IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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| UNITED STATES, | Appellee | **REPLY BRIEF ON BEHALF OF APPELLANT** |
| v. | | Docket No. ARMY 20210647 |
| Staff Sergeant (E-6)<br>**ISAC D. MENDOZA**<br>United States Army, | Appellant | Tried at Fort Riley, Kansas, on 20 September and 6-8 December 2021, before a general court-martial appointed by the Commander, 1st Infantry Division and Fort Riley, Lieutenant Colonel Ryan W. Rosauer, military judge, presiding. |

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

## Statement of the Case

On 27 September 2022, appellant filed his Brief on Behalf of Appellant. On 25 January 2023, the government filed its Brief on Behalf of Appellee. This is appellant's Reply Brief.

### I. WHETHER APPELLANT'S CONVICTION FOR SPECIFICATION 1 OF THE CHARGE IS FACTUALLY SUFFICIENT.

Pursuant to Article 66(d)(1)(B), appellant requests this court consider whether this conviction is correct in fact. The proof is specifically deficient because no evidence establishes [redacted] express lack of consent, incapability to consent, or incapacitation. And no evidence refutes appellant's honest and reasonable mistake of fact as to consent.

The test for factual sufficiency is whether "the Court is clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ. This court weighs the evidence and determines the facts at issue, subject to appropriate deference to "the fact the trial court saw and heard the witnesses and other evidence" and "findings of fact entered into the record by the military judge." Article 66(d)(1)(B)(ii).

## Argument

### 1. This court should consider all evidence contained in the record and find appellant's conviction factually insufficient.

The government erroneously claims this court may not consider presentencing evidence in its review for factual sufficiency, citing *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007). (Gov. Br. 12-13, fn. 2). The government's reliance on *Beatty* is misplaced for two reasons. First, the service court in *Beatty* seemingly relied on the victim's testimony *from an evidentiary hearing* to bolster her trial testimony. 64 M.J. at 458. The Court of Appeals for the Armed Forces (CAAF) found that, if true, the service court relied on evidence never placed before the factfinder. *Id.* *Beatty* did not specify the meaning of "presented at trial." Second, as the government noted, CAAF found ambiguity in the lower court's initial Article 66 review and remanded the case. The CAAF expressly declined to make any determinations on the merits about the underlying challenge. *Id*. at 459. Thus, *Beatty* is not dispositive for the government's argument.

The CAAF has held a service court may not consider "extra-record" matters when making determinations of guilt, innocence, and sentence appropriateness and "in reviewing guilt, evidence excluded in a trial forum cannot be considered on appeal to affirm guilt." *United States v. Holt*, 58 M.J. 227, 232-32 (C.A.A.F. 2003). The CAAF interpreted the service court's Article 66 review as requiring a review based on the "entire record" but prohibiting consideration of matters outside the "entire record." *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). "The 'entire record' restriction, under the grammar and punctuation of the second sentence, applies equally whether the [service court of appeals (CCA)] is reviewing a sentence's correctness in law, reviewing a sentence's correctness in fact, or determining whether a sentence should be approved." *Id*. The CAAF construed the "entire record" to include the "record of trial" and "allied papers." *Id*. at 440. The "record of trial" consists of matters in compliance with Rule for Courts-Martial 1112(b). *Id*.

While Article 66 factfinding power is not wholly unfettered, the CAAF has repeatedly recognized the breadth of the CCAs' Article 66 review authority, returning to the statutory mandate that "[i]n considering the record, [the CCA] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

*United States v. Clark*, 75 M.J. 298, 299 (C.A.A.F. 2016).[1] On factual sufficiency, the *Clark* court further stated, "[t]he tonic chord running through our cases is a clear recognition of the unique powers lodged by Congress in the Courts of Criminal Appeals, coupled with a strong disinclination to involve ourselves in the review of the exercise of that power." *Id*. at 300.

Amid this backdrop is the CAAF's nearest definition of evidence "presented at trial" for purposes of a factual sufficiency review. "[F]actual determinations germane to a finding on the merits should be based on evidence that has been exposed to cross-examination or the right to cross-examine." *United States v. Bethea*, 46 C.M.R. 223, 225 (C.M.A. 1973). Thus, the CCA's factual sufficiency review would necessarily include sworn testimony of presentencing witnesses subject to cross-examination or the right to cross-examine. This interpretation is consistent with the plenary, de novo authority of Article 66, even as amended. Here, multiple servicemembers testified under oath on appellant's behalf during presentencing, subject to the crucible of direct examination and cross-examination or the right to cross-examination. By all accounts, appellant was an outstanding

[1] According to the amended language of Article 66(d)(B), an "appropriate deference" by the CCA attaches to "the fact that the trial court saw and heard the witnesses and other evidence" and "findings of fact entered into the record by the military judge." However, this amendment remains consistent with the prior version giving authority to the CCA to still consider the correctness of findings of fact upon appellant's showing of a deficiency in proof, and to do so by weighing the evidence in determining controverted questions of fact.

noncommissioned officer. This testimony squarely falls within the permissible boundaries of *Bethea* and this court's review authority.[2]

**2. The court should consider Prosecution Exhibits 1 and 2 in their entirety.**

Because [redacted] claimed to remember nothing about an eight-hour span, to include the consensual sexual acts, the government cherry picks from Prosecution Exhibit (PE) 1 (including facts going to the acquitted Specification 2) as well as Prosecution Exhibit 2 to establish supporting factual predicates. (Gov. Br. 5-7). This court should consider these prosecution exhibits *in their entirety*, and give particular attention to appellant's frame and build in contrast to [redacted] build (e.g. appellant is 5'5" and weighs approximately 150 pounds, and [redacted] is taller than appellant by several inches).

**3. Despite SA [redacted] numerous compound and confusing questions, appellant remained consistent in his answers that established key exculpatory facts.**

The government's references to various facts from appellant's interrogation

[2] This court's consideration of testimony regarding appellant's superior military character for factual sufficiency does not violate Mil. R. Evid. 404(a)(2)(A)(ii). The scope of this rule prevents an accused from putting forth evidence of good military character to support the general argument that because he is a good soldier and good soldiers do not commit crimes, he did not commit a crime. *See United States v. Brown*, 2018 CCA LEXIS 107 * (28 Feb 2018). Here, appellant's stellar achievements as a noncommissioned officer are notable for a fundamentally different purpose. Appellant's fraternization and extramarital sexual conduct are enumerated offenses that carry significant penalties and would likely derail the success of appellant's military career, not to mention his marriage, as appellant would have been well aware the morning after the incident.

distorts the appropriate context. (Gov. Br. 5-7). This court should note SA [redacted] abrasive demeanor and physical proximity as he interrogated the appellant, especially onward from the three hour and twenty-minute mark, in contrast to appellant's respectful and quiet demeanor. Throughout the interrogation SA [redacted] sat directly in front of the appellant, generally closely and with their knees almost touching at times. SA [redacted] often yelled, cut off the appellant's answers mid-way, and linearly conflated drunkenness with nonconsent. (cf. PE 2, 3:24-3:25).

Appellant calmly responded to SA [redacted] declarative statements, such as "come on, man, you're pushing blame on everyone but yourself" (PE 2, 3:23-3:24) and "you can't tell me she was saying yes the whole time, don't you dare say that! That's why I said you're putting the blame on somebody else. She didn't say yes, and you know that! She was incapable of doing that! Do you think that's right?!" (PE 2, 3:27-3:28). SA [redacted] repeatedly accused appellant of lying and demanded appellant walk through the facts again.

And the appellant complied, telling SA [redacted], inter alia, that he and [redacted] talked and kissed. (PE 2, 3:28-3:29). Appellant stated JW took off her own clothes, without assistance from him, and then they had sex. (PE 2, 3:29-3:30). When SA [redacted] asked "what made you think she gave you consent?" (PE 2, 3:29:37) then emphasized again how [redacted] could not possibly consent because of her intoxicated state, despite her ability to walk down the hallway, to appellant's room, and then

smile at him when appellant touched her groin-- it was confusing. Appellant thought [redacted] consented because, among other things, she kissed him and took off her clothes.

SA [redacted] interrogation of appellant focused on emphasizing ad nauseam [redacted] state of intoxication and reiterating to appellant that no matter what [redacted] voluntarily did inside appellant's room, it was not good enough—if [redacted] was drunk, nothing could be consensual. That is simply untrue.

**Conclusion**

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

[redacted]

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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 15 February 2023.

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