IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Specialist (E-4) **TAYRON D. DAVIS,** United States Army, Appellant	**APPELLEE MOTION FOR RECONSIDERATION AND SUGGESTION FOR *EN BANC* RECONSIDERATION** Docket No. ARMY 20220272 Tried at Kaiserslautern, Germany on 14 February, 11 April, 19 May, and 23–24 May 2022, before a general court-martial convened by Commander, Headquarters, 21st Theater Sustainment Command, Colonel Charles Pritchard and Lieutenant Colonel Thomas Hynes, Military Judges, presiding.

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

COMES NOW, the undersigned appellate government counsel pursuant to Rules 23, 27 and 31.2(e) of this court's Rules of Appellate Procedure to motion the court to reconsider its 8 September 2025 Memorandum Opinion and suggest that the court reconsider *en banc*.

Reconsideration of this matter by the full court is necessary to maintain uniformity of decisions and to avoid a potential panel split. Specifically, the government requests this court to reconsider its 2–1 decision finding that appellant's conviction was not factually sufficient. It is well established that the degree to which this court gives deference to the trial court's ability to see and hear

the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015). The present case hinges entirely upon the credibility of the victim's in-court testimony. Therefore, this court's majority opinion should have afforded greater deference to the trier of fact (in this case, the military judge) who personally observed the testimony.

Statement of Facts

On 24 May 2022, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. (Statement of Trial Results [STR]; R. at 369). The military judge acquitted appellant of attempted sexual assault in violation of Article 80, UCMJ, 10 U.S.C. § 880. (STR; R. at 369).

On 24 November 2020, appellant went to the victim's apartment with a bottle of alcohol; the two became intoxicated. (R. at 138). Throughout the evening, appellant made multiple sexual advances toward the victim which were denied. (R. at 163–65). The victim made multiple repeated trips to the bathroom to intentionally create space between herself and appellant as she began to feel uncomfortable. (R. at 165).

After one trip to the bathroom, the victim returned and found appellant sleeping on the couch. (R. at 165-68). The victim sat on the L-shaped couch with her feet touching the floor and fell asleep, but woke up to appellant, on the ground in front of her, performing oral sex on her. (R. at 165–68). The victim told appellant to stop and attempted to push him away but was unable to do so. (R. at 168–69). She was able to succeed in halting the assault when she pulled up her pants and pushed appellant away. (R. at 173). Attempting to de-escalate the situation, the victim suggested she and appellant go to her room to sleep. (R. at 174). After falling asleep, the victim awoke to appellant digitally penetrating her vulva. (R. at 174).

On 13 February 2025, the Court of Appeals for the Armed Forces (CAAF) reversed this court's previous decision to set aside and dismiss the charges with prejudice. *United States v. Davis*, 85 M.J. 295, 308 (C.A.A.F. 2025). CAAF returned the case for review "of the claims that were mooted by the lower court's prior decision to overturn the conviction." *Id*.

On 8 September 2025, this court set aside the findings of guilty and the sentence of the trial court. *United States v. Davis*, ARMY 20220272, 2025 CCA LEXIS 431, at *22 (Army Ct. Crim. App. 8 Sep. 2025) (mem. op.). In so doing, this court cited first to factual sufficiency, that "we are not convinced of appellant's guilty beyond a reasonable doubt, and for that reason shall set aside and

dismiss." *Id*. at 17. Second, this court found the military judge abused his discretion when he denied a defense motion to compel an expert consultant in this case. *Id*. at 22.

Law

Article 66, UCMJ, establishes this Court's statutory duty to review a record of trial for factual sufficiency *de novo*. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). Though this court conducts "a fresh, impartial look at the evidence," it should still "take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *see also* UCMJ art. 66(c).[1] To affirm a conviction, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court must be convinced of appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

"In cases where witness credibility plays a critical role in the outcome of trial, this court should hesitate to second-guess the trial court's findings." *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995). Additionally, "the degree to which we 'recognize' or give deference to the trial court's ability to see

[1] As noted in the dissent in this case, under the new factual sufficiency standard, this court would be "*required* to give 'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence…' *Davis*, 2025 CCA LEXIS 431, at *27 (Morris, J., dissenting) (emphasis in the original).

and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015); *see also United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim. App. 2012) (affirming where the findings turned on witness credibility).

Argument

At odds in the present case are two competing legal principles. First, this court, pursuant to Art. 66, possesses "awesome, plenary, *de novo* power of review." *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). It is pursuant to this power that this court has the power to, as it did here, read a cold transcript and issue an "appellate acquittal." *Davis*, 2025 CCA LEXIS 431, at *22. Conversely, when the key issue at trial is the credibility of the complaining victim, deference should be provided to the military judge who "saw and heard" the witnesses testimony. *See Davis*, 2025 CCA LEXIS 431, at *27 (Morris, J., dissenting).[2] This is not a case in which there is a reasonable question as to whether the offense could have been

[2] *See also United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at *11–12 (Army Ct. Crim. App. 29 Feb. 2016 (mem. op.), aff'd 76 M.J. 350 (C.A.A.F. 2017) ("The deference given to the trial court's ability to see and hear the witnesses and evidence—or 'recogni[tion]' as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is convert into the plain text of a trial transcript . . . [The factfinder] hears not only a witness's answer, but may also *observe* the witness as he or she responds." (emphasis and first alteration in original)).

completed in the manner which it was alleged. *See United States v. Whisenhunt*, ARMY 20170274, 2019 CCA LEXIS 244, *5 (Army Ct. Crim. App. 3 Jun. 2019) (summ. disp.).

While the majority opinion found the victim's testimony "insufficiently reliable to affirm," the dissent aptly highlights the errors in this logic. Most notably, the majority found the "victim's credibility was effectively undermined by the testimony of numerous witnesses" which included a string of the accused friends who were called to testify to the victim's character for untruthfulness. *See Id*. at *8. Additionally, these friends impeached the victim via contradictions she had previously made. *Id*. at *14–15.

While the majority properly considered this evidence, it should have been weighed against the fact that these witnesses effectively impeached themselves for bias and inconsistencies during their own testimony. It is also "important to point out appellant told different stories to each of his friends about what occurred that night . . . " *Davis*, 2025 CCA LEXIS 431, at *28 (Morris, J., dissenting). Once again, the analysis of this split panel highlights that the decision of whether to affirm the findings of the military judge hinged upon the credibility of the victim. The majority elected to substitute their own opinion in place of the fact finder who personally observed the critical testimony at issue, whereas the dissent granted deference to the fact finder in accordance with the norms of this court.

This lack of deference continued to play out in the majority's opinion as they highlighted perceived inconsistencies in the victim's statements to law enforcement and her in-court testimony. While defense counsel did draw out some inconsistencies through omission between her in-court testimony and her previous statements, it is also important to note the victim explained she did not complete her initial interview with Criminal Investigation Command (CID) because she elected special victims' counsel services and the interview terminated. (R. at 202; R. at 212). The agent who conducted her interview corroborated this. (R. at 313).

As Judge Morris highlighted, the victim's failure to recall "was less an issue of deception and more a challenge with the defense counsel's likely purposefully confusing examination technique." *Davis*, 2025 CCA LEXIS 431, at *27 (Morris, J., dissenting). Notably, defense counsel did not ask the victim "what happened during the assault, instead, his questions were centered on what she might have said about the incident to a specific CID agent on a specific day." *Id*.

Lastly, the majority ends its opinion by asserting there were multiple doubts to include whether the charged acts occurred, and if they did, whether appellant was reasonably mistaken. *Id*. at 17. The dissent effectively addressed this argument throughout. To put it succinctly, "at no time, during this evening did [the victim] accept any of [appellant's] direct offers to initiate sexual activity. Thus it was not reasonable for him to think she was going to consent, which was confirmed by her

actions each time she was awakened by the assault in-progress." *Davis*, 2025 CCA LEXIS 431, at *29 (Morris, J., dissenting). The victim further testified that each assault was initiated while she was asleep. *Id*. While appellant and the victim previously had conversations regarding potential sexual activity between them, none of these conversations provided direct evidence of consent on the night of the charged misconduct nor provided evidence as to why appellant's mistake of fact existed or was reasonable. *Id*. at *25 (Morris, J., dissenting). "In fact, in light of the victim having previously rejected his coaxing her into sexual activity, he should not have expected this night to be any different." *Id*.

In conclusion, when a case hinges upon the credibility determination of in-person testimony, deference should be given to the military judge who "saw and heard" the testimony. *See Davis*, 2025 CCA LEXIS 431, at *27 (Morris, J., dissenting); *see also United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015). This court should grant reconsideration of the present case to address the panel's failure to properly acknowledge the military judge's unique position to assess witness credibility, effectively substituting their judgment for that of the trial court. By granting review, this court can ensure uniformity and reaffirm the importance of the military judge's role in evaluating testimonial evidence.

Conclusion

WHEREFORE, the government respectfully requests this court grant reconsideration *en banc*.

[redacted]
ANDREW T. BOBOWSKI
CPT, JA
Appellate Attorney, Government Appellate Division

[redacted]
STEPHEN L. HARMEL
MAJ, JA
Branch Chief, Government Appellate Division

[redacted]
GRACE VAN DYCK
MAJ, JA
Branch Chief, Government Appellate Division

[redacted]
RICHARD E. GORINI
COL, JA
Chief, Government Appellate Division

CERTIFICATE OF SERVICE

UNITED STATES V. DAVIS, ARMY 20220272

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 7th day of October 2025.

[redacted]
ANDREW T. BOBOWSKI
CPT, JA
Branch Chief, Government Appellate Division