IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Major (O-4) **DAVID J. RUDOMETKIN,** United States Army, Appellant	BRIEF ON BEHALF OF APPELLEE **Docket No. ARMY 20180058** Tried at Redstone Arsenal, Alabama, on 8 November and 20 December 2016; 3 February, 31 May, 10 August, and 15 September 2017; and 29-31 January, 1-2 February, 12 March, 22 June, and 6 September 2018, before a general court-martial appointed by the Commander, U.S. Army Aviation and Missile Command, Lieutenant Colonel Richard Henry and Colonels Jeffrey Nance and Douglas Watkins, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

I.

WHETHER SPECIFICATIONS 4 AND 5 OF CHARGE I MUST BE DISMISSED BECAUSE THE STATUTE OF LIMITATIONS WAS NOT TIMELY TOLLED.

II.

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO RECUSE HIMSELF BASED ON CIRCUMSTANCES THAT, IF KNOWN AT THE TIME OF APPELLANT'S COURT-MARTIAL,

WOULD HAVE PROVIDED REASONS TO REASONABLY QUESTION HIS IMPARTIALITY.

III.

WHETHER THE EVIDENCE IS NOT FACTUALLY SUFFICIENT BEYOND A REASONABLE DOUBT FOR SPECIFICATIONS 3 – 5 OF CHARGE I.

IV.

WHETHER THE STAFF JUDGE ADVOCATE ERRONEOUSLY ADVISED THE CONVENING AUTHORITY REGARDING HIS ABILITY TO GRANT RELIEF UNDER ARTICLE 60, UCMJ.

V.

WHETHER THE MILITARY JUDGE COULD, AS A MATTER OF LAW, REASSESS APPELLANT'S SENTENCE AFTER DISMISSING TWO SPECIFICATIONS IN A POST-TRIAL ARTICLE 39(a) SESSION. IF NOT, AND ONLY THE CONVENING AUTHORITY COULD REDUCE APPELLANT'S SENTENCE OR AUTHORIZE A SENTENCE REHEARING, WAS THE MILITARY JUDGE'S SENTENCE REASSESSMENT VOID.[1]

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests an opportunity to respond to appellant's additional briefing on the claimed error.

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Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of rape occurring prior to 1 October 2007, two specifications of aggravated sexual assault occurring between 1 October 2007 and 27 June 2012, one specification of assault consummated by battery, and three specifications of conduct unbecoming an officer and a gentlemen, in violation of Articles 120, 128, and 133, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 920, 928, and 933 (1996, 2006). (R. at 1229).[2] The military judge sentenced appellant to twenty-five years' confinement and a dismissal. (R. at 1309).

Before the convening authority took action, the Court of Appeals for the Armed Forces decided *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018) *overruled by United States v. Briggs*, 592 U.S. __, 141 S. Ct. 467 (2020). At appellant's request, the military judge held a post-trial Article 39(a) session in which—pursuant to the then-controlling *Mangahas* decision—the military judge dismissed Specifications 1 and 2 of the Charge I (rape), occurring in 1999 and 2000 respectively. (R. at 1331). The military judge denied appellant's request for a mistrial as to sentencing and conducted a proceeding in revision regarding the

[2] The military judge also found appellant not guilty of one specification aggravated sexual assault and one specification of assault. (R. at 1229).

sentence pursuant to Rule of Courts-Martial (R.C.M.) 1102 and announced a new sentence of seventeen years' confinement and a dismissal. (R. at 1335, 1348). The convening authority approved the new sentence. (First Action).

When appellant's case came before this court pursuant to Article 66, UCMJ, both appellant and the government agreed that that the Staff Judge Advocate (SJA) "erroneously advised the convening authority regarding his ability to grant relief under Article 60, UCMJ." (Appellant's Br. 71; *accord.* Appellee's Br. 1–2). This court set aside the action to allow a properly-advised convening authority to take action. *United States v. Rudometkin*, ARMY 20180058 (Army Ct. Crim. App. 4 Feb. 2020) (order). The new convening authority considered the matters originally submitted as well as appellant's additional matters, and the new convening authority approved the findings and sentence. (Second Action; Second SJAR; Second Addendum).

Statement of Facts

1. Appellant Married and then Raped a Fellow Officer

[redacted] married appellant in February 1999, at Fort Irwin, when they were in Officer Basic Course ("OBC"). (R. at 401). After OBC, [redacted] remained at Fort Irwin while appellant went to Germany. (R. at 401–02). Although the Army kept them apart, [redacted] described her early marriage to appellant as "a dream," calling the relationship "[s]weet, loving" and "fantastic." (R. at 402). Appellant returned

from Germany to Fort Irwin for the birth of their first child, MR, in the latter half of September 1999. (R. at 403).

[redacted] suffered significant injuries during childbirth. She explained—because the doctors forcefully used a vacuum without having performed an episiotomy upon [redacted]—she "was ripped from the inside out. So from my vagina to my anus it was completely torn inside and out. And it was not a clean, . . . easily stitch-able type injury." (R. at 404).

As a result of the trauma, the doctors directed [redacted] to refrain from intercourse for "at least three months." (R. at 404). Appellant knew of the extent of [redacted]'s injuries and that she could not have intercourse. (R. at 404). Appellant returned to Germany, and after ten days of bedrest, [redacted] took the baby to Germany where they would spend her maternity leave as a family. (R. at 405–06).

Within the first week of [redacted]'s time in Germany, [redacted] took a nap and woke "up to [appellant] trying to spread [her] legs to have sexual intercourse." (R. at 407). She reminded appellant that she could "barely go to the bathroom . . . because of these injuries, the stitches," let alone have intercourse. (R. at 407). Appellant responded, "just spread your legs," and began having sex with her in a manner that "hurt so bad" that it was "basically unbearable." (R. at 407–09). Appellant covered [redacted]'s mouth so that her cries would not wake the baby sleeping

next to them. (R. at 408). [redacted]'s mother, KM, testified that [redacted] told her about this rape in 1999. (R. at 582).

[redacted] tried to rationalize appellant's attack, and thought to herself it had been a long time since appellant had sex, he'd been faithful to her, appellant was under stress, and "this is a wife's duty." (R. at 410). [redacted] did not want the marriage to end, and she did not report the attack. (R. at 410). After her maternity leave, [redacted] and the baby returned to Fort Irwin. (R. at 411). Although [redacted] wanted to remain on Active Duty, her family was her first priority. (R. at 413–14). When it appeared that Human Resources Command would not post appellant and [redacted] together, [redacted] left active duty, entered the National Guard, and joined a unit that allowed her to train in Germany so the family could stay together. (R. at 411–13).

[redacted] arrived in Germany in August 2000. (R. at 414). Although the family was recently reunited, appellant would spend his off-duty time drinking and playing on his computer rather than interacting with his wife and infant son. (R. at 415). Some of the time the reunited couple's sex life would be "[c]onsensual, gentle, loving, sweet; making love like husband and wife. And the rest of the time it just seemed that maybe seeing me meek, or terrifying me, was exciting to him." (R. at 420).

One particular evening, appellant reverted to "the person [[redacted]] thought [she] married, [and] very sweetly said 'let's go up and look at the stars.'" (R. at 415).

Appellant then brought [redacted] to the attic of their home which had only two-to-three feet of space, and she became claustrophobic. (R. at 415–16). Rather than comfort his panicking wife, appellant used "his weight and strength to hold [her] down and spread [her] legs and force intercourse." (R. at 416). Appellant gripped [redacted]'s neck so tightly that his fingerprints became visible on her neck. (R. at 416).

[redacted] wanted the family to remain together, so she "made a lot of excuses for [appellant's] behavior" and they moved back to the United States. (R. at 421–22). In 2003, they had a second child. (R. at 422).

2. Appellant Raped [redacted] During Her Battle Assembly (Charge I, Specification 3).

In May 2007, [redacted], conducted Military Unit Training Assembly (MUTA) in Delaware. (R. at 422). Over lunch, she went home to check on her children because appellant had been drinking. (R. at 422). When [redacted] arrived home for her lunch break, she saw their toddler daughter naked trying to get herself food, and appellant slapped the daughter's bare buttocks so hard that he left a handprint. (R. at 422–23). Because "you could smell the alcohol on [appellant's] breath, and he was behaving like a boor," [redacted] brought their daughter down the street to her mother's house. (R. at 423).

[redacted] returned to the family house to locate their son, and appellant tackled her. (R. at 423–24). They landed on the bed, and appellant "whipped off his belt so fast that it actually left a mark on [[redacted]'s] arm." (R. at 424). Appellant took off

[redacted]'s battle dress uniform (BDUs) "just far enough to spread [her] legs to have intercourse" with her as he "choked or smothered" her. (R. at 424). As appellant penetrated [redacted], he had "one hand around the neck or on the chest to hold [her] down, and the other hand on [her] mouth to keep [her] quiet." (R. at 424). When appellant flipped [redacted] over, he kept a hand on the back of her neck "to smother [her] into a pillow to the point where [she] could not breathe." (R. at 425). Appellant's attack ended because their five-year-old son, MR, came to the room. (R. at 426). [redacted] comforted the little boy, changed him out of dirty clothes, and brought him to her mother's house. (R. at 426).

[redacted] did not immediately report the rape. (R. at 428). A day or two later, she told co-worker, Sergeant First Class (SFC) DS. (R. at 428, 495). [redacted] then told two state police officers,[3] who recommended she obtain a restraining order. (R. at 428–29). The police officers observed appellant's fingerprints on [redacted]'s neck. (R. at 494). [redacted] filed for divorce and obtained a restraining order against appellant. (R. at 429). Because the restraining order mentioned rape, a police rape investigator contacted [redacted]. (R. at 430, 669). However, [redacted]'s divorce lawyer advised her not to pursue criminal charges, so she did not cooperate at that time.

[3] Master Corporal KW of the New Castle County Police testified—during an August 2007 interview—[redacted] described this assault and indicated it occurred on 17 June 2007. (R. at 660–62). In 2007, 17 June fell on a Sunday.

(R. at 430, 670–71). The divorce became final on 1 November 2007 – less than six months after the second rape. (R. at 430).

3. Appellant Married and Raped his High School Sweetheart (Charge I, Specification 4).

[redacted] was married to appellant from 2009 to 2016. (R. at 678, 986). Previously, they dated and broke up when they were teenagers. (R. at 703). Appellant referred to [redacted] as his high school sweetheart. (R. at 703, 811). After they married, [redacted] moved with her young child from Southern California to Maryland to live with appellant. (R. at 682). [redacted] lost her child support when her ex-husband moved to a foreign country. (R. at 711). Because appellant did not want [redacted]—who had a master's degree and a career at the Institute of Research and Labor Relations at University of California at Los Angeles—to work outside the home, they planned for her to be a stay-at-home mother to her daughter as well as appellant's two children. (R. at 682, 693, 722, 738, 983–84). When they first married in December 2009 up until appellant's deployment in August of 2010, the marriage was good. (R. at 683). Appellant spent most of his mid-deployment, rest and recuperation leave in spring 2011 drunk, which caused tension in the marriage. (R. at 685, 690). One night, what started out as consensual vaginal intercourse turned into appellant pushing [redacted]'s face into a pillow as he forced his penis inside of her anus. (R. at 687).

Toward the end of the deployment, [redacted] moved the family to Redstone Arsenal where appellant would meet them. (R. at 691). When appellant redeployed, he became "extremely controlling." (R. at 695). The night appellant arrived in Georgia from theater, [redacted] left Redstone Arsenal to meet appellant in Georgia. (R. at 695). As she drove to pick up the appellant, [redacted] discovered he rented a car. (R. at 696). Accordingly, she turned around and returned to Redstone Arsenal with their daughter. (R. at 696, 990–91).

[redacted] and her daughter arrived at the Redstone Inn—their furniture had not arrived from the recent move—around 2330 or midnight, and appellant already smelled of cigarettes and alcohol. (R. at 696). Their room at the Redstone Inn had two beds separated by a nightstand. (R. at 696–97). With the young child asleep in the next bed, appellant began to reach up [redacted]'s dress. (R. at 697). [redacted] "at first was like okay great I get it but now we need to stop because my daughter was within arm's reach of our bed. And it didn't stop."[4] (R. at 697). Then "again I was turned over onto my stomach, head pushed into the pillow again, and . . . vaginally [penetrated] but definitely not something I would ever do. And I repeatedly said . . . we are not having sex [, my daughter] is right there, I'm not having sex in front of my daughter." (R. at 697–98). [redacted] recalled "being so

[4] A friend testified that [redacted] told her that appellant forced anal sex on her with her daughter in the room. (R. at 787–88).

worried and so panicked about the idea that my daughter would wake up and see her mother with her face shoved down in a pillow, and not even knowing what was going on and why he was on top of me." (R. at 698).

Shortly after this assault, [redacted] stayed with MP and discussed the assault. (R. at 699, 724). MP told her "that's what happens, they take what they want to take and if that's what he wants to take then, you know, he's kind of got the right to do that." (R. at 700). That advice unsettled [redacted]. (R. at 700).

4. Appellant Forced [redacted] to Have Vaginal and Anal Intercourse (Charge I, Specification 5).

In October of 2011, [redacted] and appellant took a camping trip to De Soto Falls. (R. at 702). Their former-spouses had the children because they were on fall break from school. (R. at 702). On the second night of the trip, appellant became angry with [redacted] because she had broken up with him decades earlier when they were in high school, which—in appellant's estimation—led to every negative part of his life. (R. at 703). [redacted] went into the tent to go to sleep, and appellant continued to drink. (R. at 704). Appellant then came into the tent, positioned himself between [redacted] and the exit to the tent, and decided that they could only make up by having sex. (R. at 705). [redacted] was "extremely pissed" at appellant, and she told him that she did not want to have sex with him. (R. at 704). [redacted] recognized she was "in the middle of nowhere, with somebody who [was] 100 pounds heavier than [her]. He was drunk, and he was a violent drunk." (R. at 705). [redacted] tried "to say no, I'm

trying to make sure that it's not happening, and then it starts happening. And so [appellant] entered [ ] vaginally." (R. at 705). As "tr[ied] to get away, [appellant] enter[ed her] anally, and then goes back to entering [her] vaginally, and then just goes back and forth at whim." (R. at 705). protested because she "wasn't consenting to have sex in the first place," and she knew "there are health implications of going back and forth between anal and vaginal sex." (R. at 705–06). kept telling appellant no, but he continued to penetrate her until he lost his erection due to intoxication. (R. at 706). After appellant's "limp dick ended the sex, then he passed out." (R. at 706).

The following day, was in excruciating pain. (R. at 706). explained that when she urinated, "it felt like glass was coming out of my urethra, and it was bloody." (R. at 707). Mortified by the consequences of appellant's assault, told the doctor that she thought she got a urinary tract infection from swimming in a lake. (R. at 708). did not immediately leave appellant because she feared for the children. (R. at 708–09). Eventually, left appellant after he shoved 's daughter to the ground.[5] (R. at 720). Once and her daughter arrived in a safe location, she reported appellant's abuse. (R. at 721–22).

5. While Married to , Appellant Had Sexual Relationships with Two More Women, One of Whom He Punched in The Face During Sex.

[5] ET testified that told her that she left appellant that day and moved in with ET for several months because appellant shoved 's daughter as the little girl went to hug him. (R. at 794).

Appellant and [redacted] were married from 2009 to 2016. (R. at 678). Appellant had a casual sexual relationship with LL from December 2013 to April 2014. (R. at 797–98). Appellant falsely told LL that he was divorced and single. (R. at 798–99).

CL had a sexual relationship with appellant from July 2014 to December 2014. (R. at 805–06). CL told appellant early on in their relationship that she had planned to go to Cozumel, Mexico for her birthday on Christmas, and appellant invited himself on the trip. (R. at 806–07). While on the trip, "[d]uring sex, [appellant] punched [CL] in the face, twice" with a closed fist. (R. at 808). Appellant testified that he slapped—not punched—CL, and that he had not previously obtained her consent to do so. (R. at 1106–07). Appellant clarified that this slap happened "[d]uring the course of having sex, without asking permission" and CL was "very much" offended by it. (R. at 1118).

6. While Married to [redacted], Appellant Had Intercourse with [redacted] Numerous Times.

In early 2015, appellant resumed a sexual relationship with [redacted], and for "a week or so," appellant and [redacted] frequently engaged in every conceivable type of sexual activity. (R. at 439, 442). During this extramarital affair, appellant became focused on having [redacted] absorb his urine —which he referred to as his "essence"—both orally and anally. (R. at 441–42). Appellant felt that [redacted] should be thankful

to have him urinate inside of her, and he became angry if she could not retain his urine in her bowels. (R. at 441–42).

On another particular occasion of this brief affair, appellant spent all day drinking water before meeting [redacted] in a hotel room, placing his penis in her mouth, urinating in her mouth until she vomited, and then urinating in her mouth again "because he wanted his essence and his hormones and all of him to go through [redacted]." (R. at 443). During the affair, appellant would spit on [redacted] in front of their children, call her a whore, and force her to sit on the ground. (R. at 447).

7. Appellant's Case.

Appellant testified at trial. During appellant's testimony, he acknowledged making dishonest statements in a memorandum to the convening authority and to a law enforcement officer. (R. at 1067–70). Appellant had to be reminded to show basic military courtesy to the trial counsel, an officer senior to him. (R. at 1067).

Appellant denied having sex with [redacted] when she visited Germany shortly after MR's birth. (R. at 950–51).

MR claimed he never witnessed his parents fight at all. (R. at 923–24). Although MR walked in on his parents having sex, he testified it was not violent and could not "recall ever seeing [redacted] in uniform while they were having sex." (R. at 926). MR told the court-martial he had an excellent memory, but he lacked

the ability to recall details about anything other than the charged incidents.[6] (R. at 936–38).

Appellant corroborated [redacted]'s testimony that they had sex at the Redstone Arsenal Inn in front of [redacted]'s daughter, but he claimed the sex in front of the little girl was consensual. (R. at 992). Appellant acknowledged [redacted] was hesitant to have sex in front of her child. (R. at 992).

Appellant claimed the whole family went on the De Soto Falls camping trip, that this was the only camping trip he ever went on with [redacted], and they did not have sex during that trip. (R. at 995–97). MR, appellant's son, claimed he was on the De Soto Falls trip in the fall of 2011. (R. at 929).

Appellant acknowledged engaging in sexual relationships with [redacted], CL, and LL while married to [redacted]. (R. at 1021–22, 1031, 1103–1104, 1112).

Appellant also called an expert who explained that memory difficulties are common among individuals with bipolar disorder and/or substance abuse—such as

[6] Appellant's sister—who tried to explain away impeachment evidence by claiming that she was the victim of a multi-generational conspiracy to strip her of guardianship over appellant's children, (R. at 915)—also told the court-martial that MR has a good memory. (R. at 901). She also noted MR had mental and emotional challenges. (R. at 901). At various times, MR was diagnosed with autism, mixed mood disorder, oppositional defiance disorder, and Asperger's syndrome. (R. at 467, 709). Appellant directed "intense" verbal and emotional abuse towards MR. (R. at 710). MR's mother told the court-martial that when MR was sixteen years old, he only functioned on the level of a ten-year-old. (R. at 468).

[redacted]. (R. at 1139). The expert acknowledged that he did not treat rape and/or sexual assault victims, and did not primarily work with domestic violence victims. (R. at 1155, 1159). Further, he agreed with a recognized expert's theory that "Traumatized persons are prone to respond to new events as though reliving the traumatic event. This makes the current event a stressful situation with no apparent reason." (R. at 1159).

The argument incorporates additional facts where necessary.

Assignments of Error

I.
WHETHER SPECIFICATIONS 4 AND 5 OF CHARGE I MUST BE DISMISSED BECAUSE THE STATUTE OF LIMITATIONS WAS NOT TIMELY TOLLED.

Additional Facts

Specification 4 of Charge I alleged that appellant committed an aggravated sexual assault upon [redacted] between on or about 25 July and 31 August 2011, and Specification 5 of Charge I alleged that appellant committed an aggravated sexual assault upon [redacted] between on or about 6 and 11 October 2011. (Charge Sheet; Promulgating Order). The charges were preferred on 22 July 2016 and received by the summary court-martial convening authority [SCMCA] on 25 July 2016. (Charge Sheet).

Standard of Review

"The applicable statute of limitations is a question of law, which [appellate courts] review de novo. An accused is subject to the statute of limitations in force at the time of the offense." *Mangahas*, 77 M.J. at 222 (internal citations omitted).

Law and Argument

The charge sheet alleges appellant committed the challenged aggravated sexual assaults in 2011. (Charge Sheet; Promulgating Order). At that time, Article 43(a), UMCJ provided that the offenses of murder, rape, rape of a child, and any other offense punishable by death could be tried without any time limitations. 10 U.S.C. § 843(a) (2008). Article 43(b)(1) UCMJ, which governed the statute of limitations for these offenses, stated:

> Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed *more than* five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

10 U.S.C. § 843(b)(1) (2008) (emphasis added).

The charges were received by the SCMCA, Colonel [COL] TH, Redstone Arsenal Garrison Commander [Garrison Commander], on 25 July 2016. (Charge Sheet). Specification 4 of Charge I alleged that appellant sexually assaulted [redacted]

between on or about 25 July[7] and 31 August 2011, and thus not more than five years elapsed between the earliest date alleged in the specification and the date the charges were received.[8] (Charge Sheet; Promulgating Order). Similarly, specification 5 of Charge I alleged that appellant sexually assaulted [redacted] between on or about 6 October and 11 October 2011, so only approximately four years, nine months, seventeen days had elapsed between the earliest date alleged in the specification and the date the charges were received. Appellant's argument that the challenged specifications were barred by the statute of limitations fails because the SCMCA's timely receipt of the charges tolled the statute of limitations prior to their expiration.

Appellant has waived the argument that the wrong SCMCA received the charges. Appellant's challenge to the Garrison Commander's authority to receive the sworn charges essentially alleges a defective in the preferral and forwarding process. An objection to a defective preferral, forwarding of charges, or referral of

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[7] Appellant now alleges the events underlying Specification 4 of Charge I happened prior to 25 July 2011 and claims that his prior defense counsel "took pains" to have appellant testify to "commit[ing] an act on the 25th" and thus rendering ineffective assistance of counsel. (Appellant's Br. 17). Accordingly, appellant either committed perjury by testifying to staying at "the old crappy Redstone lodging place" with [redacted] and her daughter on 25 July 2011 (R. at 990, 994, 1088) or now brings a meritless ineffective assistance of counsel claim.

[8] The date of the offense is included when computing the appropriate statutory period, while the date of receipt of charge is excluded. Rule for Courts-Martial [R.C.M.] 907(b)(2) discussion.

charges must be raised prior to the entry of pleas. R.C.M. 905(b)(1).[9] "Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of [R.C.M. 905] shall constitute waiver." Appellant failed to object to the Garrison Commander's receipt of the sworn charges prior to entering his pleas and therefore he waived the issue.[10] *See* R.C.M. 905(e). As appellant waived this issue, he may not now obtain relief. *See United States v. Hardy*, 77 M.J. 438, 440 (C.A.A.F. 2018).

Even if the court considers the merits of this argument, it should reject it. Appellant argues that "the [Garrison] commander was not within Appellant's chain of command or unit and thus could not 'receive' his sworn charges and toll the [statute of limitations]."[11] (Appellant's Br. 15). However, this assertion has no support in the record. This court should therefore disregard appellant's

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[9] All citations to the R.C.M. refer to the 2008 R.C.M., unless otherwise specified.

[10] Contrary to appellant's claim (Appellant's Br. 16–17), this does not constitute ineffective assistance of counsel. "Failure to raise a meritless argument does not constitute ineffective assistance." *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997).

[11] Appellant's actions—as distinct from appellate defense counsel's arguments—acknowledge the Garrison Commander's authority over him. For instance, appellant's unconditional waiver of his right to an Article 32, UCMJ preliminary hearing was addressed to "COL [TH], Commander, U.S. Army Garrison – Redstone Arsenal." (App. Ex. XIII). Furthermore, appellant attempted to challenge the court-martial's jurisdiction by citing to his mandatory retirement orders, which were issued by "Headquarters, United States Army Garrison – Redstone," again acknowledging Garrison Commander's authority over him. (Request for Post-Trial Article 39(a) Session dated 27 August 2020).

unsupported claim. Appellant has had multiple, post-trial Article 39(a) sessions to develop the record for this court's review, including a session challenging the statute of limitations. Appellant never attempted to develop the record on this point, and this court should not remand for an additional fact-finding.

II.
WHETHER THE MILITARY JUDGE ERRED IN FAILING TO RECUSE HIMSELF BASED ON CIRCUMSTANCES THAT, IF KNOWN AT THE TIME OF APPELLANT'S COURT-MARTIAL, WOULD HAVE PROVIDED REASONS TO REASONABLY QUESTION HIS IMPARTIALITY.

Additional Facts

Captain (CPT) AC became a prosecutor at Fort Benning in the summer of 2016 and began practicing in front of Lieutenant Colonel (LTC) Richard Henry, the military judge there. (App. Ex. LXXIX, p. 1). At a Halloween party in 2016 for members of the JAG Corps community, CPT AC's wife, Mrs. KC, spent most of the evening talking with LTC Henry and his wife. (App. Ex. LXXIX, p. 1; R. at 1414). Mrs. KC knew the Henrys because she and Mrs. Henry worked as special education teachers at the same school district. (R. at 1413). Mrs. KC invited the Henry's over for dinner in the fall of 2015, but after consulting with his supervisors, CPT AC did not attend. (App. Ex. LXXIX, p. 1; R. at 1415).

Appellant's trial took place at Redstone Arsenal, and CPT AC—still at Fort Benning—played no role in appellant's court-martial. (R. at Table of Contents;

App. Ex. LXXIX, p. 2). The trial portion of appellant's court-martial began on 30 January 2018. (R. at 378). On that same day, appellant requested trial before a judge alone. (R. at 379–80; App. Ex. LVIII). Lieutenant Colonel Henry entered findings and adjudged a sentence of twenty-five years confinement and a dismissal on 2 February 2018. (R. at 1229–30, 1309).

The relationship between Mrs. KC and LTC Henry "ramped up" in February and March of 2018. (R. at 1425). In "late February to early March" of 2018, Mrs. KC began to experience panic attacks. (R. at 1460). To help with these panic attacks, LTC Henry ate "with her in public as an experiment." (App. Ex. LXXIX, p. 2). Around that timeframe, LTC Henry began to allow Mrs. KC to use the Fort Benning courthouse to study for her master's degree because the library had limited hours. (R. at 1422; App. Ex. LXXIX, p. 2).

In a post-trial Article 39(a) session on 12 March 2018, LTC Henry dismissed two specifications of rape pursuant to *Mangahas*, conducted a proceeding in revision, and revised the confinement portion of appellant's sentence from twenty-five years to seventeen years. (R. at 1331, 1335–36, 1348).

On 4 April 2018, CPT AC confronted Mrs. KC about her relationship with LTC Henry. (R. at 1424, 1440). After "consulting with friends, mentors, and his state bar's ethics hotline," CPT AC made a formal complaint about LTC Henry's inappropriate relationship with Mrs. KC on 6 April 2018. (App. Ex. LXXIX, p. 5).

An investigation pursuant to Army Regulation 15-6 ensued and found the existence of an inappropriate relationship between LTC Henry and Mrs. KC. (App. Ex. LXXVIII (sealed); App. Ex. LXXIX, p. 5).

On 6 September 2018, a new military judge conducted an Article 39(a) session to explore whether LTC Henry's participation warranted relief for appellant. (R. at 1403). Captain AC testified at this hearing. (R. at 1411–61). The new military judge conducted an analysis under the test announced by the Supreme Court in *Liljeberg v. Health Srvs. Acquisition Corp.*, 486 U.S. 847 (1988), and found there was little risk of injustice to the parties in this case, the denial of relief would not cause injustice in other cases, and the denial of relief would not undermine public confidence in the judicial process. (App. Ex. LXXIX, p. 8–9).

Standard of Review

This court reviews a military judge's decision to not recuse himself for an abuse of discretion. *United States v. Burton*, 52 M.J. 223 (C.A.A.F. 2000). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks omitted).

Law and Argument

A "military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might *reasonably* be questioned." R.C.M. 902(a) (emphasis added). "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). "A judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute." *Liteky v. United States*, 510 U.S. 540, 557 (1995) (Kennedy, J., concurring).

This case is similar to *United States v. Campbell*, 2020 CCA LEXIS 74 (Army Ct. Crim. App. 2020) (mem. op.). Lieutenant Colonel Henry presided over Private (PVT) Campbell's trial at Fort Rucker approximately five weeks after appellant's court-martial adjourned. *Campbell*, 2020 CCA LEXIS 74, at *4. Captain AC played no role in PVT Campbell's court-martial. *Campbell*, 2020 CCA LEXIS 74, at *4. Under these circumstances—mirrored in this case—this court found that "LTC Henry was not disqualified from acting as the military judge in appellant's court martial" and that it "need not conduct an Article 59(a), UCMJ, analysis, nor analyze the three factors identified in *Liljeberg*." *Campbell*, 2020 CCA LEXIS 74, at *8; *see also United States v. Anderson*, 79 M.J. 762, 766 (Army

Ct. Crim. App. 2020) (finding LTC Henry not disqualified from acting as a military judge in March 2017 trial at Fort Rucker where CPT AC had no involvement), *pet. denied* 80 M.J. 159 (C.A.A.F. 2020).[12]

Even if LTC Henry was disqualified, a "'judgment should be vacated' based on a judge's appearance of partiality [if] '(1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.'" *Anderson*, 79 M.J. at 765 (quoting *Liljeberg*, 486 U.S. at 864). In evaluating the impact of LTC Henry's inappropriate relationship, this court looked to the nature of the LTC Henry's relationship with Mrs. KC at the time of trial, location of the court-martial, whether CPT AC participated in the trial, whether CPT AC was assigned to the OSJA prosecuting the case, and the similarity between the charges and LTC Henry's conduct. *Anderson*, 79 M.J. at 766.

Here, there is no risk of injustice to the parties. As CPT AC had no involvement in appellant's court-martial, LTC Henry could not have shaded his rulings, findings, or sentence to impact CPT AC. Further, LTC Henry entered mixed findings. (R. at 1229). In light of the Court of Appeals for the Armed

[12] This court's decisions on the impact of LTC Henry's inappropriate relationship take judicial notice of the record of appellant's trial. *See, e.g.*, *Anderson*, 72 M.J. at 764, n.4; *United States v. Springer*, 79 M.J. 756, 757 n.3 (Army Ct. Crim. App. 2020) (en banc).

Forces' (CAAF) opinion in *Mangahas*, LTC Henry ruled favorably for appellant on a post-trial motion to dismiss and substantially reduced his confinement.

Under the second *Liljeberg* factor, denial of relief will not produce injustice in other cases because the military judge has been removed from the bench, and reversal is not a basis to deter future violations from other military judges. *See United States v. Martinez*, 70 M.J. 154, 159 (C.A.A.F. 2011) ("it is not necessary to reverse the results of the present trial in order to ensure that military judges exercise the appropriate degree of discretion in the future") (quoting *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001)) (internal quotation marks omitted). Other Soldiers who had LTC Henry preside over their courts-martial remain free to seek relief based upon the specific circumstances in their respective cases, and several have obtained relief based upon their unique circumstances. *United States v. Springer*, 79 M.J. 756 (Army Ct. Crim. App. 2020) (en banc); *United States v. Lopez*, 2020 CCA LEXIS 161 (Army Ct. Crim. App. 2020) (mem. op.).

Under the third *Liljeberg* factor, this court should find that the military judge's service at appellant's court-martial does not produce "a significant risk of undermining the public's confidence in the judicial process." *United States v. Witt*, 75 M.J. 380, 384–85 (C.A.A.F. 2016) (quoting *Liljeberg*, 486 U.S. at 864) (internal quotation marks omitted). Certainly, the military judge's inappropriate relationship could pose a risk of undermining public confidence in the military

justice system in the context of other cases where there is a definitive link between the military judge's misconduct and the court-martial at issue. *See United States v. Goodell*, 79 M.J. 614, 619 (C.G. Ct. Crim. App. 2019); *see also Butcher*, 56 M.J. at 93 (listing "intimate personal relationships" as the first example in a list of "factors that could undermine the basic fairness of the judicial process"). In appellant's case, by contrast, public confidence in the military justice system is not undermined because: 1) the military judge's misconduct differed from appellant's criminal conduct; 2) appellant has not demonstrated that the military judge's rulings demonstrate bias; and 3) CPT AC had no involvement in appellant's case. Accordingly, appellant's claim that he is entitled to relief based upon the military judge's failure to recuse himself is without merit.

Looking at the *Anderson* sub-factors, by the time of appellant's trial, LTC Henry's relationship had already crossed the line of propriety. *See Lopez*, 2020 CCA LEXIS 161 at *11–12 (finding the relationship was inappropriate by June 2017). However, every other *Anderson* sub-factor weighs against relief. Appellant's court-martial took place in at Fort Rucker, not the Fort Benning courthouse that was the location of some of LTC Henry's misconduct.[13]

[13] *Compare Anderson*, 79 M.J. 762 (affirming a court-martial over which LTC Henry presided at Fort Rucker) *and Campbell*, 2020 CCA LEXIS 74 (same) *with Springer*, 79 M.J. at 760 (setting aside a Fort Benning conviction over which LTC Henry presided) *and Lopez*, 2020 CCA LEXIS 161 (same).

"Critically, . . . CPT AC had no involvement with appellant's case." *Anderson*, 79 M.J. at 766; *cf. Springer*, 79 M.J. at 760 (reversing where CPT AC served as prosecutor at court-martial at Fort Benning). Nor was CPT AC assigned to the U.S. Aviation & Missile Command OSJA which prosecuted appellant. (R. at 1411–12). Finally, the gravamen of appellant's crimes are violent sexual assaults, not inappropriate relationships.[14]

In sum, these facts do not necessitate LTC Henry's disqualification from appellant's court-martial. Even if LTC Henry was disqualified, *Liljeberg* and its progeny do not require reversal. Indeed, this court has developed a small body of case law related to LTC Henry's misconduct, and appellants case aligns far more closely with the cases in which this court has denied relief (*Anderson* and *Campbell*) than the cases in which it has granted relief (*Springer* and *Lopez*). Neither the facts nor the law warrant relief.

III.
WHETHER THE EVIDENCE IS NOT FACTUALLY SUFFICIENT BEYOND A REASONABLE DOUBT FOR SPECIFICATIONS 3 – 5 OF CHARGE I.

[14] Appellant stands convicted of adultery-based conduct unbecoming an officer. (Statement of Trial Results). The investigation into LTC Henry concluded that he had an inappropriate relationship; it did not establish that LTC Henry committed adultery. (App. Ex. LXXVIII) (sealed).

Standard of Review

Military appellate courts conduct a de novo review of factual and legal sufficiency. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

This court should affirm the findings and sentence because the evidence is both legally and factually sufficient to support the findings of guilty for the two specifications of which appellant stands convicted.

This court employs an extremely deferential test when evaluating legal sufficiency. Under the test, "evidence is legally sufficient if, viewed in the light most favorable to the [g]overnment, a rational trier of fact *could have* found the essential elements of the crime beyond a reasonable doubt." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (emphasis added). In resolving questions of legal sufficiency, this court is "not limited to appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). On the contrary, this court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006); *Bright*, 66 M.J. at 365. Under this limited inquiry, courts "give full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable

inferences from basic facts to ultimate facts." *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (citation omitted).

Article 66(c), UCMJ, confers upon service courts a fact-finding power to "evaluate not only the sufficiency of the evidence but also its weight." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "The test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses," this court is convinced of appellant's guilt beyond a reasonable doubt. *Craion*, 64 M.J. at 534 (citing *Turner*, 25 M.J. at 325). "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).

1. The Evidence Presented at Trial Was Legally Sufficient to Prove Each and Every Element Beyond a Reasonable Doubt.

Appellant challenges the sufficiency of the evidence supporting his conviction for Specification 3 of Charge I, that he raped [redacted] in Delaware in May or June 2007. (Appellant's Br. 42–60). The elements of rape occurring prior to 1 October 2007 are:

> (a) That the accused committed an act of sexual intercourse; and

> (b) That the act of sexual intercourse was done by force and without consent.

Manual for Courts-Martial, United States (2008 ed.) [*MCM*], app'x 27 (Punitive Articles Applicable to Sexual Assault Offenses Committed Prior to 1 October 2007), ¶45.b(1); *accord.* Article 120(a), UCMJ (1996). Then-applicable law required the victim to manifest her lack of consent. *MCM*, app'x 27, ¶45.c(1)(b). Then-controlling law also required resistance unless resistance would have been futile. *Id*.

Appellant further challenges the sufficiency of the evidence with respect to two specifications of aggravated sexual assaults, both against [redacted], occurring between 1 October 2007 and 27 June 2012: the Summer 2011 attack at the Redstone Arsenal Inn when the child was present (Charge I, Specification 4) and the October 2011 attack at De Soto Falls (Charge I, Specification 5). (Appellant's Br. 60–70).

> (i) That the accused caused another person, who is of any age, to engage in a sexual act; and
> (ii) That the accused did so by causing bodily harm to another person.

MCM, pt. IV, ¶45.b(3)(b); *accord.* Article 120(c)(1)(B), UCMJ (2006). "The term 'bodily harm' means any offensive touching of another, however slight." Article 120(t)(8), UCMJ (2006).

A. Appellant Raped [redacted] By Tackling Her, Forcibly Removing Her BDUs, and Smothering Her As He Penetrated Her (Charge I, Specification 3).

Drawing all reasonable inferences from the evidence in favor of the prosecution, *Winckelmann*, 70 M.J. at 406, the evidence establishes that appellant raped [redacted] in their home in 2007. [redacted] testified that when she got home for her lunch break during her Battle Assembly with the Delaware Army National Guard, she tried to get her children out of the house because "you could smell the alcohol on [appellant's] breath, and he was behaving like a boor[.]" (R. 422–23). [redacted] brought their daughter down the street to her mother's house and returned to get their son. (R. at 423–24). While [redacted] searched for their son, appellant tackled her. (R. at 423–24). They landed on the bed, and appellant "whipped off his belt so fast that it actually left a mark on [redacted]'s] arm." (R. at 424). With [redacted] on the bed, appellant stripped her BDUs "just far enough to spread [her] legs to have intercourse[.]" He "choked or smothered" her. (R. at 424). He had "one hand around the neck or on the chest to hold [her] down, and the other hand on [her] mouth to keep [her] quiet." (R. at 424). When appellant flipped [redacted] over, he kept a hand on the back of her neck "to smother [her] into a pillow to the point where [she] could not breathe." (R. at 425).

The evidence overwhelmingly establishes both elements of rape: (1) intercourse by (2) force without consent. [redacted] testified that appellant penetrated

her, and MR corroborated that he had observed his parents having sex—although he could not "recall ever seeing [ ] in uniform while they were having sex." (R. at 926). Under any standard, the evidence establishes penetration.

The record also establishes that appellant used force. testified that appellant tackled, choked, and smothered her. (R. at 424–25). Police officers observed appellant's fingerprints on 's neck, something appellant tried to downplay as "passion marks." (R. at 494). When asked what she said—i.e., whether she voiced her lack of consent— told the court-martial she could not say anything because she "was being choked or smothered" and that appellant kept a "hand on [her] mouth to keep [her] quiet." (R. at 424). Viewing the evidence in the light most favorable to the prosecution, 's testimony established force.

B. Appellant Forced To Have Sex An Arms-length From Her Daughter By Shoving Her Face In A Pillow After She "Repeatedly" Said She Did Not Want To Have Sex (Charge I, Specification 4).

The evidence establishes that Appellant perpetrated an aggravated sexual assault against in the Redstone Arsenal Inn as her daughter slept feet away from them. As appellant stuck his hand up 's skirt, she initially did not rebuff his gropes. (R. at 697). However, then told appellant that "we need to stop because my daughter was within arm's reach of our bed. And it didn't stop." (R. at 697). "repeatedly" told appellant that she did not want to have sex with him in front of her daughter. (R. at 697–98). After told appellant that the sexual

activity needed to stop, appellant turned [redacted] over onto her stomach, pushed her head into the pillow, and began vaginally penetrating her. (R. at 697). As appellant assaulted her, [redacted] tried to stay quiet because she did not know how to explain to her daughter what was occurring. (R. at 698).

Appellant testified that he penetrated [redacted] at the Redstone Arsenal Inn. (R. at 992). Thus, all parties agree that appellant engaged in the sexual act alleged in this specification. By any standard of proof, the evidence establishes the sexual act.

Appellant corroborated [redacted] on the element of bodily harm by testifying that [redacted] indicated that did not want to have sex in front of her child. (R. at 992). Further, [redacted]'s friend testified that while appellant and [redacted] were still married—before the proffered-divorce-related motive to lie arose—[redacted] disclosed an incident where appellant pushed [redacted]'s face into a pillow and forcibly penetrated her while they were in a hotel room. (R. at 787–88). Allowing all reasonable inferences in favor of the prosecution, the evidence establishes appellant accomplished this sexual act via bodily harm.

C. Appellant Forcibly Penetrated [redacted]'s Vagina On a Camping Trip and Then Anally Penetrated [redacted] as She Tried to Escape (Charge I, Specification 5).

[redacted] testified that she and appellant went alone to De Soto Falls when appellant—who she knew to be "a violent drunk"—became intoxicated and started to blame her for decades' worth of his life's ills. (R. at 702, 705). Appellant

insisted that they make up via sex. (R. at 705). [redacted] told appellant she did not want to have sex. (R. at 704). Although [redacted] tried to "make sure" appellant did not have sex with her, he vaginally and anally penetrated her over her protests—and as she tried to escape—until his "limp dick ended the sex, then he passed out." (R. at 705–06).

Although appellant denied having sex with [redacted] at De Soto Falls, he corroborated her testimony that the trip occurred. (R. at 997). Both appellant and MR corroborated the fact that [redacted] shared a tent with appellant. (R. at 930). Even under the biased version of events of appellant and his child—over whom appellant had custody for most of his life (R. at 981, 1101, 1122)—appellant had the opportunity to commit this assault. The physical effects of the assault also corroborated the occurrence of a sexual act: because appellant jammed his penis in [redacted]'s vagina after anally penetrating her against her will, she obtained such a bad UTI that she had bloody urine that "felt like glass was coming out of [her] urethra[.]" (R. at 706–07).

The evidence also establishes bodily harm. [redacted] testified that she told appellant she did not want to have sex with him. (R. at 704). She testified that she tried to get away from him. (R. at 705). But appellant used his physical strength to procure sex from his unwilling wife. (R. at 705–06). When appellant started to go back-and-forth between [redacted]'s vagina and anus, she further protested because of

the obvious health issues and because she "wasn't consenting in the first place[.]" (R. at 705–06). [redacted]'s verbal and physical resistance could not prevent the assault from continuing.

Any doubt this court might have is not a reasonable doubt. Thus, it is clear that a rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt" based on the evidence presented. *Winckelmann*, 70 M.J. at 406 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

2. The Evidence Was Factually Sufficient to Prove Each and Every Element Beyond a Reasonable Doubt.

The evidence at trial overwhelmingly proved appellant's guilt.

A. Appellant's Attacks On His Victims' Credibility Provide Additional Reason To Defer To The Military Judge.

While weighing the evidence, a reviewing court must be mindful that it did not personally observe and hear the witnesses. Article 66, UCMJ; *Turner*, 25 M.J. at 325. 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)). This court has explained that 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). Judge Learned Hand wrote that:

> the carriage, behavior, bearing, manner and appearance of a witness -- in short, his 'demeanor' -- is a part of the evidence. *The words used are by no means all that we rely on in making up our minds about the truth* of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale.

Dyer v. MacDougall, 201 F.2d 265, 268–69 (2d Cir. 1952) (emphasis added). This court, sitting en banc, explained, "the degree to which we 'recognize' or give 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); *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).

i. Appellant's Ineffectual Credibility Arguments.

Appellant devotes the bulk of his argument on the sufficiency of the evidence to attacking the victims' credibility. He points to [redacted]'s "hypersexuality" in 2015 as evidence that she could not accurately perceive the 2007 assault.[15]

[15] The evidence of "hypersexuality" before the court-martial was that [redacted] asked Police Officer JD if he wanted to "piss in her ass, or fuck her in the ass" when he

(Appellant's Br. 51–52). He called an expert to explain this "hypersexual" woman suffered from bipolar disorder and could not be trusted, (R. at 1139, 1147, 1154), a trial argument regurgitated on appeal, (Appellant's Br. 56–59). Appellant called his sister to testify about [redacted]'s prior bad acts, most of which occurred years after the challenged specification. (R. at 904–06). Further, appellant testified extensively—drawing multiple, sustained objections—as to [redacted]'s bad acts and his perception of her unfitness as a parent. (R. at 970, 973, 981, 988, 1023, 1035, 1037, 1048). Appellant's arguments—individually or taken together—do little to blunt the graphic, compelling testimony that the court-martial observed.

Inexplicably, appellant invites this court to "speculate about the reason for" communication between [redacted] and [redacted] in an effort to show that they conspired to frame him for decades' worth of criminal sexual conduct. (Appellant's Br. 59). The evidence provides a benign explanation for contact between the victims:

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was physically restraining her following an altercation with appellant in November 2015. (R. at 596, 657). Police Officer JD noted [redacted] was under the influence and thought she was being abused when she made these statements. (R. at 601, 606). Appellant's expert agreed "[t]raumatized persons are prone to respond to new events as though reliving the traumatic event. This makes the current event a stressful situation with no apparent reason." (R. at 1159). This is consistent with [redacted]'s testimony that appellant violently penetrated and urinated inside of her anus. (R. at 439–41). Police Officer JD also testified that earlier in the day, he responded to appellant's home for an "assault in progress." (R. at 590–91). He observed [redacted] at appellant's home with a four-to-five inch laceration on the back of her head, and her hair was matted with fresh blood. (R. at 593, 600, 615). [redacted] testified that appellant caused those injuries, (R. at 539–41), and PO JD observed appellant when he arrived. (R. at 591).

childcare.[16] Appellant failed to appropriately develop the record to support the speculation he now invites.[17] When appellant tried to argue that the victims and [redacted]'s mother engaged in nefarious communications, the military judge sustained the trial counsel's objection because those facts were not in evidence. (R. at 1215).

Appellant claims [redacted] was evasive on the stand. (Appellant's Br. 62). Further, appellant intimates that [redacted] was a perjurer. (Appellant's Br. 66). He also indicates that the military judge should have credited the testimony of appellant and his son over [redacted]. (Appellant's Br. 68–69). At trial, appellant suggested [redacted] used his money to pay off her personal debts. (R. at 1008, 1090–91). Finally, appellant intimates that [redacted] made up the allegations to get a more favorable divorce settlement. (Appellant's Br. 69–70).

As this court, sitting en banc, recognized, this is precisely the sort of case where it owes the trier of fact maximum deference. *Davis*, 75 M.J. at 546. The military judge—who undoubtedly had experience with other sexual assault cases—

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[16] [redacted] testified that she spoke with [redacted] to coordinate child visitation. (R. at 569). [redacted] added that for the actual pickup, she would meet with [redacted] and/or her mother. (R. at 746). Although [redacted]'s mother testified, (R. at 582–86), appellant did not inquire as to any contact between her and [redacted].

[17] When appellant asked [redacted] whether [redacted] or her mother asked "for pictures of any domestic violence," trial counsel objected based on relevance grounds, defense counsel indicated that the contact would be relevant to demonstrate similarities between the two divorce proceedings, and the military judge sustained the objection. (R. at 773–75). When appellant asked [redacted] if she ever discussed visitation with [redacted] or her mother, appellant withdrew the question before the military judge could rule on trial counsel's objection. (R. at 781).

had an opportunity to observe both victims and [redacted]'s mother. He had the opportunity to see the three women appellant now castigates: "hypersexual" [redacted], her biased mother, and money-grubbing [redacted]. The military judge saw not just what these women said, but how they said it. He could evaluate whether they came off as the type of individuals who would conspire to falsely accuse someone of three rapes and three sexual assaults occurring over a sixteen-year period. (Charge Sheet). Given appellant's decision to argue that [redacted] and [redacted] lied to the court-martial, this court should give additional deference to the military judge and affirm the findings. *See Jimenez-Victoria*, 75 M.J. at 771 ("the degree to which [appellate courts] recognize or give 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 witnesses is at issue") (internal quotation marks omitted). Appellant's main argument is that the witnesses against him were not credible and that his testimony was more believable. It is precisely these types of arguments where the opportunity to physically see and hear a witness is important in assessing credibility. And 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. at 674.

B. Appellant Misplaces His Reliance On Facts Not Before The Military Judge.

The tests for factual and legal sufficiency ask this court to review the evidence presented to the factfinder. *See Winckelmann*, 70 M.J. at 406; *Craion*, 64 M.J. at 534. Factual sufficiency review is limited to the evidence actually presented at trial. *United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003) (quoting *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). "Undeniably, evidence not presented at trial cannot be used to support or reverse a conviction." *United States v. Bethea*, 22 U.S.C.M.A. 223, 46 C.M.R. 223, 225 (1973).

Appellant attempts to impeach [redacted]'s credibility on appeal via a protective order in his post-trial clemency package to the convening authority. (Appellant's Br. 46). More specifically, appellant uses this extra-record protective order in an effort to cast doubt as to the exact date on which the assault occurred. (Appellant's Br. 46). However, because the court-martial did not receive the protective order, it should be excluded from this court's review of the sufficiency of the evidence. *United States v. Stokes*, 65 M.J. 651, 654–55 and n.8 (Army Ct. Crim. App. 2007). The evidence in the record as to the timing of the 2007 rape is uncontradicted and unimpeached: it occurred during [redacted]'s May or June Battle Assembly.

Appellant also points to a purported letter that [redacted] wrote to him in 2014 as evidence she was "hypersexual." (Appellant's Br. 50–51). [redacted] could not recall whether she wrote the letter in question. (R. at 527). The military judge denied

admission of the letter. (R. at 1126). This court is "precluded from considering evidence excluded at trial in performing their appellate review function under" Article 66, UCMJ. *Holt*, 58 M.J. at 232. The contents of the purported letter should not factor into this court's evaluation of the evidence.

Appellant attempts to impeach [redacted]'s credibility on appeal by reference to an unsworn letter—purporting to be from MP—submitted by him in his clemency matters. (Appellant's Br. 66). The very first question that appellant asked [redacted] on cross-examination was to confirm MP as the other participant in the conversation. (R. at 724). Yet appellant never sought to introduce any evidence from MP—either testimonial or documentary—at his trial. Now on appeal, he asks this court to find [redacted] less credible on the basis of extra-evidentiary documents. This letter—which remains unauthenticated and unsworn—should play no role whatsoever in this court's review of the factual and legal sufficiency of the evidence. *See Holt*, 58 M.J. at 232.

Appellant's convictions are lawful, appropriate, consistent with the evidence presented, and should not be disturbed.

IV.
WHETHER THE STAFF JUDGE ADVOCATE ERRONEOUSLY ADVISED THE CONVENING AUTHORITY REGARDING HIS ABILITY TO GRANT RELIEF UNDER ARTICLE 60, UCMJ.

Additional Facts

When appellant's case first came before this court pursuant to Article 66, UCMJ, both appellant and the government agreed that that the Staff Judge Advocate (SJA) "erroneously advised the convening authority regarding his ability to grant relief under Article 60, UCMJ." (Appellant's Br. 71; *accord.* Appellee's Br. 1–2). This court set aside the action to allow a properly advised convening authority to take action. *United States v. Rudometkin*, ARMY 20180058 (Army Ct. Crim. App. 4 Feb. 2020) (order). The new convening authority considered the matters originally submitted as well as appellant's additional matters, and the new convening authority approved the findings and sentence. (Second Action; Second SJAR; Second Addendum).

Standard of Review

This court reviews convening authorities' actions for an abuse of discretion. *United States v. Dean*, 74 M.J. 608, 611 (Army Ct. Crim. App. 2015).

Law and Argument

This court set aside the prior action and the convening authority affirmed the sentence of findings after being properly advised via a new SJAR. *United States v. Rudometkin*, ARMY 20180058 (Army Ct. Crim. App. 4 Feb. 2020) (order); (Second Action; Second SJAR; Second Addendum). This assignment of error is now moot and requires no further action from this court or relief to appellant.

V.

WHETHER THE MILITARY JUDGE COULD, AS A MATTER OF LAW, REASSESS APPELLANT'S SENTENCE AFTER DISMISSING TWO SPECIFICATIONS IN A POST-TRIAL ARTICLE 39(a) SESSION. IF NOT, AND ONLY THE CONVENING AUTHORITY COULD REDUCE APPELLANT'S SENTENCE OR AUTHORIZE A SENTENCE REHEARING, WAS THE MILITARY JUDGE'S SENTENCE REASSESSMENT VOID.[18]

Statement of Facts

The military judge announced sentence on 2 February 2018. (R. at 1309). Four days later, the Court of Appeals for the Armed Forces held in *Mangahas* that rapes committed prior to the effective date of the 2006 NDAA had a five-year statute of limitations. 77 M.J. at 225. Relying on the new decision, on 12 February 2018, appellant requested "a mistrial with respect to Specifications 1, 2, and 3 of Charge I" and "a mistrial as to the sentence." (App. Ex. LXIV). The military judge held at a post-trial Article 39(a) session on 12 March 2018 to conduct a proceeding in revision in accordance with R.C.M. 1102 resolve appellant's motion for a mistrial. (R. at 1310).

After considering the parties' arguments on the applicability of *Mangahas*, the military judge dismissed Specifications 1 and 2 of Charge I but denied the

[18] The government acknowledges appellant's desire to withdraw this assignment of error. (Appellant's Supplemental Br. 2). The government does not oppose appellant's request. However, the government has briefed the issue should the Court nonetheless desire to consider appellant's fifth assignment of error.

request for a mistrial on Specification 3 of Charge I. (R. at 1330–31). On the remaining charges, the military judge revised appellant's sentence to seventeen years' confinement and a dismissal. (R. at 1348).

Standard of Review

This Court reviews questions of law de novo. *United States v. Jones*, 64 M.J. 596, 601 (Army Ct. Crim. App. 2007).

Law and Argument

Rule for Courts-Martial 1102(b)(2) allows a military judge to hold an Article 39(a) session in revision to "resolv[e] any matter that arises after trial and that substantially affects . . . the sentence." This type of proceeding will "often provide a means for promptly . . . disposing of a claim of error[] before necessary witnesses disperse[], memories fade[], and witnesses bec[o]me unavailable." *United States v. Griffith*, 27 M.J. 42, 46 (C.M.A. 1988). Such a session "may be directed by the military judge or the convening authority[.]" R.C.M. 1102(a). "[I]f, before authenticating the record of trial, a military judge becomes aware of an error that has prejudiced the rights of the accused . . . he may take remedial action on behalf of the accused without awaiting an order[.]" *Griffith*, 27 M.J. at 47.

These proceedings in revision must not prejudice the material rights of the accused. R.C.M. 1102(b)(1). More specifically, a proceeding in revision "may not be directed for increasing the severity of the sentence[.]" R.C.M. 1102(c)(3).

When explaining why he denied the defense motion for a mistrial on sentencing and rather opted to conduct a hearing in revision, the military judge accurately acknowledged that under this course of action, appellant's "sentence can only go down." (R. at 1135–36).

The military judge used his authority—granted *directly* to him by Rule 1102(a)—to conduct a proceeding in revision. The military judge's post-adjournment dismissal of two of the five specifications of the gravamen charge, (R. at 1330), constitutes a "matter that arises after trial and that substantially affects . . . the sentence." R.C.M. 1102(b)(2). This court "endorse[s] initiative-taking by military judges" when they use Rule 1102 because such "an approach is crucial in our justice system, which favors resolution of disputed issues at trial." *United States v. Chandler*, 74 M.J. 674, 684 (Army Ct. Crim. App. 2015) (reversing when the military judge used a proceeding in revision to re-instruct the panel members because "one cannot reasonably expect panel members to set aside their original findings and deliberate anew"). The military judge astutely took the initiative that this court encourages: had the military judge not revised the sentence in the post-trial Article 39(a) session, the convening authority and/or this court would surely have concerns about the sentence given that the military judge dismissed two of the three specifications with the potential for confinement for life without parole.

MCM, app'x 27, ¶45.e(1).[19] By proactively correcting this obvious issue, the military judge prudently conserved judicial economy by disposing of the issue while it was fresh in all parties' minds.

The Court of Military Appeals (CMA) approved of proceedings in revision to reevaluate a sentence which improperly considered criminal conduct other than the underlying findings. *See United States v. Carpenter*, 15 U.S.C.M.A. 526, 36 C.M.R. 24, 26 (1965). There, the panel considered an irrelevant conviction during sentencing. *Id.* at 25. The convening authority directed a proceeding in revision, the panel deliberated, and the panel adhered to its initial sentence. *Id*. at 26. The CMA affirmed the sentence. *Id.* at 28. The only relevant difference between the revision proceeding in Airman Carpenter's court-martial and in appellant's is that the former proceeding was directed by the convening authority and the latter was directed by the military judge. However, "proceedings in revision . . . *may be directed by the military judge or the convening authority*." R.C.M. 1102(a) (emphasis added). The disjunctive wording of the Rule grants the military judge the independent authority to initiate this proceeding.

Military appellate courts routinely reassess sentences after dismissing charges and/or specifications. *See generally United States v. Winckelmann*, 73

[19] Although appellant's crimes qualified for the death penalty, *MCM*, app'x 27, ¶45.e(1), the convening authority did not refer this to a capital general court-martial, (Charge Sheet).

M.J. 11 (C.A.A.F. 2013). The CAAF encourages reassessment because—"in light of the experience, training, and independence of military judges"—reassessment moves cases along "'more expeditiously, more intelligently, and more fairly' than a new court-martial.'" *Id*. at 15 (quoting *Jackson v. Taylor*, 353 U.S. 569, 580 (1957)). Even after dismissal of two specifications of the gravamen charge, appellant remained convicted of three specifications of that charge, the penalty landscape remained exactly the same, appellant chose sentencing by judge-alone, and the remaining offenses are ones with which the military judge had significant experience. *See id.* at 15–16. The military judge's used his Rule 1102(a)-derived authority to revise the sentence, all of the *Winckelmann* factors favor this revision, and the policies underlying *Winckelmann* favor the military judge's prompt action.

Even if the military judge exceeded his authority by conducting a sentencing proceeding in revision, any error did not prejudice the substantial rights of appellant. *United States v. Widdowson*, 2009 CCA LEXIS 102, *9 (N.M. Ct. Crim. App. 2009) (unpub. op.); *see also* Article 59(a), UCMJ ("sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused"). Appellant explicitly asks this court to "approve" the procedure used by the military judge. (Appellant's Br. 76). Further, appellant wishes the court to not decide this

assignment of error. (Appellant's Supplemental Br. 2). These requests disclaim any prejudice.

Conclusion

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

[redacted]
CPT, JA
Appellate Attorney, Government
Appellate Division

JO [redacted] INER
MAJ, JA
Appellate Attorney, Government
Appellate Division

FOR
BRE [redacted]
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted] LIAMS
LTC, JA
Deputy Chief, Government
Appellate Division

CERTIFICATION OF SERVICE, U.S. v. RUDOMETKIN (20180058)
BRIEF OF APPELLEE

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 31st day of March, 2021.

[redacted]CK
Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
[redacted]