite. The government could have easily requested the county clerk's office to provide an authentic duplicate of the underlying birth record which, according to their own

⁴ Similarly, the self-authentication under Mil. R. Evid. 902 applies to documents, not statements by individuals.

document, exists in its records system. Military Rule of Evidence 1004(c) does not apply to the facts of this case, and under 1004(d), the alleged victim's birth certificate, which potentially proves one of the two elements of a rape of a child, is very closely related to a controlling issue in appellant's case. The government has failed to meet any of the exceptions under Rule 1004 for the underlying birth record.

In order to satisfy Mil. R. Evid. 1002, the birth verification must be offered on its own as a document that proves the alleged victim's age. It does no such thing. At best, PE1 shows that there is another document that shows her age. However, the verification cannot serve as proof of the content in the underlying birth record because that record was never presented to the military judge at trial. Then, logically, the verification must excise any reference to the underlying birth record.

This problem thus creates prejudice. If the verification does not rely on the underlying birth record, what is the document's evidentiary value? After all, it merely states that some person (██████ with the initials ██████ was born on 11 August 2007. This verification is of low probative weight and lacking the indicia of trustworthiness attributable to an actual self-authenticating document like a birth certificate. It suggests without being subject to examination that the process involved in creating the verification effectively ruled out all other females with

similar sounding names, and also ruled out any with similar birthdays. There is no examination to inquire whether there are a number of other similarly named individuals in the system who are not twelve years old or whether the system contains information about individuals who are sixteen years old.

There is an alleged victim in this case, as one was identified on the charge sheet (██████). However, no alleged victim testified at trial. This birth verification glides over inferential steps to arrive at the conclusion that, beyond a reasonable doubt, the person in the verification (██████) is the actual alleged victim (██████) without providing any additional facts to make that assertion reliable. This is the prejudice that substantially outweighs any probative value under Mil. R. Evid. 403. For a charge so repulsive to the ordinary citizenry such as the rape of a child, unreliable documents of low probative value are potentially even more harmful.

D. Appellant was prejudiced under *Kohlбек*.

For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings. *United States v. Finch*, 79 M.J. 389, 398-399 (C.A.A.F. 2020) (internal quotations marks omitted) (quoting *United States v. Kohlбек*, 78 M.J. 326, 334 (C.A.A.F. 2019)). The court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the

evidence in question. *Id.* (internal quotation marks omitted) (quoting *Kohlbeck*, 78 M.J. at 334).

The government's case was fatally flawed. Without this inadmissible birth verification, no other evidence establishes that the alleged victim (██████) was under the age of 12. In contrast, the defense's case is strong. In Prosecution Exhibit 2, screenshots of the online chat between ██████ and appellant, ██████'s online profile clearly states that ██████ is eighteen. The inadmissible evidence is highly material, because without it, one of the two required elements for each of the charged specifications fail. In sum, without the birth verification, there is no government case. The erroneously admitted evidence prejudiced appellant.

II. WHETHER APPELLANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS WERE VIOLATED.

Law

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. Const. amend. VI. "Accordingly, no testimonial hearsay may be admitted against a criminal defendant unless (1) the witness is unavailable, and (2) the witness was subject to prior cross-examination." *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)).

“In determining whether a statement is testimonial, this Court asks ‘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.’” *United States v. Baas*, 80 M.J. 114, 121 (C.A.A.F. 2020) (quoting *United States v. Katso*, 74 M.J. 273, 279 (C.A.A.F. 2015) (citations omitted)).

““In the end, the question is whether, in light of all the circumstances, viewed objectively, the “primary purpose” of the [statement] was to “creat[e] an out-of-court substitute for trial testimony.”” *Id.* (quoting *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015) (second alteration in original) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011))).

Trial by affidavit is the exact harm the founders sought to prevent, and the Supreme Court prohibited in *Crawford v. Washington*, 541 U.S. 36 (2004). *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) is the best controlling case. In *Melendez-Diaz*, the Supreme Court held the Sixth Amendment does not permit the government to prove its case through *ex parte* out-of-court affidavits, and the admission of such evidence against appellant was error. 557 U.S. at 329.

“[A]ffidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.” *Melendez-*

Diaz, 557 U.S. at 321. If an offered statement was prepared specifically for use at an appellant’s trial, whether or not it qualifies as a business or public record, it is testimonial and the author is subject to confrontation under the Sixth Amendment. *See id.* at 330. (“[A] clerk . . . was permitted to certify to the correctness of a copy of a record kept in his office, but had no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect....(internal quotations and citations omitted)... A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.” *Melendez-Diaz*, 557 U.S. at 322-323 (emphasis in original)).

Argument

Appellant’s confrontation rights were violated because the government failed to call Mr. Quiroga, the author of the birth verification and the affidavit, as a merits witness. As in *Melendez-Diaz*, Mr. [REDACTED] was a witness for purposes of the Sixth Amendment, providing direct and specific testimony against appellant by “proving one fact necessary for his conviction” -- the age of the alleged victim. *See id.* at 311 and 313. If the government wished to introduce Mr. [REDACTED] verification in order to prove that the alleged victim was under the age of twelve at the time of the alleged offense, Mr. [REDACTED] needed to testify at trial and be

subjected to cross-examination. Had appellant the opportunity, he at least could have inquired about the many different factors involved in how the county clerk's office culls and narrows by elimination all outstanding birth records except one—[REDACTED]'s birth record.

For the charged specifications the government had to prove the alleged victim's age as one of the two necessary elements. The birth verification and affidavit were the only evidence government offered to prove the element of the alleged victim's age, and this evidence directly contributed to appellant's conviction and sentence. Therefore, its erroneous entry cannot be found harmless. On the contrary, it was a necessary and critical lynchpin to the government's case. Thus, because the violation of appellant's constitutional right to confrontation was not harmless beyond a reasonable doubt, this court must set aside the findings and sentence. *See United States v. Tovarchavez*, 78 M.J. 458, 469 (C.A.A.F. 2019).

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

Standard of Review

In accordance with Article 66, UCMJ, this Court reviews legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

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

The test for factual sufficiency is whether the court is itself convinced of appellant’s guilt beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The court must take a “fresh, impartial look” at the evidence presented at trial and give “no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses.” *Id.* The evidence must leave no fair and reasonable hypothesis other than appellant’s guilt. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003).

This Court need not believe appellant to reverse this conviction. It is “not required to determine categorically whether appellant or [the complaining witness’s] testimony is true, or even whether their testimony is more likely true than not.” *United States v. Whisenhunt*, ARMY 20170274, 2019 CCA LEXIS 244, at *6 (Army Ct. Crim. App. 3 Jun. 2019) (summ. disp.). Convictions are not reviewed under a “preponderance of the evidence” standard—rather, this Court “may only affirm convictions that we are ourselves convinced have been proven

beyond a reasonable doubt.” *Id.* Therefore, if the defense, at trial or on appeal, lays out a scenario that leaves this Court with any fair and rational hypothesis other than guilt, Article 66, UCMJ, mandates this Court *must* set aside and dismiss the findings of guilt. *Id.*

“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) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005)). The term “reasonable doubt” does not mean the evidence must be free from any conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff’d*, 54 M.J. 37 (C.A.A.F. 2000). However, it does mean that the Government must prove guilt on every element beyond “an honest, conscientious doubt” and beyond “mere conjecture.” R.C.M. 918c, Discussion.

In a prosecution under Article 120b, if the alleged victim is under the age of twelve, the government does not need to prove that the accused knew the age of the alleged victim, and it is not a defense that the accused reasonably believed that the alleged victim had attained the age of twelve years. Article 120b, para. 62.a.(d)(2).

Argument

A. Appellant's convictions are legally insufficient.

Appellant's case is legally insufficient because it lacks proof that the alleged victim was not yet 12 years old at the time of the offenses. As discussed above, the government did not offer any evidence at trial in addition to the birth verification and affidavit in Prosecution Exhibit 1 regarding the alleged victim's age. Also, none of the witnesses at trial testified as to her age. Should this court set aside PE 1 for any of the bases discussed above, even without a prejudice analysis, this court must also set aside appellant's convictions because there is no evidentiary basis for the element of age, rendering the convictions legally insufficient. Without dispositive evidence of the alleged victim's age at the time of the offense, this court cannot affirm any of the three specifications of the Charge.

B. Appellant's convictions are factually insufficient.

Even if this court does not find that the military judge erred in admitting PE 1, appellant's convictions are factually insufficient. The record of trial incorrectly notes Prosecution Exhibits 3 and 10 were admitted exhibits; they were not. (R. at 339). The government was permitted to move to admit them later in the case if there was a basis to do so; however, the government never revisited the issue. (R. at 339).

The birth verification and affidavit lack trustworthiness because there is an inadequate showing as to the process the clerk used to determine who [REDACTED] ([REDACTED]) is, and whether [REDACTED] is actually Ms. H ([REDACTED]). The birth verification, even if could be authenticated and admitted and was not hearsay within hearsay, requires such speculation that its probative value is low and ultimately meaningless. In order for appellant's convictions to be factually sufficient, the government must effectively link the Ms. [REDACTED] ([REDACTED]) identified by the civilian authorities to appellant. To do that, the government must prove that Ms. [REDACTED] ([REDACTED]) is the same person who CID only knows through documentary references; is the Ms. [REDACTED] ([REDACTED]) that appellant chatted with online and has met; and is *both* the Ms. [REDACTED] ([REDACTED]) known by appellant *and* the [REDACTED] ([REDACTED]) noted in the birth verification. These various references to some [REDACTED] ([REDACTED]) MEH ([REDACTED]) and Ms. H ([REDACTED]) must all link to one individual and the same on appellant's charge sheet. The government failed to link these personas beyond a reasonable doubt, and this court must set aside 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.

On 23 July 2021 the defense filed a post-trial motion. (App. Ex. LIX). Defense requested a post-trial Article 39(a) session, a declaration of a mistrial or a new trial, and for the military judge to recuse himself from presiding over the post-

trial Article 39(a) session and from ruling on the defense motion. A post-trial 39(a) session was held on 18 October 2022. (R. at 491).

The record of trial does not contain the military judge's ruling on the defense motion. This ruling is critical for this court's review of Assignment of Error V, below.

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

Statement of Facts

Appellant's court-martial began on 28 June 2021. (R. at 307). The military judge, Colonel ■■■ who replaced COL ■■■ as the military judge, re-advised appellant of his forum rights. (R. at 311). The military judge also stated for the record that he was "not aware of any manner that might be a ground for challenge against me" and asked counsel whether they wished to question or challenge him. (R. at 309). At that time, based on what counsel knew, neither side wished to do so. (R. at 309). The military judge found appellant guilty of all three specifications as charged. (R. at 383).

On 29 June 2021, during presentencing, the military judge asked the forensic expert several questions about the risk of recidivism. (R. at 465-466). He asked:

"Doctor, you indicated that in regards (sic) to the eight percent of offenders who reaffirmed within a five year

time period, that is individuals who have been arrested, correct?”

“Right, so if somebody reoffends but it’s not detected how does that impact the score?”

“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?”

“So if somebody reoffends and then commits suicide, and presumably they’re not arrested, that would not show up in that eight percent, is that correct?”

(R. at 465-66).

The government asked for the military judge to sentence appellant to five years of confinement. (R. at 480). The defense asked for eighteen months of confinement. (R. at 487). The military judge sentenced appellant to be reduced to the grade of E1, forfeit all pay and allowances, and to be dishonorably discharged. (R. at 383, 490). The military judge also sentenced appellant to be confined for 48 months for the penile penetration of Specification 1, 36 months for the oral penetration of Specification 2, and 11 months for the indecent communication of Specification 3, all confinement periods to run concurrently. (R. at 490).

On 30 June 2021, defense counsel learned that the military judge, COL [REDACTED] was previously the victim of sexual abuse when he was a child. (AE LIX (59), p. 2). Subsequently, defense also learned that on 3 December 2014, the defense in *United States v. Close* filed a motion to disqualify COL [REDACTED] as the military judge in

a general court-martial at Fort Sill, Oklahoma, which was denied. (AE 59, p.2).

On 1 February 2021, during *United States v. Gilkey* at Fort Leavenworth, COL [REDACTED] was voir dired by defense on his experience as a victim of sexual abuse as a child. *Id.*

Appellant's defense counsel filed a post-trial motion on 23 July 2021 on the basis of the new facts that had come to light, moving for a post-trial Article 39(a) session, for the military judge to recuse himself from presiding over the post-trial session and ruling on the defense motion, and for a declaration of a mistrial, or in the alternative, a new trial. (AE 59).

The parties voir dired the military judge during the post-trial 39(a) session. When asked by the government, "[w]hat impact has this incident had on your life going forward?" the military judge responded, ". . . it really didn't have any impact on me . . . I've been a prosecutor and a defense attorney, a military judge, an attorney for almost 30 years. And it really wasn't until I became a military judge that I thought about at some point it might be appropriate to disclose it." (R. at 507-508). To the government's follow-up question, "do you think about this incident often?" the military judge answered, "No, I don't think about it at all. Except for whether it'd be appropriate to disclose it to defense counsel." (R. at 508). Then again, when asked by the government, "[did] being a victim of child sexual abuse impact your ability to defend your client?" the military judge

responded, “no, it did not. In fact, I don’t think I ever really thought about [it] until I became a military judge.” (R. at 509).

Had appellant known that the military judge had been the victim of sexual crimes as a child, he would not have elected to be tried by the military judge alone. (Appellant’s Declaration, AE 64).

The record of trial does not contain the military judge’s ruling on the post-trial 39(a) session requesting his recusal and a mistrial or a new trial. (R. at 525).

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, 447 (C.A.A.F. 2021) (quotation marks omitted) (quoting *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015)). This court reviews the military judge’s compliance with UCMJ and R.C.M. provisions de novo. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012).

Law

Rule for Courts-Martial [R.C.M.] 902(a) requires that a military judge disqualify himself in any proceeding in which that military judge’s impartiality might reasonably be questioned. Upon receipt of a timely request for trial by military judge alone, the military judge should ordinarily inquire personally of the

accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding. R.C.M. 903(c)(2), Discussion.

Disqualification of a military judge does not require actual bias, "an appearance of bias is sufficient[.]" *Uribe*, 80 M.J. at 446. "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.'" *Id.* (citing *Sullivan*, 74 M.J. at 453).

Where a military judge abuses his discretion in failing to disqualify himself, this Court applies the three facts from *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988): 1) "any specific injustice that the appellant personally suffered;" 2) "whether granting relief would encourage a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered;" and 3) applying an objective standard, "whether the circumstances of a case will risk undermining the public's confidence in the military justice system." *Uribe*, 80 M.J. at 449 (cleaned up).

Under Article 16, UCMJ, a general court-martial may consist of a military judge alone, if "before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests, orally on the record in writing, a court composed of a military judge alone and the military

judge approves the request.” An accused’s waiver of the right to trial by members must be “knowing and voluntary.” *St. Blanc*, 70 M.J. at 429; *see* R.C.M. 903.

Argument

The military judge in this case made three separate, but related errors. First, he failed to disclose relevant and material facts that would likely cause either party to question his impartiality. This led directly to appellant making an uninformed, unknowing, and involuntary forum selection. Second, he failed to recuse himself from appellant’s trial, even though he possessed the relevant and material information the parties were denied. Third and finally, when the parties finally did learn these facts, the judge failed to recuse himself and declare a mistrial. These errors built upon and compounded each other, all to appellant’s prejudice.

A. Appellant’s forum selection was not knowing and voluntary.

The military judge’s prior history of sexual abuse as a child was critical information he should have disclosed prior to appellant’s election to be tried by military judge alone. By his own answers to the government’s question, the military judge recognized a need to disclose this information. And yet, he did not. This failure to disclose deprived appellant of a meaningful forum selection, because his selection was not knowing and voluntary. As stated in his declaration, had he known about the military judge’s history, appellant would not have elected trial by military judge alone. As appellant faced charged offenses involving sexual

acts with a child it is near axiomatic that he would not want to be sentenced by someone who had been a victim of a similar offense.

Given the military judge's failure to disclose before appellant made his forum selection, appellant did not have critical information before deciding to have his case tried by military judge alone. It is ultimately for appellant alone to decide the worthiness of moving forward with a judge who was a child victim of sexual abuse, when he was being tried for the rape of a child. Appellant's counsel could not adequately discuss nor advise regarding this choice, because they too lacked necessary and relevant information. The military judge abused his discretion in withholding this critical information, relevant to appellant's case, which led to the lack of appellant's inability to weigh his forum selection decision with the utmost care. Appellant's forum choice was not based on an informed decision, and was therefore not knowing and voluntary.

B. The military judge abused his discretion in failing to disqualify himself or, alternatively, in failing to disclose his prior history to the parties in a timely manner.

The military judge should have been mindful that, at the very least, there is an appearance of bias in this case. A reasonable person knowing the circumstances of his sexual abuse as a child, and his thoughts about that now as a judge, would certainly conclude that his impartiality might reasonably be questioned. The test is not that the military judge's impartiality is actually called into question. But the

possibility that might happen is highly present here. Especially as the military judge already had considered whether disclosure or disqualifying himself would be prudent, he “failed in his primary duty: to ‘serve as the independent check on the integrity of the court-martial process.’” *Uribe*, 80 M.J. at 455 (quoting *Hasan v. Gross*, 71 M.J. 416, 418-19 (C.A.A.F. 2012)).

C. Appellant was prejudiced under the *Liljeberg* factors..

Under the first *Liljeberg* factor, appellant was not able to meaningfully select the forum in which he was tried. Under the second factor, granting relief would certainly encourage this military judge (and others) to promptly disclose (meaning, as early as possible and prior to finalizing appellant’s forum selection) the factual circumstances of his history of child sexual abuse when presiding over cases involving related allegations, such as appellant’s case. And under the third factor, the circumstances of appellant’s case will risk undermining the public’s confidence in the military justice system should this court find that there was no prejudice. Appellant was given a drastic sentence (see below) by a judge who had been the victim of a similar crime he now stood in judgment of.

Appellant’s case was rendered fundamentally unfair by the military judge’s nondisclosure. As the defense argued at the post-trial 39(a), in discovering late (so late as to be post-trial) the basis for challenge, the ability to litigate the military judge’s recusal in a timely manner was completely lost. (R. at 514-15). No

amount of *voir dire post-trial* can cure that loss. Appellant cannot be made whole with any other remedy, especially under the facts of this case, where the government's case-in-chief suffered from legally deficient evidence. For the gravamen offense of rape of a child, the government only had to prove *two* elements. No matter how much or how strong evidence exists for one element, if none exists for the other element, the case fails. Would another military judge have found appellant guilty in a case where the charged offenses were extremely serious, when none of the three government witnesses ever met the alleged victim in person, when the alleged victim refused to cooperate with the government, when the alleged victim did not testify at trial, and the government did not bother to prosecute the case with the appropriate documentary evidence? Likely, no. Would another judge sentence appellant so harshly? Again, likely, no. And even if perhaps, yes, therein lies the speculative uncertainty, and thus, prejudice to appellant.

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

Standard of Review

In accordance with Article 66, UCMJ, this court may only 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."

Statement of Facts

Appellant has a son who is approximately thirteen months old and a sister who is fifteen years old. They are, of course, not victims of appellant's alleged crimes. Appellant is currently confined at the Joint Regional Confinement Facility at Fort Leavenworth, Kansas. Due to the nature of appellant's convictions, appellant is not permitted by the prison officials to interact with his son or his sister. Appellant's sister has repeatedly offered to travel to the confinement facility with his son, but appellant is also not allowed to have visitations with them. Appellant has submitted multiple administrative requests seeking an exception to policy to allow phone and written communications and visitations. Appellant's requests have been pending since March 2022.

Law

When conditions of post-trial confinement are raised on appeal, the court must assure that appellant's sentence is correct in law and decide whether the sentence imposed is appropriate based on the underlying facts and should therefore be approved. *United States v. Guinn*, 2021 CCA LEXIS 423, *4 (Army Ct. Crim. App. 20 Aug. 2021). The court should ensure "the adjudged and approved sentence has not been unlawfully increased by prison officials" and that "the sentence is executed in a manner consistent with Article 55[, UCMJ,] and the Constitution." *Id.* (quoting *United States v. Guinn*, 81 M.J. 195, 200 (C.A.A.F.

2021) (citing *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) (brackets in original)). The court must also “consider whether post-trial confinement conditions amount to a legal deficiency in the post-trial process rendering the sentence inappropriate, even where the conditions don’t violate the Eight Amendment or Article 55, UCMJ. [*Guinn*, 81 M.J. at 201] (citing *United States v. Gay*, 75 M.J. 264, 269 (C.A.A.F. 2016)).” *Id.*

“As a prerequisite to appellate review of post-trial confinement conditions, an appellant must first exhaust possible administrative remedies through the available grievance system. Appellant must then demonstrate a jurisdictional basis for relief from this court. Finally, appellant must provide a clear record establishing the legal deficiency at issue.” *Id.* (citing *Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021)).

Argument

Appellant’s case is nearly identical to the factual circumstances in *United States v. Guinn*, 80 M.J. 442 (C.A.A.F. 2021). In *Guinn II*, this court found that appellant’s sentence should not be approved because the prison policy denying all forms of contact with appellant’s non-victim biological children violated his First Amendment right to association. *United States v. Guinn*, 2021 CCA LEXIS 423 (Army Ct. Crim. App. 20 Aug. 2021). This court then considered four factors from the Supreme Court in *Turner v Safley* to determine whether the prison regulation

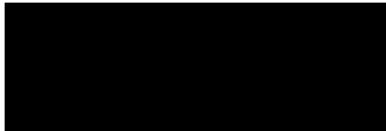
impinging on inmates' constitutional rights was reasonably related to legitimate penological interests, and thus, valid. The four factors are "(i) whether there is a valid and rational connection between the regulation and a legitimate government interest forming the basis for the regulation; (ii) whether there are alternative means of exercising the right at issue that remains open to prison inmates; (iii) the impact allowing an accommodation would have on prison guards, other inmates, and on prison resources; and, finally, (iv) the existence of other 'ready alternatives.'" *Id.* at *9 (quoting *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)).

Like *Guinn*, the balance of these factors indicates appellant's First Amendment right to association has been violated, and continues to be violated by the policy. Assuming that there is a valid and rational connection between the regulation barring appellant from communicating with his non-victim son and a legitimate government interest, appellant does not have access to alternative means of exercising his First Amendment right to association. Additionally, because of the silence by the confinement facility in holding appellant's request for an exception to policy without action, there is no means of knowing what impact, if any, granting appellant's ETP would have on prison guards, other inmates, and on prison resources. Finally, there are no other "ready alternatives" that the confinement facility has offered to appellant while his ETP requests are pending

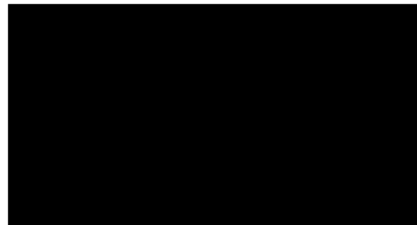
consideration. Appellant is entitled to relief from the violation of his right of association.

Conclusion

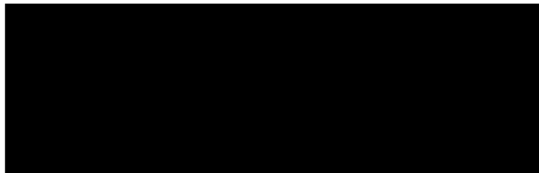
WHEREFORE, the appellant respectfully requests this honorable court set aside the findings and sentence.



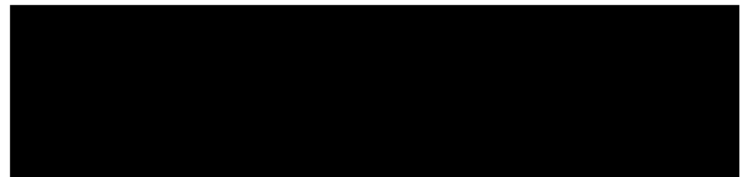
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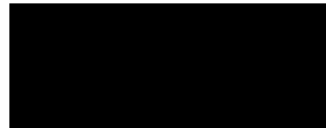
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 3 January 2023.



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