IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Sergeant (E-5) **ROBERT B. BERGDAHL** U.S. Army, *Petitioner*, v. **UNITED STATES**, *Respondent.*	))))))))))	**PETITIONER'S REPLY TO ANSWER TO PETITION FOR WRIT OF ERROR CORAM NOBIS** Dkt. No. ARMY MISC 20200588

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

Both this Court and the Court of Appeals decided Sergeant Bergdahl's case on direct review based on an incomplete factual record. Because the military judge omitted critical information, both courts were denied the opportunity to conduct the required holistic review on the central tenet of military jurisprudence. The Court of Appeals having afforded Sergeant Bergdahl the opportunity to seek coram nobis relief, this Court should review the merits of his claim in light of the expanded pertinent evidence.

Preliminary Matters

Respondent appended to its answer the September 7, 2020 petition for reconsideration Sergeant Bergdahl filed in connection with the Court of Appeals' Art. 67(a)(3), UCMJ, review. Resp. App. A. We append the other submissions related to that filing, including Sergeant Bergdahl's September 18, 2020 motion to supplement

the record, as well as the Court of Appeals' October 14, 2020 Order. That Order denied both the petition for reconsideration and the motion to supplement the record "without prejudice to [Sergeant Bergdahl's] right to file a writ of error coram nobis with the appropriate court." *United States v. Bergdahl*, No. 19/0406/AR, 2020 CAAF LEXIS 569 (C.A.A.F. Oct. 14, 2020). Since the court-martial no longer exists, this is the appropriate court. *United States v. Denedo*, 66 M.J. 114, 124 (C.A.A.F. 2008), *aff'd & remanded*, 556 U.S. 904, 914-15 (2009).

Argument

I

THE PETITION SATISFIES THE THRESHOLD CRITERIA

Sergeant Bergdahl's initial filing explained that he has met the threshold criteria. The error complained of is unquestionably of "the most fundamental character." The case implicates not only the right to an impartial judge and the right to conduct *voir dire* to ensure that the judge is impartial, but also the high interest in ensuring public confidence in the administration of justice. That interest is reflected both in the doctrine of apparent unlawful command influence (UCI) and in the broader teaching of the third factor in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988). As Judge Sparks wrote, "the facts of this case raise a serious due process issue." *United States v. Bergdahl*, 80 M.J. 230, 246 (2020)

(Sparks, J., concurring in part and dissenting in part). If questions such as these are not "of the most fundamental character," nothing is.

Respondent claims (at 7), however, that Sergeant Bergdahl is ineligible for the prayed-for writ because he could have discovered the information presented through the exercise of reasonable diligence "prior to the original judgment." This is mistaken for a host of reasons.

A

Judge Nance had a long career on the bench. He was a senior officer with a good reputation. Sergeant Bergdahl therefore had every reason to credit his representations that he was planning to go home when the time came to retire. Even when the defense became aware he had been hired as an immigration judge, there was no way to know he had applied for that or any other job *during the trial*. Until we received a response to our FOIA request, there was, given his representations, no reason to imagine he had applied *during the trial*. And until respondent filed the Justice Department's job announcement, the defense had no reason to know when the application process had either begun or ended. *See* note 8 *infra*. Our FOIA request was filed out of an abundance of caution and we were shocked by the documents we received.

United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013), counsels restraint in delving into any military judge's private affairs. By respondent's own account (at 7

n.5), "[t]he government is unaware of an unending duty to independently investigate every facet of a military judge's life." This disposes of its claim that Sergeant Bergdahl did not exercise reasonable diligence. The government cites no authority, and we know of none, for the proposition that a litigant whose case is still on direct appellate review[1] must not only assume a respected sitting judge has been disingenuous but proceed on that premise to invoke the Freedom of Information Act, 5 U.S.C. § 552, in order to be deemed to have exercised reasonable diligence for purposes of a *possible* coram nobis petition he might never need to file.

B

The "original judgment" referred to in *Denedo*, 66 M.J. at 127, is the judgment of the court-martial and not, as respondent appears (at 7) to believe, that of the Court of Appeals. This Court obviously has no authority to grant a writ of error coram nobis to overturn a decision of its superior court; that would stand the appellate system on its head. It would be strange indeed to read such a notion into the Court of

[1] Sergeant Bergdahl's case will remain on direct appellate review until he either waives review by the Supreme Court or, if he seeks certiorari, until that court acts on his certiorari petition. R.C.M. 1209(a)(1)(iii). His time in which to file a petition for a writ of certiorari will not expire until next March because, "[i]n light of the ongoing public health concerns relating to COVID-19," https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf, the Supreme Court extended the deadline for all certiorari petitions due on or after March 19, 2020 to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing.

Appeals' decision to deny Sergeant Bergdahl's petition and motion *without prejudice to his right to seek such a writ from the appropriate court*. Respondent's reliance (at 7-8) on the unpublished decision in *Roy v. United States*, 2014 CCA LEXIS 364 (A.F. Ct. Crim. App. June 17, 2014), is therefore misplaced.

Airman Roy challenged a CCA judge's defective appointment, not that of the trial judge. Sergeant Bergdahl has not challenged the appointment of any judge of the Court of Appeals, and there was no basis for him not to take Judge Nance's assurances at face value until much later. Unlike Airman Roy, Sergeant Bergdahl raised the issue that underlies his coram nobis petition in the course of direct appellate review. Airman Roy did not file his coram nobis petition until after the Court of Appeals had denied discretionary review. Because it did so, he had no right to seek certiorari, *see* Art. 67a(a), UCMJ; 28 U.S.C. § 1259(3), and appellate review had come to an end. R.C.M. 1209(a)(1)(B)(ii).

C

Even if the "original judgment" were deemed to be the convening authority's action on June 4, 2018, a person in Sergeant Bergdahl's position would have had no reason to inquire into whether Judge Nance had applied for a job in 2017 or to doubt the accuracy of his statements in 2017 about his future plans as buttressing for his claim to immunity from presidential influence. As respondent notes (at 3, 7), the Department of Justice's press release announcing the military judge's hiring did not

come out until September 28, 2018. That was months after the trial end and the convening authority signed the action. Sergeant Bergdahl never had any reason to monitor routine Justice Department press releases. The Department's process for hiring Judge Nance was conducted in private. Neither he nor anyone else disclosed it to the defense. Sergeant Bergdahl had no reason—and certainly no duty—to go on a fishing expedition into the judge's private business.

But even if knowledge of the press release were imputed to Sergeant Bergdahl as of its date of issuance, his submission of a FOIA request on August 27, 2020—less than two years later—is not even close to the kind of delay that precludes a writ of error coram nobis. And in any event, that is not the proper starting point for gauging diligence. The full import of the matter did not become clear until April 16, 2019, when *In re al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), was decided. Sergeant Bergdahl submitted his FOIA request 16 months later and brought the fruits of that request to the attention of the Court of Appeals within three days of receiving them—at a time when, importantly, his timely petition for reconsideration was still pending.[2]

[2] "The timely filing of a petition for reconsideration shall stay the mandate until disposition of the petition unless otherwise ordered by the Court." C.A.A.F. R. 43A(a). Until the mandate issues, the decision is without effect. *United States v. Tanner*, 3 M.J. 924, 925-27 (A.C.M.R.), *pet. denied*, 4 M.J. 169 (C.M.A. 1977). The mandate was not issued until October 21, 2020. *United States. Bergdahl*, No. 19-0406/AR, 2020 WL 6503399 (C.A.A.F. Oct. 21, 2020).

Respondent cites nothing to support the draconian diligence standard it would have the Court apply. Our own research reveals that if respondent's contention were embraced, the period of delay the Court would be deeming excessive would be, with a single questionable exception from another service,[3] the shortest on record. *See, e.g.*, *Gray v. United States*, 76 M.J. 579, 588-89 (A. Ct. Crim. App.) (coram nobis petition *held* untimely when the issue was ripe 16 years earlier and a jurisdictional question had been settled for over five years), *app. dismissed for lack of jurisdiction*, 77 M.J. 5 (C.A.A.F. 2017), *cert. denied*, 138 S. Ct. 2709 (2018); *Willenbring v. McCarthy*, ARMY MISC 20200430, slip op. at 3 n.3 (A. Ct. Crim. App. Oct. 26, 2020) (coram nobis petition *held* untimely when filed 18 months after denial of petition for review and more than two years after pertinent ruling), *writ-app. pet. filed*, No. 21-000506/AR (C.A.A.F. Nov. 16, 2020).[4]

[3] The exception is *Roy*. The Court of Appeals' Appointments Clause ruling that prompted Airman Roy to seek coram nobis, *United States v. Janssen*, 73 M.J 221 (C.A.A.F. 2014), was issued on April 15, 2014. The Air Force Court's decision does not reveal when he filed his petition, but the decision itself came down only two months later, on June 17, 2014. Whether diligence is calculated on that basis, or as the Air Force Court did, on the extreme basis that he should have raised the issue at the Court of Appeals in the three weeks between Mr. Soybel's defective appointment and when he filed his petition for a grant of review, *Roy, supra*, at *9, the case, the decision—which has never been cited by any court—is a clear and serious outlier and the delay part of its rationale is unsound. The Air Force Court's "Special Panel" did well to moot the issue.

[4] *Willenbring* and *Gray* are also distinguishable because they were no longer pending on direct appellate review.

The civilian federal cases are instructive. *See* Art. 36(a), UCMJ. In *Blanton v. United States*, 94 F.3d 227, 231-32 (6th Cir. 1996), the Sixth Circuit held that "[t]hree years was not an unduly long delay." In granting coram nobis in *United States v. Jackson*, 371 F. Supp.2d 257, 265 (E.D. Va. 2019), Judge Ellis described a 17-month delay as "a reasonably short time." When coram nobis is denied on delay grounds, far longer periods are typical.[5] The Court should reject respondent's effort to impose, *especially after the fact*, a harsher standard for delay than the overall pattern in the federal cases supports.

Even if the Court were to find unreasonable delay, respondent's argument fails because it has not even claimed to have been prejudiced in any way. As respondent observed in *Willenbring*, laches is an affirmative equitable defense in coram nobis proceedings. *See* Answer to the Petition for a Writ of Coram Nobis, or in the Alternative, Habeas Corpus, *Willenbring v. McCarthy, supra*, at 9 (Aug. 14, 2020) (citing *Johnson v. United States*, 49 M.J. 569, 573-74 (N-M. Ct. Crim. App.

[5] For example, in *United States v. Durrani*, 294 F. Supp.2d 204, 213-15 (D. Conn. 2003), *aff'd*, 115 Fed. Appx. 500 (2d Cir. 2004), Judge Underhill found that a petitioner's "tremendous delay" was excessive where it could be viewed as having lasted six, seven, or 10 years. The shortest unacceptable delay instance he found was three years, or half again as long as the worst-case delay here. Others ran from four years and eight months all the way up to 15 years. The Second Circuit treated Durrani's as a 10-year delay. 115 Fed. Appx. at *503. *Rossini v. United States*, 2014 WL 5280531, at *4 (D.D.C. 2014), found excessive delay where the petition was not filed until 2014, even though the grounds had been apparent for five years.

1998)). Like laches generally, coram nobis requires a showing of prejudice. *E.g.*, *Johnson*, *supra*, 49 M.J. at 573-74; *Jackson*, *supra*, 371 F. Supp.2d at 265 (noting that the government "has not identified any evidence the government was unable to produce" and "was fully able to oppose defendant's *coram nobis* petition"). The same is true here.

Respondent's delay argument is thus doubly deficient.

D

There is yet another flaw in respondent's claim that Sergeant Bergdahl has not satisfied the threshold criteria.

Over two months ago, when the case was still before the Court of Appeals, Sergeant Bergdahl raised the question of who in the Army knew what, and when, about Judge Nance's job application. *See* Reply to Amended Answer to Motion to Supplement the Record at 3-5. Since then, respondent has remained as silent as the tomb on this important matter. It has never submitted anything from Judge Nance, who would know, or anyone else, such as the multimember prosecution team, the leadership of the Trial Judiciary, the TJAG or DJAG (who would be quite likely to have been informed of the retirement plans of a senior Colonel in the Corps they lead and whom they presumably knew personally), or the officials who deal with judge advocate retirements.

In the absence of this information (which should have been disclosed voluntarily[6] and which Sergeant Bergdahl has no way to obtain), respondent should not be heard to complain about allegedly unreasonable delay. To allow it to do so while remaining silent about whether and when those in positions of responsibility learned of what Judge Nance had withheld from the defense would be grossly unfair.

E

Finally, respondent insists (at 8) that Sergeant Bergdahl's petition must be dismissed because its timing "resulted in his inability to bring this matter to this court's attention within the two-year time limit for filing a petition for new trial under Article 73, UCMJ." Respondent thus accuses him of having performed an "end-run" around the new trial deadline.

This point is not well-taken because the alternative-remedies threshold criterion asks simply whether there is such a remedy, not why one that may *once* have been available no longer is. Respondent, on the other hand, suggests that the petition fails that criterion because Sergeant Bergdahl did not act promptly to seek a new

[6] The Supreme Court has rejected the notion that defense counsel should have uncovered *Brady* information; counsel are entitled to rely on the representations of the prosecutor and, more generally, on the prosecutor's constitutional duty of disclosure. *Strickler v. Greene*, 527 U.S. 263, 283 n.23, 284 (1999). "[A] rule .. . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 688, 695-98 (2004).

trial. That is a category error because diligence enters the conversation under the unreasonable delay criterion, which obviously concerns delay in the filing of the coram nobis petition itself, not in the invocation of some other now-unavailable remedy.

By mistakenly importing the (June 2020) deadline for seeking a new trial, respondent would in effect have the Court impose an even harsher diligence standard, requiring Sergeant Bergdahl to have acted only 14 months after *al-Nashiri* was decided. *See generally* pp. 5-9 *supra*. This is an invitation the Court should resist because it conflates distinct threshold criteria.

Sergeant Bergdahl raised the *al-Nashiri* and R.C.M. 902 issue in support of a timely petition for reconsideration at the Court of Appeals. His motion to supplement the record was germane to that petition. If the Court of Appeals had considered this an "end-run," it would have denied that petition and motion outright, rather than doing so *explicitly without prejudice* to his right to seek a writ of error coram nobis.

The cases respondent cites are also unavailing. In *Murray v. United States*, 2018 CCA LEXIS 47 (A. Ct. Crim. App. Jan. 31, 2018), the fatal problem was that the petitioner himself knew the pivotal information but failed to share it with his attorney. *Id*. at *5-6. Here, in utter contrast, *it was the military judge who withheld the pivotal information*.

In *Roberts v. United States*, 77 M.J. 615, 617 (A. Ct. Crim. App. 2018), the Court noted that the Court of Appeals had "on at least one occasion, considered an application for relief based on new evidence that was not filed within the two-year limit set out by Article 73." While the opinion struggles to suggest that that action did not command a majority on the Court of Appeals, *id*. at n.3, it also observes that that case is distinguishable because both of that court's decisions "were appeals in which new evidence was considered while the case remained on direct appeal." *Id*. at 617. But precisely the same thing is true here: Sergeant Bergdahl brought the *al-Nashiri* and R.C.M. 902 issues to the Court of Appeals during the pendency of a timely petition for reconsideration. His case, in other words, "remained on direct appeal." It still does. *See* note 1 *supra*.

The petition meets the threshold criteria for a writ of error coram nobis. The Court must therefore address the merits.

II

THE COURT OF APPEALS' DECISION DOES NOT BAR THIS COURT FROM CONSIDERING THE PETITION

Respondent mistakenly contends (at 8) that the Court must dismiss the petition because Sergeant Bergdahl asks it to re-evaluate a previously litigated legal issue.

We have acknowledged that this Court is bound by what the Court of Appeals decided.[7] But that decision rests on a determination whether the government carried its UCI burden of proof beyond a reasonable doubt—a determination the Court of Appeals considered a close question. The matter now before this Court requires that that question be revisited on the basis of an expanded record (*i.e.*, including the evidence relating to the military judge's undisclosed job application, R.C.M. 902, and the Army Rules of Judicial Conduct).

If the Court concludes that the government has, in the end, not carried its UCI burden of proof, it should so indicate. Its judgment will be subject to review on writ-appeal petition. C.A.A.F. R. 4(b)(2). What it cannot properly do, however, is refuse to address the matter before it on the theory that it lacks authority to do so. Such a

[7] Our brief in support of the petition stated (at 5-6):

> The Court is bound by the conclusions of law of the Court of Appeals. *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012). Whether apparent UCI has occurred is a conclusion of law. *United States v. Bergdahl*, 80 M.J. [230, 236] n.7 (C.A.A.F. 2020) (slip op. at 9 n.7) (citing *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). Nonetheless, to the extent that there is additional information that bears on whether a disinterested, objective, and fully informed member of the general public would harbor a significant doubt as to the fairness of the proceedings, this Court may revisit that issue and determine that the record, when supplemented with the new evidence and *taken as a whole*, does not satisfy the requirement of proof beyond a reasonable doubt.

refusal would disrespect the Court of Appeals' Order and ill serve the appellate process by requiring that court to address the matter in the first instance without the benefit of this Court's evaluation.

In addition, the petition for a writ of error coram nobis raises an R.C.M. 902 issue that overlaps with but is analytically distinct from the apparent UCI issue. The R.C.M. 902 issue has not been decided by the Court of Appeals.

III

SERGEANT BERGDAHL HAS A CLEAR AND INDISPUTABLE RIGHT TO THE WRIT

A party seeking a writ of error coram nobis must have a clear and indisputable right to the writ. *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380–81 (2004). Sergeant Bergdahl has such a right.

First and foremost, the military judge failed to abide by the disclosure requirements of R.C.M. 902 and the Code of Judicial Conduct. Worse yet, he affirmatively misled the defense in a way that thwarted Sergeant Bergdahl's ability to conduct *voir dire* that, had the judge's job application been known, we certainly would have demanded. Indeed, it would have been derelict not to have sought an opportunity for additional *voir dire*. The undisputed facts make this an open-and-shut matter and entitle Sergeant Bergdahl to a writ of error coram nobis.

A second aspect of the case is also compelling: the additional information, when added to the existing body of information that the Court of Appeals imputed

to the reasonable observer, plainly affects the UCI balance, and does so in Sergeant Bergdahl's favor. That information is sufficiently salient[8] that what was previously a "close case" is no longer close at all. Where, as in the area of apparent UCI, the burden is on the government to prove the matter at issue beyond a reasonable doubt, even a modest change in the factual record shatters any prior evaluation. Here, the change in the evidence is not modest; it is devastating because it entails a plain violation of the governing *Manual* provision and rule of judicial conduct.

Plainly, there are distinctions, but this is a stronger case than *Al-Nashiri*. Judge Spath had not made the kind of misleading statements Judge Nance put on the record in claiming to be impervious to presidential influence. This affirmatively lulled the

[8] Both here and in the Court of Appeals, respondent cited Judge Nance's representations as evidence of his imperviousness to UCI (page 30 of its April 2, 2019 brief to this Court; page 13 of its January 3, 2020 brief to the Court of Appeals). The new evidence not only reduces the overall evidence on which the government relied in attempting to carry its high burden of proof, but in fact provides an additional data point that—along with everything else—would lead a reasonable member of the public to harbor a significant doubt about the fairness of the proceedings. The new evidence is thus doubly adverse to respondent's UCI defense: it both weakens respondent's case and simultaneously strengthens Sergeant Bergdahl's. Respondent contends (at 24 n.15) that Judge Nance's representations were "not incongruent with the act of merely submitting an employment application when there has been no offer or acceptance of employment." Whether or not he had an offer in hand when he made those representations is no answer to his continuing R.C.M. 902 duty. What is more, despite having the burden of proof, respondent has adduced no evidence as to when he received or accepted a job offer.

defense into a false sense of security and deprived Sergeant Bergdahl of key information needed to recognize the need for (and to seek an opportunity to conduct) additional focused *voir dire* of the judge.

Respondent's claim (at 16) that Sergeant Bergdahl has failed to show prejudice is wide of the mark. For apparent UCI, such a showing is not required. *United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017). And where, as here, the question is not only disqualification but concealment of a matter into which an accused would have had every right (and reason) to inquire on *voir dire*, the concealment thwarts the defense's ability to show prejudice. Denying an accused the tools and information needed to *show* prejudice *is* prejudice.

Respondent's reliance (at 11) on *United States v. Snyder*, 2020 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 15, 2020), *pet. denied*, No. 20-0336/AF, 2020 CAAF LEXIS 628 (C.A.A.F. Nov. 13, 2020),[9] as a basis for limiting *al-Nashiri* to military commissions is misplaced. Judges Spath and Nance were members of the same pool of military judges. It makes no difference that the one (a sister service's Chief Military Judge) was presiding over a military commission while the other was presiding over a general court-martial. And in *Snyder*, as in *al-Nashiri*, there was no suggestion

[9] Denial of a petition for grant of review implies no judgment on the merits of the case. *United States v. McGriff*, 78 M.J. 487 (C.A.A.F. 2019) (per curiam).

that the military judge had affirmatively misled the defense. *See* 2020 CCA LEXIS 117 at *55-63.

The Air Force Court purported to distinguish *al-Nashiri* on the ground that "[t]here is not reason to believe that a DoJ hiring official would hear about [a ruling that implicated DOJ because it concerned SORNA] would be pleased or displeased, or that Judge Spath believed a DoJ hiring official would be aware of his ruling or that it would be any matter of consequence." *Id*. at *61. Here, in contrast, Judge Nance not only highlighted his role in this specific high-profile case, but attached as his writing sample a ruling that just happened to concern the very official to whom the Attorney General reports. Thus, the Air Force Court's decision rested on a distinction that ironically makes *al-Nashiri* more, rather than less, pertinent here.

Immigration judges are management officials. *U.S. Dep't of Justice, Exec. Off. for Immigration Review v. Nat'l Ass'n of Immigration Judges*, 71 FLRA No. 207, 1046, at 1049 (Nov. 2, 2020), *available at* https://www.flra.gov/decisions/authority-decisions?volume=71&issuancenumber= 207, *noted in* Brief of Law Professors as *Amici Curiae* at 3. The notion that, as such, they inhabit a professional world in which President Trump plays no role is untenable. *See generally id.* at 8-9, 12-13. No issue has been more pervasive in his administration's policies than immigration.

None is more closely associated with the President himself. And the Attorney General works for him, serves at his pleasure, heads the Justice Department—*and hires immigration judges*.

A reasonable member of the public, knowing all of this, would harbor a significant doubt about the fairness of the proceedings if she knew that Judge Nance had (1) concealed his DOJ job application from the defense, (2) affirmatively stated that he was UCI-proof because he was fixing to go home and retire, and (3) attached as his sole writing sample–plucked from the hundreds he surely penned in the more than 500 cases he tried over the course of his 12 years on the bench–the only one that happened to reject a claim of presidential UCI leveled against the then-incumbent.

Respondent attempts (at 16 n.9) to wriggle off this difficulty by pointing to the fact that Sergeant Bergdahl did not seek review of some of Judge Nance's rulings, this Court found no errors in some of them, and the Court of Appeals declined to grant review of some of them.

This is all irrelevant.

The question is not whether Judge Nance's rulings suggested he was partial, but whether his concealment of his application for a job that concerned one of the President's signature issues was something he had a duty to disclose (rather than

give the clear impression he was simply going to retire), and what effect this additional fact, atop the close question presented by the previously available information, would have on whether a disinterested, informed member of the public would harbor a significant doubt about the fairness of the proceedings.

IV

THE GOVERNMENT FAILED TO CARRY ITS UCI BURDEN

The UCI and UCI-relief issues have been fully briefed and decided both here and by the Court of Appeals. Aside from rather hyperbolically claiming (at 23 n.15) that Judge Nance's writing sample "castigated" President Trump,[10] respondent argues (at 21 n.13) that Sergeant Bergdahl's "claim does nothing to disrupt the CAAF's finding of no apparent UCI with respect to the investigative, preferral, referral, convening authority action or appellate review of the case."

This kind of piecemeal segmentation, treating each stage of a case as if it were hermetically sealed from the others, is mistaken, as shown by both this Court's 2019

[10] Calling Mr. Trump's campaign of vilification against Sergeant Bergdahl merely "troubling," "disturbing, or "disappointing," Resp. Ans. at 24, hardly qualifies as castigation. In fact, these kid glove terms are remarkably understated considering the outrageous facts. Found in Judge Nance's hand-picked writing sample, they signal to the potential employer that he was capable of soft-pedaling bad facts so as not to abort a prosecution to which the President had long been personally and deeply committed.

decision and that of the Court of Appeals. Apparent UCI claims are analyzed both on a per-stage basis and cumulatively.[11]

Judge Nance took critical actions on the very day and not long after he applied for a position at the Justice Department. (He surely did not first think about applying on the very day he hit "send," since that was the *last* day the Justice Department had allowed and the application surely required considerable time to prepare.) He denied Sergeant Bergdahl's "Rose Garden comments" motion to dismiss; he ruled on the providence of the pleas; he adjudged a sentence. Even on respondent's cramped view, therefore, every one of his actions from the time of his job application is directly at issue, along with everything downstream, to include the convening authority's action. *See al-Nashiri*, 921 F.3d at 240. From a cumulative perspective, everything is on the table, including prior aspects of the overall case.

Apparent UCI aside, the Court must also fashion a remedy for the military judge's R.C.M. 902 violation. For the reasons explained in the brief in support of the petition (at 14-15), the circumstances militate in favor of dismissal with prejudice on that ground as well, rather than pouring additional time, effort and resources into further proceedings.

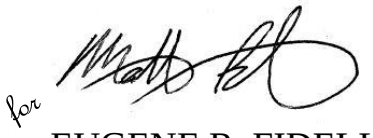
---

[11] *United States v. Bergdahl*, 80 M.J. 230, 239 (C.A.A.F. 2020) ("This conclusion is predicated on all of the relevant facts of this case, regardless of whether the various stages of the court-martial proceedings are viewed individually or cumulatively."); *United States v. Bergdahl*, 79 M.J. 512, 527 (A. Ct. Crim. App. 2019).

Conclusion

For the foregoing reasons and those previously stated, a writ of error coram nobis should issue dismissing the charges and specifications with prejudice.

Respectfully submitted.



EUGENE R. FIDELL
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Ste. 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

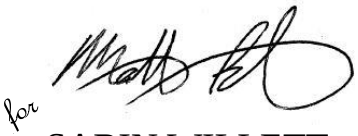
FRANKLIN D. ROSENBLATT
Butler Snow LLP
1020 Highland Colony Pkwy. #1400
Ridgeland, MS 39157
(601) 985-4494
franklin.rosenblatt@butlersnow.com

JONATHAN F. POTTER
Senior Appellate Counsel
Defense Appellate Division

MATTHEW D. BERNSTEIN
Major, Judge Advocate
Defense Appellate Division
(202) 838-7894
matthew.d.bernstein9.mil@mail.mil

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief Defense Appellate Division

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Dep. Chief Defense Appellate Division



SABIN WILLETT

CHRISTOPHER L. MELENDEZ

for
STEPHEN A. SALTZBURG
2000 H St., N.W.
Washington, DC 20052
(202) 994-7089
ssaltz@law.gwu.edu

for
SEAN T. BLIGH
Morgan, Lewis & Bockius LLP
One Federal St.
Boston, MA 02110-1726
(617) 951-8775
sabin.willett@morganlewis.com

for
STEPHEN I. VLADECK
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

for
PHILIP D. CAVE
1318 Princess St.
Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com

Appellate Defense Counsel

Certificate of Filing and Service

I certify that a copy of the foregoing Reply was sent via electronic submission to the Clerk of Court and the Government Appellate Division on November 23, 2020.

Matthew D. Bernstein

A P P E N D I X

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Sergeant (E-5) **ROBERT B. BERGDAHL,** United States Army, Appellant	ANSWER ON BEHALF OF APPELLEE TO APPELLANT'S PETITION FOR RECONSIDERATION Crim. App. No. ARMY 20170582 USCA Dkt. No. 19-0406/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

COME NOW the undersigned appellate government counsel and hereby requests this Court deny Appellant's petition for reconsideration. This Court should deny Appellant's petition for reconsideration because this Court properly analyzed and applied the law in its opinion with respect to the issues Appellant now seeks to re-litigate.[1]

Appellant seeks reconsideration, in part, on the basis that this Court misapplied the test for apparent unlawful command influence (UCI) by "blurring the distinction" between apparent and actual UCI. (Appellant's Pet. 4). This Court

[1] Appellant repeatedly mischaracterizes this Court's opinion as a "plurality opinion" in his petition for reconsideration. No portion of the Opinion of the Court authored by Judge Ohlson commanded less than a majority of the Court.

did no such thing. Rather, this Court clearly and correctly stated the apparent UCI test and framed its analysis in accordance with such test. *United States v. Bergdahl*, No. 19-0406, slip op. at 5 (C.A.A.F. 2020).

Appellant's circular suggestion that the split among judges bears on whether the government ultimately met its burden (Appellant's Pet. 3) is simply nonsensical and has no basis in the law. *See United States v. Criswell*, 78 M.J. 136 (C.A.A.F. 2018) (finding that the government carried its burden to prove harmlessness beyond a reasonable doubt over the dissent of two judges of this Court); *United States v. Torres*, 74 M.J. 154 (C.A.A.F. 2015) (same). In any event, the presence of a dissent has no bearing on whether grounds for reconsideration exist in light of the majority's application of the law analysis of the facts in this case.

While attempting to demonstrate that this Court erred in its application of apparent UCI doctrine, Appellant seemingly advocates for a standard of a fully informed observer who is only fully informed of the facts and circumstances that are helpful to him.[2] (Appellant's Pet. 7–23). When determining whether a

[2] Appellant faults the Opinion of the Court as both over-inclusive and under-inclusive. (Appellant's Pet. 8, 17). Under the standard advocated by Appellant in the instant petition—but not in his briefs or oral argument—the "fully informed observer" could not know that convening authorities frequently make disposition determinations at odds with the preliminary hearing officer, (Appellant's Pet. 8), but would know television catch-phrases. (Appellant's Pet. 23). This inventive standard is unworkable and unhelpful to guiding lower courts as to which facts it

reasonable observer fully informed of all the facts would harbor a significant doubt about the fairness of Appellant's court-martial, this Court appropriately considered, in juxtaposition with the comments at issue, the highly relevant facts that: 1) Appellant pleaded guilty to offenses that carried a significant maximum punishment; 2) Appellant chose not to withdraw his plea after the military judge gave him such opportunity; and 3) Appellant himself requested a dishonorable discharge for his serious misconduct.

This Court also gave appropriate weight to Appellant's argument concerning the alleged "policy" of not prosecuting repatriated prisoners of war. (Appellant's Pet. 20–21). Even if such a purported "policy" existed, it has little, if any, bearing on whether the comments by President Trump and Senator McCain placed an intolerable strain on the military justice system. As much as Appellant wishes it were so, the fact that he was subsequently captured and held by the Taliban does not absolve him from criminal liability for his conscious decision to intentionally leave his combat observation post, which it was his duty to defend, without authority. This Court correctly recognized, in pleading guilty to the offenses of

---

should cherry pick and ascribe to the informed observer—who would necessarily no longer be "fully informed." Instead, this Court properly looked to determine whether "'an objective, disinterested observer, *fully informed of all the facts and circumstances* would harbor a significant doubt about the fairness of the proceeding.'" *Bergdahl*, No. 19-0406, slip op. at 2 (quoting *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017)).

desertion with intent to shirk hazardous duty and misbehavior before the enemy, Appellant "explicitly agreed in open court that he was voluntarily pleading guilty *because he was in fact guilty* and not for any other reason," and correctly recognized the limitations of the "policy" that Appellant purports to exist.[3] *Bergdahl*, No. 19-0406, slip op. at 14–15 n. 10, 20.

Appellant also requests reconsideration on the basis that this Court's decision "will not deter political UCI" and "will only encourage more political UCI." (Appellant's Pet. 23–26). As an initial matter, no military court has ever held there exists a concept such as "political UCI." Unlawful command influence is clearly defined by Article 37, U.S.C. § 837 (UCMJ) (2012), and Rule for Courts-Martial 104 as interpreted by this Court's precedent. Further, Appellant's desire for a policy-oriented result has no bearing on this Court's application of the apparent UCI doctrine to the facts of this case. *See Universal Health Servs. v. United States*, 579 U.S. __, 136 S. Ct. 1989, 2002 (2016) ("[P]olicy arguments cannot supersede the clear statutory text"). To be sure, rather than encourage "more political UCI," this Court clearly expressed the dangers of commentary about pending cases by those capable of committing UCI. *See Bergdahl*, No. 19-0406, slip op. at 13–14. As perilous as such improper statements may be, their

[3] Among those limitations, this Court appropriately found that the source upon which Appellant relied to claim the existence of the purported "policy" did not support Appellant's assertion. *Bergdahl*, No. 19-0406, slip op. at 14–15 n. 10.

mere utterance does not, and cannot, lead this Court to completely disregard the parameters of the law. Instead, this Court should continue to follow Article 37, UCMJ, R.C.M. 104, and its own apparent UCI analysis as applied to the unique facts and circumstances of each case before it. Here, this Court correctly considered all of the relevant facts and circumstances to conclude that the comments by President Trump and Senator McCain "did not place an intolerable strain on the public's perception of the military justice system *in this particular case*." *Bergdahl*, No. 19-0406, slip op. at 24–25 (emphasis added).

With respect to the remaining points Appellant raises in the petition for reconsideration, the government rests on its brief and its oral argument, concedes none of those points, and opposes all of them. This Court did not err in its application of the law or rely on any clearly erroneous facts in Part II.C. of its opinion, and no other circumstances exist that warrant this Court to reconsider its opinion. Accordingly, this Court should deny the petition for reconsideration.

CONCLUSION

WHEREFORE, the United States prays that this Honorable Court deny Appellant's petition for reconsideration.

ALLISON L. ROWLEY
Captain, Judge Advocate
Branch Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0773
Allison.l.rowley.mil@mail.mil
U.S.C.A.A.F. Bar No. 36904

JONATHAN S. REINER
Major, Judge Advocate
Appellate Attorney, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Room 2016
Fort Belvoir, VA 22060
(703) 693-0793
Jonathan.s.reiner.mil@mail.mil
U.S.C.A.A.F. Bar No. 35862

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0774
Wayne.h.williams.mil@mail.mil
U.S.C.A.A.F. Bar. No. 37060

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

This brief contains **1,098** words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

This brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

ALLISON L. ROWLEY
Captain, Judge Advocate
Attorney for Appellee
September 11, 2020

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on September 11, 2020.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate
General, United States Army
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. ROBERT B. BERGDAHL Sergeant (E-5) U.S. Army, *Appellant*.	))))))))))	APPELLANT'S REPLY TO ANSWER TO PETITION FOR RECONSIDERATION Crim. App. Dkt. No. ARMY 20170582 USCA Dkt. No. 19-0406/AR September 18, 2020

TO THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

Index

Table of Cases, Statutes, and Other Authorities

Cases:

Supreme Court of the United States:

U.S. Court of Appeals for the Armed Forces:

Constitution and Statutes:

Rules:

Miscellaneous:

Reply

The government is right about one thing[1] but wrong about everything else. It has made no effort to respond to, much less rebut, a variety of substantial points in the petition, including our showing that the Court's "intolerable strain" analysis was in fact an application of actual-UCI doctrine, despite its invocation of the apparent UCI test. This latter serves to explain why the Court's analysis seems strained.

1. The core of the "intolerable strain" analysis has two components. One is the characteristics attributed to the observer. *See* Petition for Reconsideration at 7. The other is the "evidentiary burden" the government must meet. *See United States v. Boyce*, 76 M.J. 242, 250 (C.A.A.F. 2017) (Ohlson, J.). Neither of those words is surplusage; both do work. Bryan Garner's first definition of "evidentiary" is "Having the quality of evidence; constituting evidence; evidencing." BLACK'S LAW DICTIONARY 640 (Bryan A. Garner ed., 9th ed. 2009). An evidentiary matter is something that is proven by lawful evidence or of which judicial notice may be taken. Mil. R. Evid. 201; *see also* C.A.A.F. 30A(b).[2] To treat as "evidentiary" propositions

---

[1] The Opinion of the Court was not a plurality opinion: three Judges joined section II.C. (including its acknowledgement that the "intolerable strain" issue was a "close question" that "give[s] great pause," requiring "long consideration").

[2] The government never asked at trial, at the Army Court, or here for judicial notice of any of the matters on which the Court's intolerable strain analysis relies. Nor does the opinion purport to take judicial notice. *See* Mil. R. Evid. 201(c).

that are merely *conceivable* or that can merely be *posited* is to transform the most critical part of apparent UCI analysis into something more akin to rational basis review. Rational basis review, however, has no place in the adjudication of a criminal charge. Moreover, such a transformation would turn one party's ostensible beyond-a-reasonable-doubt burden into the other party's burden to prove that some proposition could not possibly be true. It is difficult to imagine a more dramatic or unwarranted inversion of this Court's settled law.

Similarly, the word "burden" indicates that it is incumbent on a party, not the Court, to assemble the propositions it claims (and must prove) take a case out of the "intolerable strain" zone. As the petition repeatedly notes, key elements on which the decision rests were never advanced by the government. Whether or not those elements would have justified a no-intolerable-strain holding in the abstract, it was for the government to prove them, rather than for the Court to do its work for it. This defect is not cured by a government submission that in turns says the majority's assemblage is correct. It is for the Court to approve a government submission rather than the other way around.

2. The most revealing sentence in the government's answer appears on page 4: "[N]o military court has ever held there exists a concept such as 'political UCI.'" From this we learn that the government considers UCI an essentially static doctrine, a view that is conclusively refuted by the cornucopia of UCI issues with which the

Court has had to wrestle over its entire existence. It also suggests that the government has learned nothing from this case or even from the op-ed recently published by its own trial counsel or the cautionary letter to the editor that former Secretary Chuck Hagel sent in response. Its resistance to the very idea that a new and pernicious form of UCI—one that can be defined as "UCI committed for the purpose of achieving a political end"—might arise shows the importance of what the Court does in this case, not merely what it says. What makes political UCI especially concerning is that those civilian officials whose words or deeds give rise to it–unless they fortuitously happen to be retired regulars subject to the Code, like the late Senator McCain–are beyond the reach of Article 131f, UCMJ. *See Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 87.c.(2). If the Court has never seen a case like this, it is not because the law doesn't cover it, but because misbehavior as blatant as that of the President and Senator McCain has never happened.

It is not wrong to take account of a decision's "grave implications." *See, e.g., United States v. Bess*, 80 M.J. 1, 21 (C.A.A.F. 2020) (Ohlson, J., dissenting). This is unquestionably such a case.

3. The government quotes Justice Thomas's opinion for a unanimous Court in *Universal Health Servs. v. United States*, 136 S. Ct. 1989, 2002 (2016), for the proposition that "policy arguments cannot supersede the clear statutory text." All will agree with that proposition, but it has nothing to do with this case or the "intolerable

strain" issue. No statutory text precludes any argument Sergeant Bergdahl has advanced. The Court's UCI jurisprudence grows from Article 37, UCMJ, R.C.M. 104(a)(1), and the Due Process Clause, and not a jot or tittle of the text of any of those sources forbids the Court from taking into account any of the considerations on which the petition relies. If the government had in mind the amended version of Article 37, (a) the actions that gave rise to the apparent UCI here all occurred before the December 20, 2019 effective date, *see* Appellant's Reply Br. at 2 n.2, and (b) no inference can be drawn from the statutory clarification that Congress disapproved of this Court's apparent UCI caselaw. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 & n.12 (1994).

4. The government (at 2) cites *United States v. Criswell*, 78 M.J. 136 (C.A.A.F. 2018), and *United States v. Torres*, 74 M.J. 154 (C.A.A.F. 2015), in support of its insistence that our reference to the divergent judicial views expressed here and on the Army Court is "simply nonsensical and has no basis in the law." Those were, to be sure, 3-2 decisions, in which the Court was divided on whether the government had shown an error to be harmless beyond a reasonable doubt. But there the similarity ends. They are readily distinguishable.

First, in neither case was there a general recognition by all of the Judges who formed the majority that the issue was a close one. Indeed, the only Judges who thought *Torres* was close were the dissenters. *See United States v. Torres*, 74 M.J.

at 159 (Stucky, J., dissenting, joined by Erdmann, J.). This contrasts sharply with the majority's strong acknowledgement that the "intolerable strain" issue was a close one.

Second, neither *Torres* nor *Criswell* involved a claim of apparent UCI. The apparent UCI doctrine vindicates the strong interest in fostering public confidence in the military justice system and properly enjoys a special place in the Court's jurisprudence. It is UCI that impelled Congress to think of this Court as a "bulwark." Neither *Torres* nor *Criswell* called upon the Court to make the kind of informed, objective observer analysis *Boyce* and the other leading cases mandate for apparent UCI claims. The cases the government cites required the Court to directly evaluate harmlessness, rather than to do so through the prism of what a member of the general public would conclude. A close division on the "intolerable strain" issue thus (a) involves a different kind of analysis and (b) vindicates a different interest from the search for individualized prejudice that is required in cases involving conventional matters like the suppression of evidence (*Criswell*) or instructional error (*Torres*). As a consequence, such a division should indeed be a cause for concern.

5. In response to the petition's analysis of the majority's imputation of facts to a member of the general public, the government insists (at 2 n.2) that the "inventive standard is unworkable and unhelpful to guiding lower courts as to which facts it should cherry pick and ascribe to the informed observer." We are at a loss to

understand what "inventive standard" this refers to. What is clear, however, is that the majority's imputation of knowledge to the person-on-the-street observer is so unstructured, limitless, and one-sided that outcomes in apparent UCI cases will be unpredictable. The government suggests (at 5) that it is fine to treat every UCI case as *sui generis*. The result of doing so will be to keep the Courts of Criminal Appeals guessing, along with military judges, convening authorities, staff judge advocates, trial and defense counsel, and, more importantly, even the senior officials, military and civilian, who are entitled to know what they can and cannot do. Where outcomes are unknowable because, to quote Cole Porter, "anything goes" when it comes to what knowledge is imputed to the observer, the battle for deterrence is over before it begins.

6. The government's answer makes no effort to reconcile the outcome here with those in *Boyce* (where, as here, the maximum authorized penalty was death) and *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (where, as here, the accused pleaded guilty).

Given the stress the majority put on Sergeant Bergdahl's pleas, it is not surprising that the government too would emphasize them (at 3-4). We have already shown why those pleas do not support a no-intolerable-strain determination or at worst are a wash on that issue. Petition for Reconsideration at 15-16. We would only

add that allowing a guilty plea to drive the intolerable-strain analysis erodes the principle that a litigated UCI claim is not waived by such a plea. What is more, President Trump's R.C.M.-violative tweet describing the sentence as "a complete disgrace to our Nation and to our Military" came *after* pleas and prior to convening authority action. As a result, it is especially clear that Sergeant Bergdahl's pleas provide no support for a finding in the government's favor in respect of the refusal of clemency, as Judge Ewing noted below.

7. The government refers (at 4 n.3) to the Court's footnote regarding Sergeant Bergdahl's reliance on the Department of Defense policy against prosecuting returning POWs unless they misbehaved in captivity. He has repeatedly invoked this policy.[3] In the intervening years, the government has never pointed to a single document or disciplinary action that refutes this account of the policy. Despite untrammeled access to the records, it has reported no case in which a POW who, like Sergeant

---

[3] *E.g.*, D APP 66, at 9 (quoting 2000 OSD history) ("Since the 1960s, Defense Department policy has disfavored the prosecution of returning POWs except those who collaborated with the enemy. When former New York Governor W. Averell Harriman served as POW coordinator during the Vietnam War, he stressed to Secretary McNamara the 'prudence of greeting any release or escapee with open arms and, except in the most flagrant instances of wrongdoing or outright collaboration, refraining from taking legal action against repatriated prisoners.' Harsh treatment of returned captives, he wrote, was 'unnecessarily heartless.'").

Bergdahl, behaved properly in captivity was prosecuted for misconduct that occurred prior to being taken prisoner. Its failure even to comment on the plainly distinguishable case of Sergeant Jenkins, to which we have referred, speaks volumes.

In the briefing, the government did not dispute that there was such a policy. Instead, it claimed without elaboration that Sergeant Bergdahl's "desertion and misbehavior before the enemy makes this case different from a typical POW case." Gov't Br. at 33. Apparently emboldened by the Court's decision, it now claims (at 3) that even if there were such a policy, "it has little, if any, bearing on whether the comments by President Trump and Senator McCain placed an intolerable strain of the military justice system."

We respectfully disagree. First, that policy would be a factor the convening authority would properly take into account in deciding on clemency, and hence goes to whether a denial of clemency was indeed a foregone conclusion. This in turn goes to whether the government had carried its burden beyond a reasonable doubt. Second, the Court must apply the same standard when deciding what considerations militate—in the observer's eyes—for and against a finding of "intolerable strain." The policy to which we have referred is as least as appropriate for imputation to the observer as the rather obscure sources in the Court's chain syllogism about the effect of non-prosecution on troop morale. If a returning POW did not misbehave in cap-

tivity, the policy disfavors prosecution, and prosecution of such a POW would adversely affect the morale of POWs. It is difficult to see that consideration as materially less salient (and imputable to the observer) than the morale effect of not prosecuting a Solder who, like Sergeant Bergdahl, leaves his place of duty without authority but for reasons that all agree were well-intentioned.

Conclusion

Just as a total denial of clemency was not inevitable, neither was referral of charges to a court-martial. The Army knew in 2009 that Sergeant Bergdahl had gone outside the wire without authority. It knew in 2009 about the search effort. Yet for five years it afforded him a variety of benefits. He was always deemed to be in a duty status, and was not listed as either AWOL or a deserter. The Army paid him, promoted him twice, and awarded him a Good Conduct Medal. Only after the political firestorm stoked by news outlets, Mr. Trump, and Senator McCain erupted did the Army reverse engines and turn Sergeant Bergdahl's case into the military crime of the century. What observer would *not* wonder what had changed?

For the foregoing reasons and those previously stated, the Court should grant the petition, determine that the government failed to satisfy its burden beyond a reasonable doubt, and order the charges and specifications dismissed with prejudice.

A separate motion to supplement the record is being submitted with this reply. We have omitted any reference to the matter proffered with that motion in preparing this reply.

Respectfully submitted,

EUGENE R. FIDELL
CAAF Bar No. 13979
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Ste. 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

FRANKLIN D. ROSENBLATT
CAAF Bar No. 36564
Butler Snow LLP
1020 Highland Colony Pkwy #1400
Ridgeland, MS 39157
(601) 985-4494
franklin.rosenblatt@butlersnow.com

JONATHAN F. POTTER
CAAF Bar No. 26450
Senior Appellate Counsel
Defense Appellate Division

STEPHEN A. SALTZBURG
CAAF Bar No. 26415
2000 H St., N.W.
Washington, DC 20052
(202) 994-7089
ssaltz@law.gwu.edu

MATTHEW D. BERNSTEIN
Major, Judge Advocate
CAAF Bar No. 35859
Defense Appellate Division
(202) 838-7894
matthew.d.bernstein9.mil@mail.mil

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief Defense Appellate Division
CAAF Bar No. 33185

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Dep. Chief Defense Appellate Division
CAAF Bar No. 36437

SABIN WILLETT
CAAF Bar No. 37214

CHRISTOPHER L. MELENDEZ
CAAF Bar No. 37216

SEAN T. BLIGH
CAAF Bar No. 37215
Morgan, Lewis & Bockius LLP
One Federal St.
Boston, MA 02110-1726
(617) 951-8775
sabin.willett@morganlewis.com

STEPHEN I. VLADECK *Appellate Defense Counsel*
CAAF Bar No. 36839
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

September 18, 2020

Certificate of Compliance with Rule 37(a)

This Reply complies with the typeface and type style requirements of Rule 37(a).

Eugene R. Fidell

Certificate of Filing and Service

I certify that I filed and served the foregoing Reply on September 18, 2020, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and the *amici curiae*.

Eugene R. Fidell

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	AMENDED ANSWER TO APPELLANT'S MOTION TO SUPPLEMENT THE RECORD
v.	
Sergeant (E-5) **ROBERT B. BERGDAHL,** United States Army, Appellant	Crim. App. No. ARMY 20170582 USCA Dkt. No. 19-0406/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

COME NOW the undersigned appellate government counsel and hereby requests that this Court deny Appellant's motion to supplement the record.

Procedural Posture and Facts

On October 16, 2017, a military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of desertion with intent to shirk hazardous duty and misbehavior before the enemy in violation of Articles 85 and 99, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 899 (2012). According to Appellant's motion to supplement the record, the military judge applied for a position as an immigration judge with the Department of Justice (DOJ) on the day of Appellant's guilty plea and included his February 24, 2017, ruling on unlawful command influence (UCI)—relating to President Trump's campaign comments—as a writing sample. On September 28, 2018, well after the military judge

sentenced Appellant, the DOJ published a press release stating that the Attorney General appointed the military judge as an immigration judge.

On December 21, 2018, Appellant filed his opening brief before the Army Court of Criminal Appeals (Army Court). The Army Court affirmed appellant's sentence on July 16, 2019. *United States v. Bergdahl*, 79 M.J. 512 (A. Ct. Crim. App. 2019). This Court affirmed the judgment on August 27, 2019. *United States v. Bergdahl*, No. 19-0406, slip. op. (C.A.A.F. 2020). On the same day that this Court affirmed, Appellant's counsel sent a Freedom of Information Act (FOIA) request to the DOJ for the military judge's employment application.

On September 7, 2020, Appellant filed a petition for reconsideration. The petition did not mention the military judge's employment even though the DOJ had issued a press release announcing it in September 2018. Appellee filed an answer to the petition on September 11, 2020. Appellant's petition also did not reference his pending FOIA request. Appellant filed a reply on September 18, 2020. Appellant's reply did not raise the information contained in his motion to supplement the record. (Reply Br. 10).

Law and Argument

1. The Motion Fails To Establish The Requisite Good Cause To Supplement The Record.

This "Court will normally not consider any facts outside of the record established at the trial and the Court of Criminal Appeals." Rule 30A(a). This Court "is generally unreceptive to motions . . . to supplement the record. *E.g.*, *United States v. Bergdahl*, [79] M.J. [435], No. 19-0406/AR, 2020 CAAF LEXIS 46 (C.A.A.F. Jan. 29, 2020) (mem.); *United States v. Bergdahl*, 79 M.J. 307 (C.A.A.F. 2019) (mem.)." Eugene R. Fidell & Dwight H. Sullivan, *Guide to the Rules of Prac. and Proc. for the U.S. Court of Appeals for the Armed Forces* § 30A.03[1] (19th ed. 2020) (additional internal citations omitted). This Court may grant an exception to the general rule "only for good cause shown[,]" Rule 30A(a), and denies motions to supplement the record that do not meet the requisite good cause. *United States v. Stefan*, 69 M.J. 256, 257 n.1 (C.A.A.F. 2010).

Here, Appellant fails to establish good cause for this Court to consider the extra-record material he seeks to attach. Although Appellant received the material on September 15, 2020, the DOJ publicized the hiring of the military judge in September 2018, three months prior to Appellant filing his opening brief with the Army Court. Yet, Appellant waited until the day this Court issued its opinion to even seek the material he now wishes to be considered by this Court. Appellant does not offer good cause for the belated supplementation of the record after the

issuance of this Court's opinion. Accordingly, the motion should be denied for failure to establish the requisite good cause.

2. The Proffered Material Will Not Assist This Court To Conduct A Proper Reconsideration.

This Court should deny the motion because the proffered material will not assist this Court to conduct a proper reconsideration. A petition for reconsideration "shall state with particularity the . . . fact which, in the opinion of the party seeking reconsideration, the Court has overlooked or misapprehended . . . ." Rule 32. "Overlook" means to look past, miss, ignore, or excuse. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/overlook>, (last visited Sep. 21, 2020). "Misapprehend" means to misunderstand. MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/misapprehend>, (last visited Sep. 21, 2020).

The Court neither overlooked nor misapprehended any fact contained in the record at the time it decided this case. Rather, Appellant seeks to use his motion to supplement the record as a vehicle to: 1) introduce extra-record available since at least September 2018 yet not requested or provided for consideration until this Court issued its opinion that denied Appellant relief; and 2) allege an entirely new argument for reconsideration after the submission of his petition for reconsideration. In doing so, Appellant seeks to use reconsideration in the precise manner for which is it not intended: "A motion for reconsideration should not be

used as a vehicle to present evidence that was available when the matter was initially adjudicated." *United States v. Luger*, 837 F.3d 870, 875 (8th Cir. 2016) (citations omitted); *see also Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 252 (3d Cir. 2010) (explaining that "'new evidence' for reconsideration purposes does not refer to evidence that a party obtains or submits to the court after an adverse ruling."). Although Appellant declined to request the military judge's employment application for the first twenty-three months after the DOJ publicized his appointment, Appellant received the requested documentation in less than twenty days after his request. Consequently, it is apparent that Appellant could have supplied this information at a far earlier date. Granting Appellant's motion would only incentivize litigants to ignore potential evidence until after the opponent can no longer respond.[1] Simply put, Appellant's failure to previously supply this Court with additional information to consider does not justify further expanding the record with information that he declined to seek for two years for purposes of reconsideration.

[1] Appellant seeks to have this Court consider the additional information contained in the motion "in connection with the petition for reconsideration" (Mot. to Supp. 1), after Appellee already filed its response to the petition. *See Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992) (explaining that appellate courts decline to consider new arguments raised for the first time in reply briefs because to do so "would be manifestly unfair to the appellee who, under [procedural] rules, has no opportunity for a written response.").

3. The Proffered Material Will Not Change The Outcome.

This Court should deny the motion because the proffered materials would have no impact on the outcome of this case. The military judge's employment application with the DOJ bears no nexus to whether the President's comments placed an "intolerable strain" on the public's perception of the military justice system.[2] *United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). It does not bring into question this Court's conclusion that the military judge was impervious to outside forces, including the President's comments. Although the DOJ is an executive agency, immigration judges—the position for which the military judge applied—are appointed and supervised by the Attorney General, not the President. *See* 8 U.S.C. § 1101(b)(4). Even if the DOJ's status as an executive agency was of import, the materials Appellant seeks to attach shows that the military judge, directly informed this agency that he publicly found the President's actions inappropriate through his submission of his February 24, 2017, ruling on the

[2] Appellant's attempt to equate this case with *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019) is unavailing. *In re Al-Nashiri* addressed a different legal issue—judicial disqualification—than the issue before this Court in this case. The question before this Court is not whether "a reasonable person would question the impartiality of Judge Nance in *Bergdahl*," (Mot. to Supp. 9), but rather whether the comments by President Trump and the late Senator McCain amounted to apparent UCI. Even still, the D.C. Circuit concluded that Judge Spath was disqualified from serving as a Military Commissions judge because he presided over a case in which his potential employer, the DOJ, was a participant; a fact not found in the current case. *Al-Nashiri*, 921 F.3d at 236-37.

President's campaign comments. The ruling highlighted the military judge's belief that the President's campaign comments were "troubling[,]" "disturbing[,]" and "disappointing." (JA 82-84). By no means did the military judge condone the comments in that ruling: "[W]e have a man who eventually became President . . . making conclusive and disparaging comments, while campaigning for election . . . . The Court recognizes the problematic potential created by these facts." (JA 82-84). Rather, the military judge indicated that he would "take special care to ensure the comments by Mr. Trump do not invade the trial." (JA 83).

The military judge's actions between Appellant's guilty plea and sentencing dispel any perception that the military judge was influenced, or appeared to be influenced by President Trump's comments by virtue of his pending DOJ employment application. On the same day the military judge submitted his application—and after having been informed of the President's views by Appellant's previous UCI motion concerning his campaign comments—the military judge acquitted Appellant of the sole portion of the charges that he contested. After the President's October 16, 2017, Rose Garden comment, the military judge offered Appellant the opportunity to withdraw his guilty plea and admitted all of the President's comments *as mitigation* during sentencing. Weeks later, in November 2017, after a seven-hour deliberation, the military judge adjudged a sentence that included a dishonorable discharge and no confinement—

precisely in accordance with Appellant's request and completely in disaccord with the punishment suggested by the President. (R. at 2693-2694, 2701-2703; Appellee Br. 48-49). Eleven months later, despite the military judge's condemnation of the President's comments and issuance of a sentence the President called a "disgrace," he began his employment with the DOJ.

Under these circumstances, the pendency of the military judge's employment application reinforce that he was not influenced by the President's comments—or that there was a perception thereof—and that his commendable judicial independence did not—or appear to—impact his future federal employment prospects. The President's comments would not lead an "objective, disinterested observer, fully informed of all the facts and circumstances," including the military judge's employment application, to "harbor a significant doubt about the fairness of the proceeding[,]" given the unique facts of this case. *Boyce*, 76 M.J. at 249. Appellant's conviction and sentence—including a dishonorable discharge and no confinement—in this case did not appear to be the result of the President's comment's, but was the result only of his guilty plea admitting that he was in fact guilty of the charged offenses and requested sentence of a dishonorable discharge and no confinement. Accordingly, because this information will not affect the outcome in this case, this Court should not take the extraordinary step of

attaching new documents to the record after the issuance of its opinion and the filing of a petition for reconsideration.

CONCLUSION

WHEREFORE, the United States prays that this Honorable Court deny Appellant's motion to supplement the record and determine the petition for reconsideration, if granted, based upon the record on which it decided the appeal.

ALLISON L. ROWLEY
Captain, Judge Advocate
Branch Chief, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0773
Allison.l.rowley.mil@mail.mil
U.S.C.A.A.F. Bar No. 36904

JONATHAN S. REINER
Major, Judge Advocate
Appellate Attorney, Government
Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Room 2016
Fort Belvoir, VA 22060
(703) 693-0793
Jonathan.s.reiner.mil@mail.mil
U.S.C.A.A.F. Bar No. 35862

WAYNE H. WILLIAMS
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate
Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0774
Wayne.h.williams.mil@mail.mil
U.S.C.A.A.F. Bar. No. 37060

Certificate of Compliance with Rule 37(a)

This motion complies with the typeface and type style requirements of Rule 37(a).

ALLISON L. ROWLEY
Captain, Judge Advocate
Attorney for Appellee

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on September 24, 2020.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate
General, United States Army
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY TO AMENDED
	)	ANSWER TO MOTION TO
Appellee,	)	SUPPLEMENT THE RECORD
	)	
v.	)	
	)	Crim. App. Dkt. No.
ROBERT B. BERGDAHL	)	ARMY 20170582
Sergeant (E-5)	)	
U.S. Army,	)	USCA Dkt. No. 19-0406/AR
	)	
Appellant.	)	September 29, 2020

TO THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

Index

Table of Cases, Statutes, and Other Authorities

Cases:

Statutes:

Rules:

Miscellaneous:

Reply to Amended Answer to
Motion to Supplement the Record

I

SERGEANT BERGDAHL HAS SHOWN GOOD CAUSE

A party moving to supplement must show good cause. C.A.A.F. Rule 30A(a). Sergeant Bergdahl has done so. The documents he obtained under the Freedom of Information Act, 5 U.S.C. § 552, pertain to the informed observer analysis with which the Court has wrestled and which is the subject of the pending petition for reconsideration. Points 1 and 2 of the government's amended answer argue that the FOIA documents should not be considered. Those reasons are unpersuasive.

First, the government suggests that the motion to supplement comes too late. The point is not well taken. The Court's rules set no deadline for such motions. If the government's claim is, in substance, that Sergeant Bergdahl is guilty of laches, that requires a showing of prejudice. *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). The government has not claimed that its ability to respond to the FOIA documents has been compromised in any way by the timing of the motion to supplement. It argues (at 4) that Sergeant Bergdahl has raised "an entirely new argument," but he has simply proffered new evidence in support of a very old one. That evidence bears on the issue on which the Court granted review (and as to which the government bears the burden). That public confidence in the administration of military justice is vital, and that the new evidence bears upon it, establish good cause to supplement

the record. *See United States v. Barry*, 76 M.J. 407 (C.A.A.F. 2017) (mem.) (granting reconsideration and leave to supplement the record in a UCI case), *noted in* EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 30A.03[2], at 315-16 (19th ed. 2020). On the merits, a similar issue, sounding in judicial conflict of interest rather than apparent UCI, is before the Court in another case. *See* Supplement to Petition for Review (Revised), *United States v. Snyder*, No. 20-336/AF (filed Sept. 24, 2020), at 6-7, 31-35. There are presumably other cases with the same issue in one posture or another given the number of military judges who sought and obtained appointment as immigration judges.

Contrary to the implication in its footnote 1, the government has suffered no unfairness. Timing does not seem to have concerned the government: it filed early, *see* C.A.A.F. R. 30(b), 34(a), it does not protest that it needs more time to marshal evidence from the military judge or other percipient witnesses, and it sought no additional time under Rule 33.

Critically, the amended answer is silent as to when the government learned that Judge Nance's representations on the record were incorrect, that he had applied for a position as an immigration judge, or that he had been hired. In the absence of any representations on these matters, much less any supporting evidence, it does not lie in the government's mouth to complain about the timing of our FOIA request.

This is especially true because, if any member of the trial counsel team, the appellate government team, or the Office of The Judge Advocate General of the Army (which deals with retirements among other personnel matters) was aware of Judge Nance's application or hiring, the government had a duty to inform the defense. *It never did.*

Instead, the government says only that Sergeant Bergdahl should have made his FOIA request earlier. But Judge Nance's undisclosed job application wasn't some routine discovery matter. It relates to an issue as to which both the government and the military judge had *an affirmative duty of disclosure*. Sergeant Bergdahl had a right to rely on the military judge's assurances, and should certainly not be penalized for accepting them at face value.

The government's duty to inform the defense is settled law. "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also United States v. Behenna*, 71 M.J. 228, 237-38 (C.A.A.F. 2012) (same). There are three components to a *Brady* violation: the evidence must be favorable to the accused (either exculpatory or impeaching); it must have been suppressed (either willfully or inadvertently); and prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). These standards do not require that the defendant make a request or could have sought the information on his own. The

Supreme Court has firmly rejected the notion that defense counsel should have uncovered *Brady* information, stating that counsel are entitled to rely on the representations of the prosecutor and, more generally, on the prosecutor's constitutional duty of disclosure. *Strickler*, 527 U.S. at 283 n.23, 284. "A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 688, 695-98 (2004).

The government's *Brady* obligations continued until the convening authority's action. *United States v. Hawkins*, 73 M.J. 605, 612 (Army Ct. Crim. App.), *rev. denied*, 73 M.J. 448 (C.A.A.F. 2014). *Brady* disclosures are especially important after trial where, as here, the investigative resources of the accused are diminished. "[O]nce trial comes, the prosecution may not assume that the defense is still in its investigatory mode." *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). As the Supreme Court observed in *Banks*, 540 U.S. at 695, "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."

Judge Nance also had a duty to disclose. His pending application to the Justice Department, the explicit links between that application and this case, his UCI ruling that rested on his claim of invulnerability, and his pecuniary interest in the Justice Department job all mandated disclosure under R.C.M. 902. According to the official Comment to Rule 2.11 of the Code of Judicial Conduct for Army Trial and Appellate

Judges (May 16, 2008), "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." A failure to disclose "deprive[s] the parties of an adequate foundation for their decisions on whether or not to request recusal" and makes it harder for the military judge to evaluate "those facts crucial to determining whether there was a conflict or appearance of conflict requiring disqualification." *United States v. Quintanilla*, 56 M.J. 37, 79–80 (C.A.A.F. 2001).

The amended answer was not accompanied by any statement from the military judge that might explain the obvious tension between what he said on the record and what he had done. Nor does it shed light on what efforts, if any, the government made, before or after the motion to supplement, to determine who in the Army knew what *and when*. Since the government has (at 6-9) in effect supplemented its answer to the petition for reconsideration, there is no sense in which its ability to respond has been compromised by any delay in submission of the FOIA request that unearthed Judge Nance's job application.

For all these reasons, the government's first two arguments are without merit.

II

THE FOIA DOCUMENTS FURNISH ADDITIONAL GROUNDS FOR CONCLUDING THAT THE GOVERNMENT DID NOT CARRY ITS APPARENT UCI BURDEN OF PROOF

The government's remaining argument is that the FOIA documents "will not change the outcome." That may or may not be true as a predictive matter, but it is not the test. Rules 30A(c) and (d), which concern remands for factfinding and stipulations, respectively, strongly suggest that the test under Rule 30A is whether the proffered matter "*may* affect the Court's resolution of the case" (emphasis added). Nothing in the rule suggests that there is one test for remands and stipulations, but another, harsher one, for all other factfinding.

As Sergeant Bergdahl's motion to supplement explains, the facts and circumstances surrounding Judge Nance's claims that he was impervious to UCI because he was retiring are among the many that would lead an objective observer to harbor a significant doubt about the fairness of the proceedings. *See United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017). They cut against the "no-intolerable-strain" case the government must make beyond a reasonable doubt.

Rather than confront the military judge's inexplicable failure to disclose, the government makes several unpersuasive arguments.

First, it insists (at 6) that an observer would make nothing of the judge's application because immigration judges are appointed and supervised by the Attorney

General rather than by the President. But the Constitution provides for a unitary executive, with the President retaining overall control. The Attorney General is removable by the President with or without cause, as shown by Attorney General Jeff Sessions' removal for having recused himself from certain matters involving the President, as it was his duty to do.[1] The law treats the Attorney General and a handful of other senior officials as the President's *alter ego*. *See, e.g.*, *In re Application for Appointment of Independent Counsel*, 596 F. Supp. 1465, 1470 (E.D.N.Y. 1984), *vacated on other grounds*, 766 F.2d 70 (2d Cir. 1985); *see also Ponzi v. Fessenden*,[2] 258 U.S. 254, 262 (1922) (Taft, C.J.) (Attorney General is "the hand of the President"). Thus, the government's first contention is without merit.

Second, the government claims (at 6-7) that the decision Judge Nance submitted as his writing sample to become an immigration judge was actually critical of President Trump. Despite its softball treatment of the Commander in Chief, that decision was unquestionably adverse to Sergeant Bergdahl. Not only were no charges dismissed, but President Trump remained free to disregard the most fundamental principles of UCI in his Rose Garden ratification and later in the "disgrace" tweet.

---

[1] This matter is sufficiently notorious, easily confirmed, and beyond reasonable dispute that the Court can take judicial notice of it. Mil. R. Evid. 201(b).

[2] Yes: *that* Ponzi.

Judge Nance was hired after those events and, notably, after he had denied Sergeant Bergdahl's renewed motion to dismiss. An informed observer would know that he was a commissioned officer on active duty and hence subject to Art. 88, UCMJ, *see* Art. 2(a)(1), UCMJ, and that truth would not have been a defense, *see Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 14.c., had he employed the harsher language President Trump's UCI deserved.

Third, the government takes solace in the fact that Judge Nance acquitted Sergeant Bergdahl of all but one day of the years-long period of desertion the government alleged in the specification to Charge I. This is a desperate argument. Judge Nance had denied Sergeant Bergdahl's motion in limine concerning duration, deferring the question to the trier of fact. App. Ex. 48. When Sergeant Bergdahl pleaded guilty to a one-day-duration desertion, the government made a perfunctory attempt to prove the longer period. R. at 1678-79, 1706. Because Judge Nance had no choice but to acquit as to that longer period, the partial acquittal he adjudged is no evidence of his independence. As a result, it does not help the government carry its burden.

Fourth, the government insists that Judge Nance's claim that he would take President Trump's comments into account in sentencing does not answer the mail. His denial of the renewed motion to dismiss was incorrect, and, tellingly, he refused, in the face of a specific argument by defense counsel, JA 513, to state separately whatever sentencing discount he was giving in respect of President Trump's latest

UCI. As a result, neither Sergeant Bergdahl, President Trump, this Court, nor the objective observer can ascertain whether the sentence was in fact adjusted. We had cautioned that "[s]ubmerging UCI relief into a sentence blunts the message and thwarts meaningful review," JA 513, but that is precisely what will have happened if the Court accepts this part of the government's claim. Worse yet, it effectively gives Judge Nance credit for awarding UCI relief in a case in which he explicitly found that the government had carried its burden.

Fifth, the government cites (at 7) the fact that Judge Nance deliberated for seven hours. All we know is that court was in recess that long. The record does not reveal how much of that recess was actually spent deliberating, as opposed to going through and/or sending emails, making and answering phone calls, having lunch, checking on his job application, or performing other functions.

Sixth, the government points (at 7-8) to the fact that Sergeant Bergdahl was not sentenced to confinement. An objective observer could nonetheless harbor a significant doubt for all the reasons we have previously explained.

Finally, the government has the chutzpah (at 8) to cite the "disgrace" tweet as somehow assuaging the reasonable observer's doubts. It does no such thing, and the government's imaginative contrary suggestion is perverse. The military judge's failure to grant either of Sergeant Bergdahl's motions to dismiss because of President Trump's words and deeds only emboldened the President to continue to do precisely

as he pleased, to include the "disgrace" tweet, a textbook violation of R.C.M. 104(a)(1) if there ever was one.

Conclusion

For the foregoing reasons and those previously stated, the Court should grant the motion to supplement the record. In light of the record as now supplemented and the resumption of regular hearings, the Court may wish to set the case for rehearing.

Respectfully submitted,

EUGENE R. FIDELL
CAAF Bar No. 13979
Feldesman Tucker Leifer Fidell LLP
1129 20th St., N.W., Ste. 400
Washington, DC 20036
(202) 256-8675 (mobile)
efidell@feldesmantucker.com

FRANKLIN D. ROSENBLATT
CAAF Bar No. 36564
Butler Snow LLP
1020 Highland Colony Pkwy #1400
Ridgeland, MS 39157
(601) 985-4494
franklin.rosenblatt@butlersnow.com

JONATHAN F. POTTER
CAAF Bar No. 26450
Senior Appellate Counsel
Defense Appellate Division

MATTHEW D. BERNSTEIN
Major, Judge Advocate
CAAF Bar No. 35859
Defense Appellate Division
(202) 838-7894
matthew.d.bernstein9.mil@mail.mil

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief Defense Appellate Division
CAAF Bar No. 33185

ANGELA D. SWILLEY
Lieutenant Colonel, Judge Advocate
Dep. Chief Defense Appellate Division
CAAF Bar No. 36437

SABIN WILLETT
CAAF Bar No. 37214

CHRISTOPHER L. MELENDEZ
CAAF Bar No. 37216

STEPHEN A. SALTZBURG for
CAAF Bar No. 26415
2000 H St., N.W.
Washington, DC 20052
(202) 994-7089
ssaltz@law.gwu.edu

STEPHEN I. VLADECK for
CAAF Bar No. 36839
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

SEAN T. BLIGH for
CAAF Bar No. 37215
Morgan, Lewis & Bockius LLP
One Federal St.
Boston, MA 02110-1726
(617) 951-8775
sabin.willett@morganlewis.com

Appellate Defense Counsel

September 29, 2020

Certificate of Compliance with Rule 37(a)

This Reply complies with the typeface and type style requirements of Rule 37(a).

Franklin D. Rosenblatt

Certificate of Filing and Service

I certify that I filed and served the foregoing Reply on September 29, 2020, by emailing copies thereof to the Clerk of the Court, the Government Appellate Division, and the *amici curiae*.

Franklin D. Rosenblatt

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Robert B. Bergdahl,
Appellant

USCA Dkt. No. 19-0406/AR
Crim.App. No. 20170582

JUDGMENT

MANDATE
Pursuant to Court Rule 43A
ISSUED: OCT 21 2020
By: Joseph R Perlak
OPINION ATTACHED

This cause came before the Court on appeal from the United States Army Court of Criminal Appeals and was argued by counsel on June 2, 2020. On consideration thereof, it is, by the Court, this 27th day of August, 2020,

ORDERED and ADJUDGED:

The decision of the United States Army Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

CERTIFIED TO BE A TRUE COPY
OF THE JUDGMENT
/s/ Joseph R Perlak
Joseph R. Perlak
CLERK
Date: OCT 21 2020

For the Court,

Joseph R. Perlak
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Robert B. Bergdahl,
Appellant

USCA Dkt. No. 19-0406/AR
Crim.App. No. 20170582

O R D E R

On consideration of Appellee's motion to file an amended answer to Appellant's motion to supplement the record, it is, by the Court, this 14th day of October, 2020,

ORDERED:

That the motion is hereby granted.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Fidell)
Appellate Government Counsel (Rowley)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Robert B. Bergdahl,
Appellant

USCA Dkt. No. 19-0406/AR
Crim.App. No. 20170582

O R D E R

On consideration of Appellant's petition for reconsideration of the Court's decision, *United States v. Bergdahl*, __ M.J. __ (C.A.A.F. 2020), and motion to supplement the record, it is, by the Court, this 14th day of October, 2020,

ORDERED:

That the motion and the petition for reconsideration are hereby denied without prejudice to Appellant's right to file a writ of error coram nobis with the appropriate court.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Fidell)
Appellate Government Counsel (Rowley)

United States v. Roy

United States Air Force Court of Criminal Appeals

June 17, 2014, Decided

Misc. Dkt. No. 2014-06 (ACM 38089)

Reporter
2014 CCA LEXIS 364 *

UNITED STATES, Respondent v. Airman Basic (E-1), MICHAEL J. ROY, USAF, Petitioner

Prior History: *United States v. Roy, 2013 CCA LEXIS 620 (A.F.C.C.A., July 16, 2013)*

Core Terms

appointment, superior court, military, sentence, Writs, petition for extraordinary relief, writ of error coram nobis

Case Summary

Overview
HOLDINGS: [1]-A servicemember was not entitled to further review based on an invalid appointment of a military appellate judge since the servicemember provided no reason for not raising the issue earlier in the appellate process, and the de facto officer doctrine conferred validity upon the judge's acts prior to discovery of the invalid appointment.

Outcome
Petition denied.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN1[] **Judicial Review, Extraordinary Writs**

Courts-martial are subject to collateral review within the military justice system. A military appellate court is among the courts authorized under the All Writs Act to issue all writs necessary or appropriate in aid of their respective jurisdictions. *28 U.S.C.S. § 1651(a)*.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN2[] **Judicial Review, Extraordinary Writs**

A petition for extraordinary relief under the All Writs Act requires a military appellate court to make two determinations: (1) whether the requested writ is in aid of the court's existing jurisdiction; and (2) whether the requested writ is necessary or appropriate. Concerning the first determination, the express terms of the All Writs Act confine the court's power to issuing process in aid of its existing statutory jurisdiction; the All Writs Act does not enlarge that jurisdiction. Therefore, the All Writs Act is not an independent grant of appellate jurisdiction, and it cannot enlarge a court's jurisdiction. Likewise, the All Writs Act does not grant the court authority to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed. However, when a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice

system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act in aid of the court's existing jurisdiction. Concerning the second determination, a writ is not necessary or appropriate if another adequate legal remedy is available.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN3 **Judicial Review, Extraordinary Writs**

A writ of error coram nobis may be utilized to remedy an earlier disposition of a case that is flawed because a military appellate court misperceived or improperly assessed a material fact. Coram nobis encompasses constitutional and other fundamental errors, including the denial of fundamental rights accorded by the Uniform Code of Military Justice. This writ authority extends past the point at which a court-martial conviction becomes final under Unif. Code Mil. Justice art. 76, *10 U.S.C.S. § 876*. However, coram nobis should only be used to remedy errors of the most fundamental character.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN4 **Judicial Review, Extraordinary Writs**

In order to obtain a writ of error coram nobis, a servicemember must meet the following stringent threshold requirements: (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist. If the servicemember meets these threshold requirements for a writ of error coram nobis, the court may consider issuing the writ, keeping in mind that the servicemember must establish a clear and indisputable right to the requested relief.

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN5 **Courts Martial, Judges**

The military de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of his appointment to office is deficient.

Judges: **[*1]** LAQUITTA J. SMITH, Appellate Paralegal Specialist. Senior Judge Marksteiner, Senior Judge Hecker, and Judge Weber participated in this matter.

Opinion by: LAQUITTA J. SMITH

Opinion

ORDER

Special Panel

The petitioner requested extraordinary relief on 16 May 2014 in the nature of a writ of error coram nobis. The petitioner asks this Court to grant new appellate review of his court-martial conviction under *Article 66, UCMJ*, *10 U.S.C. § 866*.

Background

The petitioner was convicted at a general court-martial in December 2011 of wrongful use and introduction of ecstasy and wrongful distribution of oxycodone, in violation of *Article 112a, UCMJ*, *10 U.S.C. § 912a*. He was sentenced to a bad-conduct discharge, confinement for 83 days, forfeiture of $978.00 pay per month for 3 months, and reduction to E-1.[1] The

[1] The trial proceedings in this matter warrant further discussion. The petitioner was previously tried and convicted of these same offenses on 21 July 2011 by a military judge

convening authority approved the sentence as adjudged.

On 25 January 2013, The Judge Advocate General of the Air Force appointed Mr. Laurence M. Soybel to the position of appellate military judge on the Air Force Court of Criminal Appeals pursuant to *Article 66(a), UCMJ*, *10 U.S.C. § 866(a)*. At the time of this appointment, Mr. Soybel, a retired Air Force officer and former appellate military judge, was serving as a civilian litigation attorney in the Department of the Air Force. On 25 June 2013, the Secretary of Defense, "[p]ursuant to [his] authority under title *5, United States Code, section 3101 et seq.*," issued a memorandum that "appoint[ed] Mr. Laurence M. Soybel, a civilian employee of the Department of the Air Force, to serve as appellate military judge on the Air Force Court of Criminal Appeals." Memorandum from Sec'y of Def. Chuck Hagel for Sec'y of the Air Force Eric Fanning (25 June 2013).

The petitioner submitted an assignment of errors to this Court in June 2012. He assigned only one error, which asserted the convening authority did not consider a post-trial clemency submission before taking action. After the Government submitted an affidavit from the staff judge advocate **[*4]** demonstrating that the convening authority did consider this clemency submission, we issued a decision on 25 March 2013 affirming the findings and sentence. Mr. Soybel took part in the decision, pursuant to the purported appointment by The Judge Advocate General. We later vacated this decision on our own motion and reconsidered this matter. On 16 July 2013, we issued a decision upon reconsideration, again affirming the findings and sentence. Mr. Soybel again took part in the decision, this time pursuant to the purported appointment by the Secretary of Defense. *United States v. Roy, ACM 38089, 2013 CCA LEXIS 620 (A.F. Ct. Crim. App. 16 July 2013)* (unpub. op.). The petitioner sought review that same day from our superior court, the United States Court of Appeals for the Armed Forces. The petitioner submitted the case to our superior court "on its merits" without assigning any specific error, including the matter of Mr. Soybel's participation in this decision. The petition for grant of review was denied on 19 August 2013. *United States v. Roy, 72 M.J. 470 (Daily Journal 2013)*.

On 15 April 2014, our superior court issued a decision in another case, ruling that the Secretary of Defense **[*5]** did not have the legislative authority to appoint appellate military judges under the *Constitution's Appointments Clause*,[2] and therefore his appointment of Mr. Soybel to this Court was "invalid and of no effect." *United States v. Janssen, 73 M.J. 221, 225 (C.A.A.F. 2014)*. The petition for extraordinary relief in the instant case followed. In a short submission, the petitioner contends he was denied proper *Article 66, UCMJ*, review by virtue of Mr. Soybel's participation in the decision, and therefore this Court should issue the writ. The Government opposes the petition for extraordinary relief.

Law

HN1[] "Courts-martial are . . . subject to collateral review within the military justice system." *Denedo v. United States (Denedo I), 66 M.J. 114, 119 (C.A.A.F. 2008)*, *aff'd and remanded*, *United States v. Denedo (Denedo II), 556 U.S. 904, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009)*. This Court is among the courts authorized under the All Writs Act to issue "all writs necessary or appropriate in aid of their respective jurisdictions." *28 U.S.C. § 1651(a)*; *LRM v. Kastenberg, 72 M.J. 364, 367 (C.A.A.F. 2013)*.

HN2[] A petition for extraordinary relief under the All Writs Act requires this Court to make two

---

sitting as a general court-martial. The petitioner was acquitted of two other drug-related specifications. At this trial, the military judge sentenced the petitioner to a bad-conduct discharge, **[*2]** confinement for 110 days, and forfeiture of all pay and allowances. During post-trial processing, the Government discovered it had not provided trial defense counsel with an endorsement signed by the convening authority excusing three court members and replacing them with three other members. No amended convening order was prepared to reflect this change, and trial counsel did not refer to this matter in announcing the convening of the court-martial. On 27 September 2011, the convening authority ordered a post-trial hearing pursuant to *Article 39(a), UCMJ*, *10 U.S.C. § 839(a)*, to address this matter. The defense moved for a new trial at this post-trial hearing, and the military judge granted the motion. The military judge specified that the petitioner could not be retried on the two specifications of which he found the petitioner not guilty. At the new trial before a different military judge, the petitioner pled guilty, pursuant to a pretrial agreement, to the same specifications of which he had been previously found guilty. One term of the pretrial agreement required that the convening authority approve no more than 83 days of confinement, to match the amount of confinement the petitioner **[*3]** had already served and for which he was to receive credit.

[2] *U.S. Const. art. II, § 2, cl. 2*.

determinations: **[*6]** (1) whether the requested writ is "in aid of" this Court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." *LRM, 72 M.J. at 367-68*. Concerning the first determination, the "express terms" of the All Writs Act "confine [our] power to issuing process 'in aid of' [our] existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Clinton v. Goldsmith, 526 U.S. 529, 534-35, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999)* (citations omitted). Therefore, the All Writs Act is not an independent grant of appellate jurisdiction, and it cannot enlarge a court's jurisdiction. *Id.* Likewise, the Act does not grant this Court authority "to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." *Id. at 536*. However:

> [W]hen a petitioner seeks collateral relief to modify an action that was taken within the subject matter jurisdiction of the military justice system, such as the findings or sentence of a court-martial, a writ that is necessary or appropriate may be issued under the All Writs Act "in aid of" the court's existing jurisdiction.

Denedo I, 66 M.J. at 120.

Concerning the second determination, a writ **[*7]** is not "necessary or appropriate" if another adequate legal remedy is available. *See Goldsmith, 526 U.S. at 537* (holding that even if our superior court had some jurisdictional basis to issue a writ of mandamus, such writ was unjustified as necessary or appropriate in light of alternative remedies available to a servicemember demanding to be kept on the rolls). *See also Denedo I, 66 M.J. at 121* (citing *Loving v. United States, 62 M.J. 235, 253-54 (C.A.A.F. 2005)*).

HN3[↑] A writ of error coram nobis may be utilized to "remedy an earlier disposition of a case that is flawed because the court misperceived or improperly assessed a material fact." *McPhail v. United States, 24 C.M.A. 304, 1 M.J. 457, 459, 52 C.M.R. 15 (C.M.A. 1976)*. Coram nobis encompasses constitutional and other fundamental errors, including the denial of fundamental rights accorded by the UCMJ. *Garrett v. Lowe, 39 M.J. 293, 295 (C.M.A. 1994)*; *United States v. Bevilacqua, 18 C.M.A. 10, 39 C.M.R. 10, 12 (C.M.A. 1968)*. This writ authority extends past the point at which a court-martial conviction becomes final under *Article 76, UCMJ*, *10 U.S.C. § 876*. *Denedo I, 66 M.J. at 121-25*. However, coram nobis "should only be used to remedy 'errors of the most fundamental character.'" **[*8]** *Loving, 62 M.J. at 252-53* (quoting *United States v. Morgan, 346 U.S. 502, 512, 74 S. Ct. 247, 98 L. Ed. 248 (1954)*). ***HN4***[↑] In order to obtain a writ of error coram nobis, a petitioner must meet the following "stringent threshold requirements":

> (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Denedo I, 66 M.J. at 126. If the petitioner meets these threshold requirements for a writ of error coram nobis, this Court may consider issuing the writ, keeping in mind that "the petitioner must establish a clear and indisputable right to the requested relief." *Id.* (citing *Cheney v. United States Dist. Court, 542 U.S. 367, 381, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)*).

Discussion

We answer in the affirmative the threshold questions of whether the requested writ is "in aid of" **[*9]** our existing jurisdiction and whether the requested writ is "necessary or appropriate." However, we hold that the petitioner is not entitled relief under the "stringent threshold requirements" established for issuance of the writ of error coram nobis.

The petitioner elected not to raise the issue to our superior court regarding Mr. Soybel's participation in the decision, even though the Secretary of Defense's purported appointment of Mr. Soybel took place about three weeks prior to our decision and the petition to our superior court. Our superior court did not issue its denial of the petition until 19 August 2013. By that time, the issue of Secretary Hagel's appointment of Mr. Soybel was very much at issue in appellate litigation. For example, the *Janssen* decision notes that the appellant in that case moved this Court to vacate our decision on 16 August 2013, asserting that the Secretary of Defense lacked the statutory authority to appoint Mr. Soybel. *Janssen, 73 M.J. at 223*. The petitioner's summary pleading provides no valid reasons why he did not seek relief on this matter earlier or any proffer as to why the issue of Mr. Soybel's appointment could not have been

discovered through **[*10]** the exercise of reasonable diligence prior to the completion of appellate review in this matter. Therefore, the petitioner has not met the requirements for the issuance of the writ.

In addition, the de facto officer doctrine indicates the petitioner has not established a clear and indisputable right to the requested relief. ***HN5***[⬆] The de facto officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of [his] appointment . . . to office is deficient." *Ryder v. United States, 515 U.S. 177, 180, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995)*. In *United States v. Carpenter, 37 M.J. 291 (C.M.A. 1993)*, *cert. granted, judgment vacated*, *515 U.S. 1138, 115 S. Ct. 2572, 132 L. Ed. 2d 823 (1995)*, our superior court initially applied the doctrine where the appointment of the Chief Judge of the Coast Guard Court of Military Review was later determined to not satisfy the *Appointments Clause of the Constitution*. In *Ryder*, the Supreme Court refused to apply the doctrine in another Coast Guard case, because the petitioner in that case challenged the composition of the Court while his case was pending before that Court on direct review. *Ryder, 515 U.S. at 182*. The Court held:

> We think **[*11]** that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise *Appointments Clause* challenges with respect to questionable judicial appointments.

Id. at 182-83. The *Janssen* Court followed this *Ryder* rationale in declining to apply the de facto officer doctrine, because Senior Airman Janssen had raised the issue of Mr. Soybel's appointment to this Court in a motion to vacate after the decision was issued listing Mr. Soybel as a judge on the panel. *Janssen, 73 M.J. at 225-26*. Here, however, the petitioner made no effort to raise this issue before either this Court or our superior court despite a meaningful opportunity to do so. Therefore, the de facto officer doctrine applies, and the petitioner is not entitled to the requested relief.

Despite the fact that the petitioner has not demonstrated a basis to issue the writ, a panel of three properly-appointed judges on this Court has conducted a fresh review of the record of trial following the receipt **[*12]** of the petition for extraordinary relief, including the petitioner's previously-submitted assignment of errors. We took this extra step to ensure the petitioner received the full benefit of his rights under *Article 66, UCMJ*, and to promote a system of appellate review that is fair in reality and appearance. We independently conclude that the petitioner is not entitled to relief, the conviction is correct in law and fact, and the adjudged and approved sentence is appropriate.

Conclusion

The petitioner has not carried his burden to demonstrate that his case presents extraordinary circumstances warranting issuance of the writ of error coram nobis. Accordingly, it is by the Court on this 17th day of June, 2014,

ORDERED:

The Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis is hereby **DENIED**.

Senior Judge Marksteiner, Senior Judge Hecker, and Judge Weber participated in this matter.

FOR THE COURT

/s/ Laquitta J. Smith

LAQUITTA J. SMITH

Appellate Paralegal Specialist

End of Document

Murray v. United States

United States Army Court of Criminal Appeals

January 31, 2018, Decided

ARMY MISC 20180025

Reporter
2018 CCA LEXIS 47 *

GREGORY J. MURRAY, United States Army, Petitioner v. UNITED STATES, Respondent

Subsequent History: Petition dismissed by, Writ dismissed by *In re Murray, 77 M.J. 319, 2018 CAAF LEXIS 147 (C.A.A.F., Mar. 13, 2018)*

Prior History: *United States v. Murray, 2014 CCA LEXIS 460 (A.C.C.A., July 22, 2014)*

Core Terms

court-martial, coram nobis, defense counsel, misconduct, alleges, asserts

Case Summary

Overview

HOLDINGS: [1]-The court did not have jurisdiction under UCMJ art. 66, *10 U.S.C.S. § 866*, to grant a former servicemember's petition seeking coram nobis relief in the form of an order vacating his conviction for rape of a person under the age of twelve, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*, based on allegations of prosecutorial misconduct; [2]-Even assuming that trial counsel threatened a commissioned officer who was the servicemember's roommate at the time of trial with prosecution if he testified on the servicemember's behalf, as the roommate alleged in an affidavit he submitted to support the servicemember's petition, the servicemember knew about the roommate's claim that he was threatened at the time of trial and did not inform his defense counsel or raise the issue after he was convicted, when his case was reviewed on appeal.

Outcome
The court dismissed the petition for lack of jurisdiction.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN1 **Postconviction Proceedings, Coram Nobis**

Unif. Code Mil. Justice ("UCMJ") art. 66, *10 U.S.C.S. § 866*, confers jurisdiction on the United States Army Court of Criminal Appeals to issue a writ of coram nobis if necessary and appropriate in aid of its jurisdiction. The *All Writs Act*, *28 U.S.C.S. § 1651(a)*, does not expand the court's underlying jurisdiction to consider the findings and sentence as approved by a convening authority. UCMJ art. 66(c), *10 U.S.C.S. § 866(c)*.

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN2[] **Postconviction Proceedings, Coram Nobis**

Because coram nobis is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired. In United States v. Morgan, the United States Supreme Court observed that coram nobis permits the continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review, but only under very limited circumstances. Although a petition may be filed at any time without limitation, a petitioner must meet all six stringent threshold requirements: (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > New Trials

HN3[] **Judicial Review, Extraordinary Writs**

The United States Army Court of Criminal Appeals held in United States v. Roberts that an extraordinary writ cannot be used as an end-run around the two-year time limit for considering a petition for a new trial under Unif. Code Mil. Justice art. 73, *10 U.S.C.S. § 873*.

Counsel: **[*1]** For Petitioner: Mr. William E. Cassara, Esquire (on brief).

Judges: Before CAMPANELLA, SALUSSOLIA, and FLEMING, Appellate Military Judges. Judge SALUSSOLIA and Judge FLEMING concur.

Opinion by: CAMPANELLA

Opinion

SUMMARY DISPOSITION AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF *CORAM NOBIS*

CAMPANELLA, Senior Judge:

Petitioner, who was convicted at a general court-martial of rape of a person under the age of twelve in violation of *Article 120*, Uniform Code of Military Justice, *10 U.S.C. § 920 (2012)* [UCMJ], is not entitled to *coram nobis* relief in the form of vacating his court-martial findings and sentence based on allegations of prosecutorial misconduct. We find the allegations of prosecutorial conduct were known by appellant prior to the original court-martial judgment. We also find no valid reason for petitioner's failure to raise this issue during his court-martial and seek relief earlier. Accordingly, we find petitioner's writ does not meet the threshold criteria for *coram nobis* review and therefore, dismiss this petition for lack of jurisdiction. Petitioner was convicted of raping JJ when she was less than twelve years old.

Petitioner's conviction stands primarily on JJ's testimony. On 22 July **[*2]** 2014, this court affirmed petitioner's conviction. The Court of Appeals for the Armed Forces denied a grant of review of petitioner's conviction on 25 November 2014 and denied a request for reconsideration on 21 April 2015. Petitioner's direct appeal is final under *Article 71(c)(1)* and *Article 76, UCMJ*. Petitioner now requests this court provide extraordinary relief in the nature of a writ of *coram nobis*, requesting to declare his conviction null and void, alleging that during his court-martial, the trial counsel threatened a witness who possessed information favorable to the petitioner into not testifying.

BACKGROUND

Petitioner now alleges that his roommate, Captain (CPT) KB, while sitting in the prosecution's waiting room during petitioner's Article 32 hearing, overheard victim, JJ, say to her mother: "How am I supposed to remember all of this?" and "I can't remember what you told me to tell them."

Petitioner asserts CPT KB informed him of the alleged conversation between JJ and her mother, and petitioner, in turn, told his defense counsel, who asked CPT KB if he would testify about the conversation to impeach the child-victim's credibility. Captain KB agreed.

Petitioner alleges that during his court-martial, the **[*3]** prosecutor, Lieutenant Colonel (LTC) Matthew McDonald, took CPT KB aside, and asked him a series of questions related to the rental arrangement between petitioner and CPT KB and asked CPT KB whether he reported the rental income on his income taxes.[1] Petitioner asserts that during this conversation LTC McDonald threatened CPT KB with criminal prosecution, and reporting him to his chain of command and the Internal Revenue Service (IRS), if he testified for petitioner.

Petitioner asserts that after LTC McDonald threatened CPT KB, he informed petitioner he could not testify for the reasons noted above. Petitioner indicates he told his attorney that CPT KB could not testify on his behalf but did not explain why. Captain KB did not testify.

In support of his writ, petitioner provides an affidavit from KB, who asserts the facts above and states that, but for LTC McDonald's threats, he would have testified favorably at petitioner's court-martial as to what he heard. Petitioner's affidavit asserted that after his release from confinement in March 2016, he spoke with KB, who was comfortable coming forward because he had gotten out of the Army.

In his own affidavit, petitioner provides several reasons **[*4]** for not raising this issue to his defense counsel or the court during his court-martial. Petitioner states he was "overwhelmed" by the court-marital process. He also states he did not want to ruin his friend's career when he believed his own career was ruined regardless of the court-martial outcome. Lastly, he did not understand LTC McDonald's alleged actions were illegal.

LAW AND ANALYSIS

HN1[↑] *Article 66, UCMJ*, confers upon this court jurisdiction to consider petitioner's claims and issue a writ of *coram nobis* if necessary and appropriate in aid thereof. *See United States v. Denedo, 66 M.J. 114, 123 (C.A.A.F. 2008)* (*Denedo I*); *United States v. Denedo, 556 U.S. 904, 917, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009)* (*Denedo II*); *28 U.S.C. § 1651(a)* (All Writs Act). The All Writs Act does not expand our underlying jurisdiction to consider "the findings and sentence as approved by the convening authority." *UCMJ, art. 66(c)*; *Denedo I, 66 M.J. at 120*; *Denedo II, 556 U.S. at 914*.

The Supreme Court established the landscape of our inquiry in *Denedo II*. ***HN2***[↑] "Because *coram nobis* is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired." *Denedo II, 556 U.S. at 912-13*.

In *United States v. Morgan, 346 U.S. 502, 511-12, 74 S. Ct. 247, 98 L. Ed. 248 (1954)* the Supreme Court observed that *coram nobis* permits the "[c]ontinuation of litigation after final judgment and exhaustion or **[*5]** waiver of any statutory right of review," but only under very limited circumstances. Although a petition may be filed at any time without limitation, a petitioner must meet all six stringent threshold requirements: (1) the alleged error is of the most fundamental character;[2] (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence

[1] During a pre-trial hearing, LTC McDonald attempted to persuade the court to allow the government to enter information into evidence in an attempt to impeach CPT KB. Specifically, the information related to CPT KB allegedly paying a discounted rate for unrelated legal services, to petitioner's defense counsel, in exchange for favorable testimony in petitioner's court-martial. The military judge ruled against the government.

[2] Because the standard for granting extraordinary relief requires a petitioner to establish that issuance of the requested writ is "necessary and appropriate," we interpret this first prerequisite to mean a petitioner must do more than merely *allege* error. *See 28 U.S.C. § 1651(a)*; *Denedo I, 66 M.J. at 126*. He has the burden to establish the error occurred.

prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist. *Denedo I, 66 M.J. at 126* citing *Morgan, 346 U.S. at 512-13*; *Loving v. United States, 62 M.J. 235, 252-53 (C.A.A.F. 2005)*.

First, assuming petitioner's claims are true, petitioner's writ alleges an error that is clearly fundamental in character in that it has the potential to affect the credibility of the child victim's testimony in this case. Second, there appears to be no other remedy available to petitioner.

As to the third criteria, we find it is not met. This court finds no valid reason why petitioner did not seek relief earlier. **[*6]** Petitioner's assertions that he was overwhelmed by the court-martial process, did not want to injure his friend's career, and did not understand the full import of LTC McDonald's conduct, are not credible.[3] Had petitioner explained the situation to his defense counsel at the time, action could have been taken to address the alleged misconduct. We find petitioner's reasons unreasonable and unconvincing.

As to the fourth criteria—whether the alleged prosecutorial misconduct could have been discovered using reasonable diligence—the information was known by appellant at the time of his court-martial prior to the original judgment. Defense's argument, that LTC McDonald's misconduct was not "discovered" because petitioner failed to inform his defense counsel due to his concern for his friend's career and his misunderstanding of the seriousness of the alleged misconduct, falls flat with this court. Petitioner had actual knowledge during his court-martial of the very information he puts before this court today including the underlying information that could be used in an attempt to impeach the victim. Curiously, the record before us conspicuously contains no information regarding the defense **[*7]** counsel's response to being informed by his client that a key witness in the case would not be testifying. Because a defense counsel decides which witnesses to call, and because of the nature of witnesses testimony in this case, we find the petitioner's assertion of unquestioning acceptance by the defense counsel to be implausible, and again, unconvincing.[4]

Finally, ***HN3***[↑] we have recently held that an extraordinary writ cannot be used as an end-run around the two-year time limit for considering a petition for new trial under *Article 73, UCMJ*. *United States v. Roberts, ARMY MISC 20180005, 77 M.J. 615 , 2018 CCA LEXIS 35 (Army. Ct. Crim. App. 30 Jan. 2018)*.

Based on the foregoing, we find petitioner's claim does not meet the threshold criteria for *coram nobis* review.[5]

NOW, THEREFORE, IT IS ORDERED:

This petition is DISMISSED for lack of jurisdiction.

Judge SALUSSOLIA and Judge FLEMING concur.

End of Document

[3] Even if his actions in this regard were reasonable, petitioner could have raised these issues during direct appeal or any time within the two-year limitation established by *Article 73, UCMJ*, for considering petitions for new trial based on fraud on the court-martial.

[4] We need not decide the two remaining criteria.

[5] This court directs the Clerk of Court to process this allegation in accordance with appropriate protocols regarding allegations of prosecutorial misconduct.

United States v. Snyder

United States Air Force Court of Criminal Appeals

April 15, 2020, Decided

No. ACM 39470

Reporter
2020 CCA LEXIS 117 *

UNITED STATES, Appellee v. Brandon L. SNYDER, Major (O-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

military, sentence, convening, clemency, unsworn statement, post-trial, continuance, defense counsel, civilian, instructions, attachments, matters, notice, sex offender registration, processing, factors, trial defense counsel, declarations, confinement, appearance, sexual, waived, sexual assault, replied, finger, collateral consequence, court-martial, forfeitures, deadline, reasonable doubt

Subsequent History: Motion granted by *United States v. Snyder, 2020 CAAF LEXIS 408, 2020 WL 5352190 (C.A.A.F., Aug. 4, 2020)*

Motion granted by *United States v. Snyder, 2020 CAAF LEXIS 471, 2020 WL 5352102 (C.A.A.F., Aug. 24, 2020)*

Motion denied by *United States v. Snyder, 2020 CAAF LEXIS 515, 2020 WL 5941773 (C.A.A.F., Sept. 21, 2020)*

Review denied by *United States v. Snyder, 2020 CAAF LEXIS 628 (C.A.A.F., Nov. 13, 2020)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: J. Wesley Moore (arraignment); Vance H. Spath. Approved sentence: Dismissal, confinement for 6 months, forfeiture of $1,000.00 pay per month for 6 months, and a reprimand. Sentence adjudged 11 January 2018 by GCM convened at Patrick Air Force Base, Florida.

Case Summary

Overview

HOLDINGS: [1]-A rational factfinder could have found appellant guilty beyond a reasonable doubt of all the elements of sexual assault as charged. After weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, the court was convinced of his guilt beyond a reasonable doubt, and therefore, his conviction of one specification of sexual assault in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, was both legally and factually sufficient; [2]-The military judge did not abuse his discretion when he denied the Defense's motion for a continuance; [3]-Among numerous other matters, appellant's public trial challenge to Mil. R. Evid. 412, Manual Courts-Martial (2016 ed.), was waived, and the court determined to leave the waiver intact; [4]-No error materially prejudicial to appellant's substantial rights occurred.

Outcome

The findings and the sentence were affirmed.

Core Terms

LexisNexis® Headnotes

Evidence > Inferences & Presumptions > Inferences

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN1 **Inferences & Presumptions, Inferences**

Sexual assault by bodily harm in violation of Unif. Code Mil. Justice art. 120(b)(1)(B), *10 U.S.C.S. § 920(b)(1)(B)*, required the Government to prove four elements beyond a reasonable doubt: (1) that appellant committed a sexual act upon SB by penetrating her vulva with his finger; (2) that appellant did so by causing bodily harm to SB, to wit: penetrating her vulva with his finger; (3) that appellant did so with an intent to gratify his sexual desire; and (4) that appellant did so without the consent of SB. Manual Courts-Martial pt. IV, para. 45.b.(4)(b) (2016 ed.). "Bodily harm" means any offensive touching of another, however slight, including any nonconsensual sexual act. Unif. Code Mil. Justice art. 120(g)(3), *10 U.S.C.S. § 920(g)(3)*. With regard to consent, the statute provides, "Consent" means a freely given agreement to the conduct at issue by a competent person. Unif. Code Mil. Justice art. 120(g)(8)(A), *10 U.S.C.S. § 920(g)(8)(A)*. Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions. Unif. Code Mil. Justice art. 120(g)(8)(C), *10 U.S.C.S. § 920(g)(8)(C)*.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN2 **Mens Rea, General Intent**

Congress clearly intended a general intent mens rea for Unif. Code Mil. Justice art. 120(b)(1)(B), *10 U.S.C.S. § 920(b)(1)(B)*.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN3 **Judicial Review, Courts of Criminal Appeals**

A court of criminal appeals may affirm only such findings of guilty as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. Article 66(c) requires the Courts of Criminal Appeals to conduct a de novo review of legal and factual sufficiency of the case. The court's assessment is limited to the evidence produced at trial.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN4 **Evidence, Weight & Sufficiency of Evidence**

The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The term reasonable doubt, however, does not mean that the evidence must be free from conflict. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN5 **Evidence, Weight & Sufficiency of Evidence**

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is itself convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a

reasonable doubt.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN6 Evidence, Weight & Sufficiency of Evidence

The "record" refers to matters introduced at trial. Matters outside the record may not be considered for factual or legal sufficiency on appeal.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Defenses

HN7 Military Offenses, Rape & Sexual Assault

Mistake of fact as to consent is a defense to sexual assault. R.C.M. 916(j)(1), Manual Courts-Martial (2016 ed.). It requires that an appellant, due to ignorance or mistake, incorrectly believed that another consented to the sexual conduct. R.C.M. 916(j)(1). To be a viable defense, the mistake of fact must have been honest and reasonable under all the circumstances. R.C.M. 916(j)(1).

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Trials > Continuances

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

HN8 Criminal Process, Assistance of Counsel

An accused has a *Sixth Amendment* right to counsel of choice. If an appellant has been erroneously deprived of this right, then the violation is not subject to harmless-error analysis. A trial court nonetheless has wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. The United States Supreme Court has observed: Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel.

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 Motions, Continuances

The court reviews a military judge's denial of a request for a continuance to be represented by civilian counsel of choice for an abuse of discretion. In determining whether the military judge abused his discretion, the court considers the factors articulated in Miller. The factors include: surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10 Judicial Review, Standards of Review

An abuse of discretion requires more than just a reviewing court's disagreement with the military judge's decision. An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous, when an erroneous view of the law influenced his decision, or when his decision is outside the range of choices reasonably arising from the applicable facts and the law. The challenged decision must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN11 **Motions, Continuances**

Miller examines a number of factors useful in determining whether a judge has abused his discretion. This court, too, considers the application of those factors bearing in mind that there are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

HN12 **Motions, Continuances**

The military judge has "wide latitude" to balance the right to counsel against the court's calendar.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN13 **Admissibility of Evidence, Sex Offenses**

Mil. R. Evid. 412(c)(2), Manual Courts-Martial (2016 ed.), provides that before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed.

Military & Veterans Law > Military Justice > Courts Martial > Sessions

HN14 **Courts Martial, Sessions**

It is the military judge, not a court of criminal appeals, that makes case-specific findings on the record justifying closure. R.C.M. 806(b)(5), Manual Courts-Martial (2016 ed.).

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Public Trial

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

HN15 **Defendant's Rights, Right to Public Trial**

Failure to object to closing of courtroom is waiver of right to public trial.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN16 **Judicial Review, Courts of Criminal Appeals**

Courts of criminal appeals are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN17 **Trial Procedures, Instructions**

Whether an appellant has waived an objection to a findings instruction is a legal question that this court reviews de novo. The U.S. Court of Appeals for the Armed Forces in Davis repeated what the court has previously explained is the significance of waiver, as opposed to forfeiture: Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. Consequently, while the court reviews forfeited issues for plain error, the court cannot review waived issues at all because a valid waiver leaves no error for the court to correct on appeal.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN18 **Criminal Process, Right to Confrontation**

The *Sixth Amendment* right of confrontation does not apply to the presentencing portion of a non-capital court-martial. In McDonald, a three-judge majority noted that Congress would not be disabled from changing the sentencing procedures in the military. Judge Sullivan,

concurring in the result, agreed with the majority that the *Sixth Amendment* does not require an adversarial sentencing proceeding with a right of confrontation. In 2013, Congress revised presentencing procedures by enacting Unif. Code Mil. Justice (UCMJ) art. 6b(a)(4)(B), *10 U.S.C.S. § 806b(a)(4)(B)*, to give a crime victim the right to be reasonably heard. In a 2015 amendment to the Manual for Courts-Martial, R.C.M. 1001A, Manual Courts-Martial, was added to implement art. 6b(a)(4)(B), UCMJ, and to allow a victim to make an unsworn statement that is not subject to cross-examination, though either party may "rebut any statements of facts therein." R.C.M. 1001A(e), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN19 **Sentences, Presentencing Proceedings**

The U.S. Court of Appeals for the Armed Forces has held that the consequences of sex offender registration are not a proper consideration for sentencing. Talkington addressed a military judge's instruction regarding an appellant's unsworn statement and observed that the proper focus of sentencing is on the offense and the character of the accused, and to prevent the waters of the military sentencing process from being muddied by an unending catalogue of administrative information. Although an appellant may reference sex offender registration in his unsworn statement, the court finds no authority for the proposition that an appellant has an unfettered right to attach anything he wants to an unsworn statement and then have it marked as an exhibit and admitted into evidence, or otherwise presented to the factfinder, to determine an appropriate sentence.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN20 **Sentences, Presentencing Proceedings**

The plain language of R.C.M. 1001(c)(2)(C), Manual Courts-Martial (2016 ed.) allows for an unsworn statement given "by the accused," his counsel, or both.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN21 **Sentences, Presentencing Proceedings**

While an appellant's right of allocution in presentencing may be very broad, a military judge may provide instructions to the members to limit his statements and place them in their proper context. In Talkington, the U.S. Court of Appeals for the Armed Forces held that sex offender registration is a collateral consequence of the conviction alone and has no causal relationship to the sentence imposed for the offense. Thus, while an accused is permitted to raise this collateral consequence in his unsworn statement, the military judge may instruct the members essentially to disregard the collateral consequence in arriving at an appropriate sentence for an accused.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN22 **Sentences, Presentencing Proceedings**

Talkington holds that the military judge is authorized to place sex offender registration in its proper context by informing the members that it is permissible for an accused to address sex offender registration in an unsworn statement, while also informing them that possible collateral consequences of a conviction should play no part in their deliberations.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN23 **Trial Procedures, Instructions**

Whether an appellant has waived an objection to an instruction is a legal question that this court reviews de novo.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN24 **Military Offenses, Rape & Sexual Assault**

In Chapman, the U.S. Supreme Court observed that a statutory sentencing scheme that eschewed "individual degrees of culpability. would clearly be constitutional." The Supreme Court noted a statute that imposed a fixed sentence for distributing any quantity of lysergic acid diethylamide (LSD), in any form, with any carrier, would be constitutional. It follows that Congress has the power to require a minimum sentence for sexual assault as it does a fixed sentence for LSD. It also follows that whether Congress commanded a minimum sentence for an unrelated offense (e.g. homicide or assault) has no bearing on the constitutionality of a minimum sentence of a punitive discharge for sexual assault.

Criminal Law & Procedure > Sentencing > Imposition of Sentence

HN25 **Sentencing, Imposition of Sentence**

The U.S. Supreme Court explained that a sentencing scheme providing for individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. Congress has the power to define criminal punishments without giving the courts any sentencing discretion, and in fact, determinate sentences were found in this country's penal codes from its inception. Although mandatory minimum sentencing schemes fail to account for the unique circumstances of offenders who warrant a lesser penalty, the Supreme Court has nonetheless held them constitutional.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN26 **Courts Martial, Sentences**

The court reviews issues of sentence appropriateness de novo. The court's authority to determine sentence appropriateness reflects the unique history and attributes of the military justice system, and includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions. The court may affirm only as much of the sentence as it finds correct in law and fact and determines should be approved on the basis of the entire record. Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c). Although the court has great discretion to determine whether a sentence is appropriate, it has no power to grant mercy.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN27 **Judges, Challenges to Judges**

An accused has a constitutional right to an impartial judge. R.C.M. 902, Manual Courts-Martial (2016 ed.), outlines the circumstances when a military judge shall disqualify himself or herself in any proceeding. Two distinct grounds include when the military judge's impartiality might reasonably be questioned, or the military judge has an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding. R.C.M. 902(a), (b)(5)(B), Manual Courts-Martial (2016 ed.). "Proceeding" includes pretrial, trial, post-trial, appellate review, or other stages of litigation. R.C.M. 902(c)(1), Manual Courts-Martial (2016 ed.).

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN28 **Judges, Challenges to Judges**

When an appellant challenges a military judge's impartiality for the first time after trial, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions. The appearance of impartiality is reviewed on appeal objectively and the military judge's conduct is tested to determine if it would lead a reasonable person knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned. Whether the military judge should disqualify herself is viewed objectively, and is assessed not in the mind of the military judge herself, but rather in the mind of a reasonable man who has knowledge of all the facts.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN29 **Judges, Challenges to Judges**

When the issue of disqualification is raised for the first

time on appeal, the court applies the plain error standard of review. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice.

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN30[] Courts Martial, Judges

Air Force Manual 51-204, United States Air Force Judiciary and Air Force Trial Judiciary, para. 1.3 (18 Jan. 2008, Incorporating Through Change 2, 9 Oct. 2014) provides that the duties of the chief trial judge include "detailing judges to all Air Force General and Special courts-martial."

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN31[] Courts Martial, Judges

There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN32[] Posttrial Procedure, Actions by Convening Authority

The standard of review for determining whether post-trial processing was properly completed is de novo. An error in post-trial processing results in material prejudice to the substantial rights of an appellant under Unif. Code Mil. Justice art. 59(a), *10 U.S.C.S. § 859(a)*, if an appellant makes some colorable showing of possible prejudice. Given the U.S. Court of Appeals for the Armed Forces' reliance on the highly discretionary nature of the convening authority's clemency power, the threshold for showing prejudice is low.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN33[] Criminal Process, Assistance of Counsel

The *Sixth Amendment* guarantees an accused the right to effective assistance of counsel. In assessing the effectiveness of counsel, the court applies the standard set forth in Strickland, and begins with the presumption of competence announced in Cronic.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN34[] Counsel, Effective Assistance of Counsel

The court reviews allegations of ineffective assistance of counsel de novo. To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that this deficiency resulted in prejudice. Accordingly, the court considers whether counsel's performance fell below an objective standard of reasonableness. An appellate court must evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN35[] Posttrial Procedure, Staff Judge Advocate Recommendations

R.C.M. 1106(f)(2), Manual Courts-Martial (2016 ed.), lists the order of precedence on whom the staff judge advocate's recommendation (SJAR) is served if an accused fails to designate a specific counsel at trial. The SJAR is served on one counsel only, and civilian

counsel is first in the order of precedence if an accused does not so designate.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN36[] **Posttrial Procedure, Actions by Convening Authority**

The convening authority must only include credit for illegal pretrial confinement in the action. R.C.M. 1107(f)(4)(F), Manual Courts-Martial (2016 ed.).

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Postconviction Proceedings

HN37[] **Effective Assistance of Counsel, Postconviction Proceedings**

The court evaluates trial defense counsel's performance not by the success of their strategy, but by an objective standard of reasonableness.

Military & Veterans Law > Military Justice > Judicial Review

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

HN38[] **Military Justice, Judicial Review**

The court reviews de novo whether an appellant has been denied the due process right to a speedy post-trial review and appeal. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in Barker: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice.

Counsel: For Appellant: Major Benjamin H. DeYoung, USAF; Major Jarett F. Merk, USAF; Donald G. Rehkopf, Jr., Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Major Zachary T. West, USAF; Captain Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, LEWIS, and POSCH, Appellate Military Judges. Judge POSCH delivered the opinion of the court, in which Senior Judge MINK and Judge LEWIS joined.

Opinion by: POSCH

Opinion

POSCH, Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*.[1] The conviction concerns Appellant's sexual act upon SB, a female friend of a coworker's daughter.[2] Appellant was sentenced to a dismissal, confinement for six months, forfeiture of $1,000.00 pay per **[*2]** month for six months, and a reprimand. The convening authority approved the sentence as adjudged.

Appellant raises 22 issues on appeal and we consider

---

[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] Appellant's sole charge consisted of two specifications in which he pleaded not guilty to both specifications, and was acquitted of the second specification of abusive sexual contact of SB in violation of *Article 120, UCMJ, 10 U.S.C. § 920*.

one additional issue. This opinion addresses 13 assignments of error, nine issues that Appellant personally raises combined as one assignment of error,[3] and one additional issue raised by the court: (1) whether the evidence is legally and factually sufficient to support the conviction; (2) whether the Specification of the Charge fails to state an offense because it fails to allege any *mens rea* element; (3) whether Appellant was denied the right to be represented at trial by retained civilian counsel of choice in violation of the *Sixth Amendment*;[4] (4) whether Appellant was denied the *Sixth Amendment* right to a public trial; (5) whether the reasonable doubt instruction the military judge gave was constitutionally defective; (6) whether Appellant was denied the *Sixth Amendment* right to confront SB after she read an unsworn victim impact statement in presentencing; (7) whether the military judge abused his discretion in precluding Appellant from including attachments to his written unsworn statement in violation of Rule for Courts-Martial (R.C.M.) 1001(c)(1)(B); (8) whether Appellant was deprived **[*3]** of due process and equal protection under the law in violation of the *Fifth Amendment*[5] because the military judge excluded attachments to his unsworn statement, and yet SB could discuss the collateral consequences of Appellant's conviction in her unsworn statement; (9) whether the military judge abused his discretion when he instructed the members to disregard the consequences to Appellant of sex offender registration; (10) whether Appellant's sentence to a mandatory dismissal is unconstitutional; (11) whether Appellant's sentence is inappropriately severe; (12) whether the military judge's undisclosed employment negotiations created a disqualifying appearance of bias; (13) whether Appellant was denied the right to procedural due process in the post-trial processing of his case; and (14) whether Appellant was denied effective assistance of counsel under the *Sixth Amendment* as alleged in nine deficiencies in the performance of his trial defense counsel.[6] In addition, we consider the issue of timely appellate review.

We find Appellant's conviction both legally and factually sufficient, and no error materially prejudicial to the substantial rights of Appellant occurred. We thus affirm.

I. Background

Appellant first met **[*4]** 18-year-old SB, a female friend of a coworker's daughter, when she was introduced to Appellant at his workplace on Patrick Air Force Base (AFB), Florida. The visit and introduction occurred during the workweek before Father's Day weekend in 2016. On Sunday evening, while visiting the coworker's family as a guest in their home, Appellant digitally penetrated SB's vulva with his finger as SB lay down in a bedroom she shared with her best friend, FK. Appellant was convicted on the basis of SB's testimony, the testimony given by FK, FK's parents, and SB's mother, and by evidence uncovered in the investigation when SB reported the incident to civilian and military authorities.

Appellant was tried on 11-12 July 2017 and 8-11 January 2018 at Patrick AFB. On the eve of trial reconvening in January with Judge Spath presiding, Appellant, through two detailed military trial defense counsel, moved for a continuance so Appellant could be represented by a civilian defense counsel (CDC), Mr. Donald G. Rehkopf, Jr., Esquire, in addition to military counsel. Judge Spath denied the continuance. After trial, the CDC prepared a brief in accordance with *Article 38(c), UCMJ, 10 U.S.C. § 838(c)*, which he intended for the convening **[*5]** authority's consideration before the convening authority took action on Appellant's case. However, the CDC submitted the brief to the convening authority's legal staff after action had been taken, and the convening authority did not recall the action to consider the brief.

In this appeal, Appellant claims structural error in Judge Spath's denial of Appellant's request for a continuance to be represented by the CDC, and alleges Judge Spath was disqualified from presiding at trial on grounds that his post-retirement employment negotiations created an appearance of bias. Appellant also claims prejudice from the convening authority's failure to recall the action

[3] Appellant's counsel raised 13 assignments of error on 23 July 2019, and the Government answered on 5 September 2019. On 10 October 2019, pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, Appellant identified nine issues alleging he received ineffective assistance by Major MR and Captain (Capt) JK who represented Appellant at trial, and by Capt JK who represented Appellant in his post-trial clemency submission.

[4] *U.S. Const. amend. VI*.

[5] *U.S. Const. amend. V*.

[6] We address the allegation that Appellant's military defense counsel were deficient during post-trial processing together with our resolution of his thirteenth assignment of error.

to consider the CDC's *Article 38(c), UCMJ*, brief. We consider these allegations of error among the other aforementioned errors Appellant assigns for review, and begin with Appellant's contention that his conviction is legally and factually insufficient.

II. Discussion

A. Legal and Factual Sufficiency

1. Additional Facts

SB and FK became close friends in the two years they attended the same high school in Virginia and they kept in touch after FK's father, a major in the Air Force, was reassigned and moved with his family to Florida. FK's parents **[*6]** also developed a close relationship with SB, and FK's mother regarded SB as a daughter. SB graduated high school in Northern Virginia in the summer of 2016 when she was 18 years old. Her best friend, FK, was present at SB's graduation, and after the ceremony the two traveled together to Florida. SB stayed with FK and her family as a guest in their home near Patrick AFB.

SB arrived in Florida during the week before Father's Day weekend in June 2016. Shortly after, she joined FK on a visit to FK's father at the workplace he shared with Appellant. A week or two before SB's visit, FK's father told Appellant that SB was his daughter's best friend from high school, and Appellant would probably meet her. He portrayed SB as a pretty, athletic girl and showed Appellant her picture. Because FK's father knew Appellant was likely to make sexual comments during the visit, he told Appellant to tone down what Appellant said because SB was just 18 years old and might be uncomfortable with his jokes and sexual innuendo. On several occasions, FK and her family similarly prepared SB for Appellant's "very crude" humor, explaining Appellant "just happens to make very inappropriate jokes, specifically towards **[*7]** women," always excusing Appellant's behavior as "very harmless."

At the workplace, SB was introduced to Appellant who right away made a comment about the size of her breasts. In that same visit SB dubbed FK a "tomboy," to which Appellant retorted, "No, [FK] doesn't have a penis she has a gigantic clit." SB left the office shortly after Appellant's comments. After the office visit, SB next saw Appellant when she and FK worked out at a gym. Although SB and Appellant had limited interaction, she overheard Appellant tell a friend in reference to SB, "Oh, look. [FK] brought me a little treat, another little treat." SB explained that FK had once introduced Appellant to a female friend from college who was adopted from China, and Appellant had remarked, "Oh, I want to eat my Chinese food. She's a treat of mine."

SB next saw Appellant on Father's Day. Appellant, his wife, and their two children joined FK's family and SB for brunch, and later in the afternoon were guests at a pool party and barbecue at FK's home. At one point, while SB played with Appellant's young daughter in the pool, Appellant swam up to SB, went underwater, and stared at a tattoo of a Bible verse on SB's right hip for about **[*8]** 30 seconds. SB found Appellant's behavior "very weird," and got out of the pool and changed into clothes.

At some point that day, FK's mother relayed to SB that Appellant gave good back rubs. Either in the kitchen with others present, or earlier in the day, Appellant gave backrubs to both SB and FK.[7] While in the kitchen, Appellant overheard a conversation about SB's inverted nipple, which prompted him to ask SB to show him her "boob" several times. SB testified she told Appellant "there is no way I am showing you my boob. That's not happening. I'm not doing that." Appellant approached FK on multiple occasions that afternoon to be, in Appellant's words, "his wingman" to help him convince SB to show him her breast. FK refused and at one point told Appellant to "please go away" because she "felt he was badgering [her] to make that happen."

Before dinner, and while FK, FK's mother, Appellant's wife, and others took a tour of nearby model homes, SB lay down alone on the bed in the room she was sharing with FK. FK's father stayed behind to finish preparing the meal, and asked Appellant to tell SB that dinner was ready. According to FK's father, Appellant left the kitchen, entered SB's room, **[*9]** and five to seven minutes passed until Appellant returned to the kitchen.

SB testified she was using her cell phone and her back was to the door when Appellant entered the bedroom and told her that dinner was ready. She replied she would be out shortly. Appellant approached her from

[7] SB testified on cross-examination that the backrub may have been earlier in the day and she was unsure of the timeline.

behind as she lay on the bed and tickled up her leg. She felt Appellant's body "coming on over" hers, and was "frozen," thinking, this was another "joke." She asked Appellant, "What are you doing? What is this, a joke? What is going on right now?" and told Appellant, "This is not funny." Appellant replied, "No. This is not a joke. I'm not joking." SB described that Appellant was "hovering" over her body while telling her she was "gorgeous" and "need[ed] to make time for him," and that Appellant could "make this happen" if she babysat while Appellant's wife worked the night shift at her job.

SB noticed Appellant had an erection. She testified "things kept escalating" as she tried to get off the bed, when Appellant moved her underwear and "shoved his finger into [her] vagina." SB felt Appellant's knuckles as he digitally penetrated her. Her genitals were uncomfortable because she was recovering from a vaginal **[*10]** infection. SB told Appellant to "[g]et off of [her]," pushing him away on his upper body and he pulled his fingers out of her. SB ran to the bathroom, locked the door, and waited until she heard Appellant leave. She then returned to the bedroom to get her phone and promptly tried calling, and then texted, FK's phone. SB texted FK to "[c]ome home right f[**]king now," and "[l]iterally right now I'm hyperventilating." SB relayed that "[Appellant] just put his fingers in [her] vagina and kissed [her]," and pleaded for FK to "come home" because she was "freaking out," "can't breath[e,]" and was "bawling." SB texted FK again, asking FK to "[c]ome home," "please come home," to "[p]lease answer [her]," and relayed, "I'm hiding in your closet with the door locked." After getting no response from FK, SB tried calling FK's mother, but FK's father picked up his wife's phone and answered instead.

FK's father testified about what happened when Appellant returned to the kitchen and before he picked up his wife's cell phone. He asked Appellant, "Is everything all right?" and Appellant replied, "Yeah, everything is fine." A couple of minutes later, FK's father noticed his wife had left her cell phone **[*11]** behind when it started to ring. He looked at the phone and saw SB was identified as the caller, and thought it was odd she was calling from inside the house. He answered the phone and SB asked him if he would "come down here please?" and not to be, in his words, "too conspicuous about it." FK's father entered his daughter's bedroom where SB was staying and saw that SB was teary-eyed and upset. He asked her what was wrong and SB replied, "He touched me . . . . Yeah, he touched me. He put his fingers in my vagina."

FK's father returned to the kitchen and asked Appellant, "Did you touch her inappropriately?" Appellant replied, "Yes," and tried to elaborate, but FK's father told Appellant he needed to "get [his] s[**]t and leave now." The group that had left the house were returning as Appellant was leaving. Appellant approached FK's mother and said, "I think I owe you an apology. . . . There was a misunderstanding between [SB] and me." FK and her mother then went to FK's bedroom and found the door was locked. SB opened the door and was crying. SB relayed to them that Appellant had touched her and put his fingers inside her vagina. SB reported the incident to her parents, and a civilian **[*12]** and military investigation ensued.

At some point during the gathering of families on Father's Day at FK's home, SB told FK she thought Appellant had a crush on her. FK found the idea silly, because she would "never know a Major in the Air Force to have a crush on an 18 year old girl."

2. Law

Appellant was convicted of ***HN1***[↑] sexual assault by bodily harm in violation of *Article 120(b)(1)(B), UCMJ, 10 U.S.C. § 920(b)(1)(B)*, which required the Government to prove four elements beyond a reasonable doubt: (1) that Appellant committed a sexual act upon SB by penetrating her vulva with his finger; (2) that Appellant did so by causing bodily harm to SB, to wit: penetrating her vulva with his finger; (3) that Appellant did so with an intent to gratify his sexual desire; and (4) that Appellant did so without the consent of SB.[8] *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45.b.(4)(b). "'[B]odily harm' means any offensive touching of another, however slight, including any nonconsensual sexual act." *Article 120(g)(3), UCMJ, 10 U.S.C. § 920(g)(3)*. With regard to consent, the statute provides, "'[C]onsent' means a freely given agreement to the conduct at issue by a competent person." *Article 120(g)(8)(A), UCMJ, 10 U.S.C. § 920(g)(8)(A)*. "Lack of **[*13]** consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in

[8] In a separate assignment of error, Appellant claims the specification fails to state an offense because the element of consent lacked a *mens rea* requirement. We disagree. ***HN2***[↑] "Congress clearly intended a general intent mens rea for *Article 120(b)(1)(B)*," *United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019)*.

determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions." *Article 120(g)(8)(C), UCMJ, 10 U.S.C. § 920(g)(8)(C)*.

HN3[] A court of criminal appeals may affirm only such findings of guilty "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*. "*Article 66(c)* requires the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case." *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

HN4[] "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (quoting *United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017))*. "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986))*, *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*. "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence **[*14]** of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

HN5[] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler, 76 M.J. at 568* (alteration in original) (quoting *Washington, 57 M.J. at 399*).

3. Analysis [9]

Appellant argues the evidence is insufficient because SB was not a credible witness in that she did not attempt to push Appellant off of her sooner, and because of the inherent improbability that Appellant could have committed the act without her participation and, thus, consent. We conclude a reasonable factfinder would find SB's testimony and the supporting evidence both probable and convincing. SB's testimony provided convincing proof of each of the elements of the offense, to include that Appellant penetrated her **[*15]** vulva with his finger and did so without SB's consent and with intent to gratify his own sexual desire. Other evidence lends support to her testimony and proof of the charged offense, including SB's actions moments after the assault that included her texting FK that Appellant had "put his fingers in [her] vagina," SB's demeanor as observed by FK and FK's parents, and Appellant's admission to FK's father that he touched SB inappropriately and to FK's mother that Appellant owed her an apology.

Appellant also contends the Government failed to disprove that Appellant labored under an honest and reasonable mistake of fact as to consent. ***HN7***[] Mistake of fact as to consent is a defense to sexual assault. *See* R.C.M. 916(j)(1). It requires that an appellant, due to ignorance or mistake, incorrectly believed that another consented to the sexual conduct. *See id.* To be a viable defense, the mistake of fact must have been honest and reasonable under all the circumstances. *See id.*; *see generally* *United States v. Jones, 49 M.J. 85, 91 (C.A.A.F. 1998)* (quoting *United States v. Willis, 41 M.J. 435, 438 (C.A.A.F 1995))* (charge of rape). Having just met before the weekend, Appellant and SB had little interaction before the offense and none of it was mutually sexual or involved activities unaccompanied by others. The settings were **[*16]** an office, a gym, and gatherings of families including children at a restaurant for breakfast and later at a co-worker's home on Father's Day. To be persuaded by Appellant's argument that he was mistaken, a factfinder would have to discount evidence that Appellant initiated

---

[9] In his brief, Appellant's counsel cites information that was not introduced in the findings portion of trial for this court's determination of the factual and legal sufficiency of his conviction, and thus, this court cannot consider it. *See* *United States v. Reed, 54 M.J. 37, 43-44 (C.A.A.F. 2000)* (citations omitted) ***HN6***[] (The "record" refers to matters introduced at trial. Matters outside the record may not be considered for factual or legal sufficiency on appeal).

sexual penetration of SB's vulva with his finger when he approached SB unannounced while she was alone in a bedroom with her back to the door. FK's father told Appellant to tone down Appellant's sexual comments and innuendo during SB's visit. SB rebuffed his request that she show Appellant her breasts, and FK told Appellant she would not be his "wingman" to convince SB otherwise. None of Appellant's interactions with SB before the offense should have led him or a reasonable person to believe that SB would consent to Appellant penetrating her vagina with his finger. On these facts we find the Government proved beyond a reasonable doubt that Appellant was not reasonably mistaken as to consent.

Considering the evidence in the light most favorable to the Prosecution, we find that a rational factfinder could have found Appellant guilty beyond a reasonable doubt of all the elements of sexual assault as charged. Furthermore, **[*17]** after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction both legally and factually sufficient.

B. Defense Motion for Continuance to Retain Civilian Counsel

1. Additional Background

The Charge and its two specifications were preferred on 31 January 2017 and an *Article 32, UCMJ, 10 U.S.C. § 832*, preliminary hearing took place on 3 February 2017. Appellant was informed of his right to counsel including the right to be represented by civilian counsel of his own choosing at his own expense, R.C.M. 405(d)(3)(C), and elected to be represented by military counsel.

Appellant was arraigned on the docketed trial date of 11 July 2017. During this *Article 39(a), UCMJ*, session, the first military judge informed Appellant of his right to retain civilian counsel under R.C.M. 506(a). After a defense continuance request to have access to a deployed witness, the trial was scheduled to reconvene on Monday, 8 January 2018, to allow time for the Government to obtain the unavailable witness[10] and produce discovery compelled by the first military judge. Meanwhile, Appellant released **[*18]** both of his detailed military counsel because they were set to begin new positions well before the new trial date,[11] and two different military trial defense counsel were detailed to represent Appellant.

Towards the end of the nearly seven month period that trial was delayed, Appellant avers he experienced growing unease about his military defense counsel and his case. In late December 2017 he reached out to a lawyer friend who advised Appellant to contact the CDC who would subsequently represent Appellant in post-trial matters and this appeal. Appellant contacted the CDC on Wednesday afternoon, 3 January 2018, and notified his military counsel on Friday, 5 January 2018, of his intent to retain the CDC. That same day the CDC signed a "Notice of Provisional Appearance" stating he was unavailable to begin a contested trial on Monday.

The CDC stated in the notice he was "conditionally retained" to represent Appellant "subject to the approval of the Presiding Military Judge." The CDC explained he "advised [Appellant] that [the CDC] was unavailable to begin a contested GCM on Monday, 8 January 2018, and that the Military Judge would have to approve a continuance." The provisional notice mentioned **[*19]** that the CDC discussed with Appellant "other motions and investigations that in [the CDC's] professional opinion would have to be done," but did not indicate when the CDC was available to appear in court. The notice mentioned the steps Appellant was taking to pay one-third of the CDC's retainer fee by Monday, with the rest paid not later than Friday, 12 January 2018.

On Saturday, 6 January 2018, Appellant's military defense counsel filed a motion to continue the case to give the CDC time to prepare for trial. Both the Government and SB, through her detailed victim's legal counsel (VLC), opposed the motion. Accompanying the motion was Appellant's own affidavit explaining he hired the CDC because of discomfort with the preparedness and experience of his military defense counsel.

On Monday, 8 January 2018, Judge Spath reconvened the court-martial as scheduled and held a hearing on the motion. He asked Appellant by whom he wished to be represented at trial, and Appellant identified both his detailed military defense counsel who were present and

[10] In the end, the witness did not testify.

[11] On 14 July 2017, Appellant released his first pair of military defense counsel. When he did so, Appellant signed two written releases that advised him of his right to hire and be represented by civilian defense counsel.

the CDC who was not. The CDC testified by telephone that he first spoke to Appellant five days before trial. The CDC explained he had formed an attorney-client **[*20]** relationship with Appellant and that the "provisional" notice of representation was patterned on a practice utilized in New York state courts. The CDC stated he would be available for trial during the week of 26 March 2018. On cross-examination, the CDC stated he did not have any upcoming trials but was working on "four habeas writs"[12] involving military trials and appeals that he needed to file before 20 March 2018. Both military counsel acknowledged they were prepared to represent Appellant.

After the military judge denied the motion for continuance and the CDC received Appellant's fee, the CDC did not file a notice of appearance with the trial court or otherwise indicate a change in the provisional nature of the notice he gave or that he was unconditionally retained to represent Appellant at trial.[13]

2. Law

HN8[] An accused has a *Sixth Amendment* right to counsel of choice. *United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)* (citations omitted). If an appellant has been erroneously deprived of this right, then the "violation is not subject to harmless-error analysis." *Id. at 152*. A trial court nonetheless has "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." The United States Supreme **[*21]** Court has observed:

> Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.

Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (quoting *Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)*); *United States v. Wellington, 58 M.J. 420, 425 (C.A.A.F. 2003)*.

HN9[] We review a military judge's denial of a request for a continuance to be represented by civilian counsel of choice for an abuse of discretion. *United States v. Wiest, 59 M.J. 276, 279 (C.A.A.F. 2004)* (citing *United States v. Weisbeck, 50 M.J. 461, 464-66 (C.A.A.F. 1999)*). In determining whether the military judge abused his discretion, we consider the factors articulated in *United States v. Miller, 47 M.J. 352, 358 (C.A.A.F. 1997)* (citation omitted). *See Wiest, 59 M.J. at 279* (citations omitted) (listing *Miller* factors). The factors include:

> surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable **[*22]** diligence by moving party, possible impact on verdict, and prior notice.

Miller, 47 M.J. at 358 (quoting F. Gilligan and F. Lederer, *Court-Martial Procedure*, § 18-32.00, at 704 (1991)).

HN10[] An abuse of discretion "requires more than just [a reviewing court's] disagreement with the military judge's decision." *United States v. Bess, 75 M.J. 70, 73 (C.A.A.F. 2016)* (citing *United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015)*). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous, when an erroneous view of the law influenced his decision, or when his decision is "outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (quoting *Stellato, 74 M.J. at 480*). The challenged decision "must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)* (quoting *United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)*).

3. Military Judge's Ruling Denying the Continuance

Trial was scheduled to commence on Monday, 8

---

[12] Writs of habeas corpus. *See All Writs Act, 28 U.S.C. § 1651(a)*.

[13] In a post-trial declaration to this court, the CDC avers "[a]s the court-martial progressed, [the CDC] was in continuous contact either via telephone or email with [Appellant] and his detailed counsel, and assisting them 'remotely' on some of the legal issues that were arising during the trial."

January 2018, as agreed upon by all parties in late July 2017. In an oral ruling at the *Article 39(a), UCMJ*, session, on 8 January 2018, the military judge denied the Defense's motion for a continuance. The military judge supplemented his ruling on the record, adding greater detail on Thursday, 11 January 2018, the last day of trial. He found the parties agreed on 31 July 2017 to reconvene for trial the week of 8 January 2018. **[*23]** Between 31 July 2017 and 5 January 2018, Appellant's military counsel participated in joint status updates and none mentioned the potential for civilian counsel to represent Appellant. On Friday, 5 January 2018, the Defense notified the Government and military judge that the Defense would request a continuance. The military judge received this notice at 1622 hours on the last weekday before the 8 January 2018 trial date.

On Saturday, 5 January 2018, the CDC entered a notice of a provisional appearance contingent on receipt of fees and a delay in the proceedings. The CDC did not have any court appearances scheduled for the week of Appellant's trial. He did not make any efforts to travel to Patrick AFB in advance of trial,[14] and he did not formally enter an appearance while awaiting payment of his retainer. The CDC had no trial obligations between the date of trial and 28 March 2018,[15] the date of the requested continuance, but he needed to file four habeas petitions.

The military judge found the CDC did not enter a formal appearance after he received the retainer fee from Appellant on 8 January 2018. He found the March 2018 continuance date "a bit optimistic" bearing in mind that the CDC **[*24]** indicated further investigations and motion practice would have to be done. The military judge observed that the charge sheet had been served on Appellant in March[16] "and motion practice had already been completed in July of 2017." The military judge noted that the CDC picked the March 2018 date "with no discussion of availability of other counsel or other witnesses."

After considering Appellant's burden as the moving party, R.C.M. 906, and relevant case law, the military judge denied Appellant's continuance request. The military judge considered whether fairness dictated he should grant the request, with fairness assessed against Appellant's *Sixth Amendment* right to counsel. Citing *Morris*, the military judge observed the right is not absolute and must be balanced against society's interest in the efficient and expeditious administration of justice. In performing this assessment, the military judge found that he should consider a named victim's right under *Article 6b(a)(7), UCMJ, 10 U.S.C. § 806b(a)(7)*, to have a proceeding free from unreasonable delay, so long as the assertion of that right did not deprive an accused of his *Sixth Amendment* right. The military judge stated that even if a reviewing court found that SB lacked standing on a continuance **[*25]** motion, his analysis would remain the same.

Before analyzing the *Miller* factors, the military judge found that Appellant was informed of his right to retain civilian counsel multiple times and had sufficient opportunity to retain civilian counsel of his choice. Considering the significant delay already in the case, and the fact that Appellant had sufficient opportunity to obtain civilian counsel, the military judge found that proceeding to trial was "neither unreasonable [n]or arbitrary."

The military judge then applied the *Miller* factors he considered germane to consideration of a continuance[17] and denied Appellant's request. As to each factor, he found as follows:

a. Surprise

The timing of Appellant's continuance request was a surprise to the trial court and to the Government because it came at the end of the last business day before trial was set to commence. The military judge found this factor weighed against Appellant, citing the multiple times Appellant "was informed of, indicated he understood, and exercised his rights to counsel."

b. Timeliness of the request

The military judge found Appellant "had more than a

[14] The CDC averred that a snowstorm at the CDC's location when trial began prohibited travel to Patrick AFB.

[15] This finding was error. The date the CDC said he was available was 26 March 2018.

[16] The referred charge and specifications were served on 6 March 2017. The military judge misstated the service date as "March of '16."

[17] The military judge found two factors inapplicable, and they were not part of his analysis: the nature of any evidence involved and the availability of substitute testimony or evidence. *See Miller, 47 M.J. at 358* (quoting F. Gilligan, *Court-Martial Procedure*, § 18-32.00, at 704).

reasonable ability and opportunity to secure **[*26]** counsel of his choice" after July 2017 and that "[h]e failed to do so in a timely manner despite being advised of his rights on multiple occasions and exercising them on at least one occasion." Appellant's request was untimely, he found, because Appellant did not request the continuance until the end of the last business day before trial, after the parties agreed on 31 July 2017 to reconvene for trial the week of 8 January 2018. The military judge found this factor weighed against Appellant.

c. Availability of witness or evidence requested

While noting that Appellant's continuance request was not based on a request for evidence or a witness, the military judge noted that the parties agreed to the January 2018 date, and that further delay would require the Government to rearrange witness travel. The military judge took note that scheduling of the 8 January 2018 trial included consideration of the availability of a witness whose presence Appellant had requested. This factor weighed against Appellant.

d. Length of continuance

The military judge considered that Appellant's CDC requested a delay until the last week of March 2018, but this date did not account for the availability of other witnesses, **[*27]** experts, and the Government counsel. Based on the CDC's indication that further investigation and motion practice would have to be done, the military judge considered the March date "optimistic." He found a nearly three-month delay after a six-month delay weighed against Appellant especially considering that the CDC did not have any trials during this period that justified the delay.

e. Prejudice to opponent

The military judge found the Government had "some limited right in the orderly administration of justice." He found a concern that delay in timely presentation of testimony on the merits could affect witness testimony and the memory on which it depends. In assessing this factor, he considered SB's *Article 6b, UCMJ*, right to a proceeding free from unreasonable delay that SB's VLC asserted on her behalf, but observed "[t]his factor didn't carry very much weight in [his] analysis." The military judge found what little weight it did have favored the Government.

f. Moving party received prior continuance

The military judge found Appellant had already been granted a six-month continuance to secure the attendance of a possible witness and to align a new trial date with the schedules of counsel for both **[*28]** sides and all witnesses. The military judge noted the original docketed 11 July 2017 trial date was established in April 2017. The military judge found this factor weighed against Appellant

g. Good faith of moving party

The military judge contrasted the good faith of Appellant's military counsel—who notified the military judge as soon as they were aware Appellant planned to hire the CDC—with Appellant's actions, which he found "problematic." Specifically, the military judge referred to Appellant's decision to wait until the last business day before trial to be represented by the CDC, which generated the request. The military judge found this factor was "reasonably neutral" and stated "I have no doubt the party acted in good faith." The military judge contrasted again the good faith of Appellant with that of the CDC who took on representation for a trial he knew he could not attend that was starting the next business day. The military judge took into account that the CDC had not entered an appearance even after he had been retained and the CDC's retainer payment was no longer pending.

h. Use of reasonable diligence by moving party

The military judge found Appellant did not show diligence **[*29]** in making the request because "[i]t was provided to this court [at] 1622 hours on 5 January 2018, the very end of the last business day before trial was scheduled to commence. At best, initial contact was made with civilian counsel by the accused on 3 January 2018."

i. Possible impact on verdict

The military judge found two qualified military defense counsel represented Appellant, including an experienced senior defense counsel. He noted both counsel proffered they were prepared for trial and that they would, and did, provide effective representation.

The military judge caveated his analysis of this factor noting that his assessment that Appellant "did receive effective representation" was "not relevant to this ruling" because he denied the continuance before he could observe the effectiveness of counsel. The military judge found that "[a]dding a counsel is going to have no appreciable effect on the verdict simply because he happens to be a civilian counsel," and appeared to weigh this factor against Appellant without stating as such.

j. Prior notice

The military judge found there was no issue of prior notice of the January 2018 proceeding, and this factor weighed against Appellant. The **[*30]** date trial was scheduled to reconvene was established on 31 July 2017. Appellant had been on notice of the 8 January 2018 trial date for over five months.

4. Analysis

The military judge did not abuse his discretion when he denied the Defense's motion. The military judge detailed his consideration of the *Miller* factors in his ruling, and the weight of the factors fell in favor of the Government. ***HN11***[↑] *Miller* examines a number of factors useful in determining whether a judge has abused his discretion. We, too, consider the application of those factors bearing in mind that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Ungar, 376 U.S. at 589*. Although the right of the victim to a proceeding free from unreasonable delay is not among the listed factors, the military judge appropriately considered it when determining if there was prejudice to Government and did not give the matter undue weight.

A fair reading of the record suggests that there was no "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.'" *Morris, 461 U.S. at 11-12* (quoting *Ungar, 376 U.S. at 589*). If there was one controlling factor in the ruling, it is whether Appellant had **[*31]** reasonable opportunity to secure counsel of choice, *see Miller, 47 M.J. at 358*, and the military judge found Appellant had been given that opportunity. That Appellant failed to secure counsel of choice in a timely manner was relevant to ***HN12***[↑] the military judge's "wide latitude" to balance the right to counsel against the court's calendar, *see Gonzalez-Lopez, 548 U.S. at 151* (citation omitted). Indeed, the focus of the ruling was that Appellant had been informed of his right to be represented by civilian counsel and did not begin searching for civilian representation until late December 2017, after a lengthy continuance had been granted, and then secured provisional representation on the eve of trial reconvening.

The military judge gave appropriate consideration to the provisional nature of the CDC's notice of appearance, which stated that the CDC was "conditionally retained" to represent Appellant "subject to the approval of the Presiding Military Judge." Both the timing and substance of the notice were properly relied on by the military judge. The record shows Appellant's request for a nearly three-month delay was not based on a need to deconflict the CDC's trial schedule—he had none, and offered little assurance that a third continuance **[*32]** would not be necessary.

The military judge made findings of fact supported by the evidence, applied those facts to the appropriate law, and used the *Miller* factors to conclude Appellant's continuance request was unreasonable. The military judge's application of the *Miller* factors and his decision to deny the request was not "clearly untenable," *Miller, 47 M.J. at 358* (quoting *United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)*), or "outside the range of choices reasonably arising from the applicable facts and the law," *Bess, 75 M.J. at 73* (quoting *Stellato, 74 M.J. at 480*). We conclude his decision was neither arbitrary, fanciful, clearly unreasonable, nor clearly erroneous. *See Solomon, 72 M.J. at 179* (quoting *White, 69 M.J. at 239*).

C. Alleged Denial of Right to a Public Trial

On two occasions, the first military judge held an *Article 39(a), UCMJ*, session and closed the courtroom to spectators to determine whether evidence that might qualify as sexual behavior or predisposition was admissible in Appellant's trial. *See* ***HN13***[↑] Mil. R. Evid. 412(c)(2) ("Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed."). The record shows spectators departed the courtroom on both occasions before the military judge took evidence to decide admissibility.

Appellant did not object to the closures nor did any member of the public. Before **[*33]** the first closure and while SB was on the witness stand, the military judge asked the Defense, "So, my understanding is we want

to take up some additional matters in closed session than [sic] at this time?" The trial defense counsel who at the time was conducting a direct examination of SB replied, "Yes, sir," and continued his examination of SB in the closed session. After going back into open session of the court and before the second closure, the military judge notified the parties of a matter he would consider in a closed session and then asked the Defense if there was "anything further?" before closing the court. The trial defense counsel replied, "No, sir, not in this open session." In the closed session that followed, the military judge, counsel for both parties, and SB's VLC discussed a matter that SB's VLC claimed was protected by his attorney-client privilege with SB, as well as a matter involving SB's medical and cell phone records as they related to the Government's discovery obligation and Mil. R. Evid. 412 admissibility.

Appellant contends for the first time on appeal that he was denied his *Sixth Amendment* right to a public trial and the military judge erred in failing to conduct the four-part closure **[*34]** analysis under R.C.M. 806(b)(5). *See also* *Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)* (holding state court failed to give proper weight to a criminal defendant's *Sixth Amendment* right to a public trial at a weeklong suppression hearing that was closed over defense objection).

Appellant observes that the military judge and *all* counsel apparently just assumed that the closure and sealing provisions of Mil. R. Evid. 412(c)(2) controlled the matter. We find Appellant waived this issue by failing to object so that the military judge might conduct the closure analysis, which we decline to conduct after the fact. ***HN14***[] It is the military judge, not a court of criminal appeals, that "makes case-specific findings on the record justifying closure." *See* R.C.M. 806(b)(5). We decline Appellant's suggestion that we should find structural error and remand for a new trial because this was not done.

Appellant's failure to object at trial waived the right to challenge the closed hearing requirement of Mil. R. Evid. 412(c)(2), and thus leaves no error for this court to correct on appeal. *See* *Levine v. United States, 362 U.S. 610, 619-20, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960)* (counsel and client forfeited public trial challenge by failing to ask trial judge to open the proceedings); *see also* *Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991)* ***HN15***[] ("failure to object to closing of courtroom is waiver of right to public trial" (citing *Levine, 362 U.S. at 619*)). In reaching this result we recognize that **[*35]** in *United States v. Hershey*, a case decided 25 years after the Supreme Court decided *Levine*, our superior court applied a more stringent test than the Supreme Court did in *Levine*, requiring an appellant's waiver of a public trial to be "intentional and knowing." *20 M.J. 433, 437 (C.M.A. 1985)* (quoting *Martineau v. Perrin, 601 F.2d 1196, 1200 (1st Cir. 1979))* (additional citation omitted) (refusing to apply the doctrine of waiver). *Hershey* relied on a decision by the United States Court of Appeals for the First Circuit, *Martineau v. Perrin, 601 F.2d 1196, 1200 (1st Cir. 1979)*, as authority for this conclusion, and cited Supreme Court precedent that predated *Levine* for support.[18] *Hershey, 20 M.J. at 437*. The Supreme Court's later decision in *Peretz* and those of several federal circuits including the First Circuit cast doubt on the validity of *Hershey* as precedent.[19]

Even if *Hershey* remains the law of this jurisdiction after the Supreme Court in *Peretz* followed the Court's precedent in *Levine*, we still find waiver. The trial defense counsel did not just fail to object, but acceded both times to the closed session. Before the first closure, Appellant's counsel agreed with the military judge's understanding that the Defense wanted to continue its direct examination of a witness **[*36]** in a closed session. Before the second closure, counsel agreed there was nothing further to discuss in the open session. Both the statements and actions of counsel evince an "intentional and knowing" waiver on Appellant's behalf. *See* *Hershey, 20 M.J. at 437*. Thus, Appellant's public trial challenge to Mil. R. Evid. 412 was

---

[18] *Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)*.

[19] *See, e.g.,* *United States v. Reagan, 725 F.3d 471, 488-89 (5th Cir. 2013)* (knowledge of courtroom closure and failure to object unreviewable), *cert. denied*, ***572 U.S. 1003, 572 U.S. 1003, 134 S. Ct. 1514, 188 L. Ed. 2d 452 (2014)***; *United States v. Christi, 682 F.3d 138, 142-43 (1st Cir. 2012)* ("In *Peretz*, the Supreme Court expressly cited [*Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960)]* for the proposition that a failure to object to closing a courtroom waives any claim of infringement to a right of public trial."), *cert. denied*, ***568 U.S. 988, 133 S. Ct. 549, 184 L. Ed. 2d 357 (2012)***; *Johnson v. Sherry, 586 F.3d 439, 444 (6th Cir. 2009)* (If the litigant does not assert the right to a public trial "in a timely fashion, he is foreclosed." (quoting *Freytag v. Commissioner, 501 U.S. 868, 896, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991))*, *overruled in part on other grounds by* *Weaver v. Massachusetts, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420 (2017)*.

waived, *see id.*, and we determine to leave the waiver intact, *see* United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016) (citation omitted) **HN16**[] (courts of criminal appeals "are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error.").

D. Challenge to the Reasonable Doubt Instruction

Also for the first time on appeal, and what appears to be an issue of first impression, Appellant challenges the reasonable doubt instruction the military judge gave as constitutionally unsound. Appellant claims it was error to instruct that a reasonable doubt is one "arising from the state of the evidence," as the military judge stated in both his preliminary instructions to the members and again after the close of evidence. Appellant claims he was denied a fair trial because the military judge erred in failing to instruct that reasonable doubt may arise from a lack of evidence as opposed to the state of the evidence. **[*37]** Appellant argues we should find structural error and remand for a new trial.

Before trial, Appellant advocated for a modified reasonable doubt instruction and raised an objection to the standard instruction that is unlike the challenge he makes now.[20] After the close of the Government's case, the military judge requested proposed instructions from counsel for both parties. Appellant requested a mistake of fact instruction, but did not seek a modified reasonable doubt instruction as he did before trial. After the military judge circulated his draft instructions, Appellant asked for an instruction regarding his decision not to testify and again proposed no modification to the reasonable doubt instruction. The military judge asked whether the Defense had any objections or requests for additional instructions. Trial defense counsel replied, "No. Your Honor." After the arguments of counsel the military judge again asked the Defense if there were any objections to the findings instructions or request for additional instructions. Counsel again answered in the negative.

HN17[] Whether an appellant has waived an objection to a findings instruction is a legal question that this court reviews de novo. United States v. Davis, 79 M.J. 329 , No. 19-0104, 2020 CAAF LEXIS 76, at *6-7 **[*38]** (C.A.A.F. 12 Feb. 2020) ("By 'expressly and unequivocally acquiescing' to the military judge's instructions, Appellant waived all objections to the instructions." (quoting United States v. Smith, 2 C.M.A. 440, 9 C.M.R. 70, 72 (C.M.A. 1953))). The CAAF in *Davis* repeated what the court has previously explained is the significance of waiver, as opposed to forfeiture:

> "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Consequently, while we review forfeited issues for plain error, "we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

*Id. at *6* (internal quotation marks omitted).

Before trial, Appellant suggested a modification to the reasonable doubt instruction without identifying changes to the language he now claims is constitutionally deficient. Then, at trial he twice declined to propose an instruction like the one he proposes now, and twice declined to object to the instruction and offered no additional instructions when prompted by the military judge. On these facts, Appellant expressly and unequivocally acquiesced to the reasonable doubt instruction the military judge gave to the members. *See* Davis at *7 (citing United States v. Wall, 349 F.3d 18, 24 (1st Cir. 2003) ("[C]ounsel twice confirmed upon inquiry from the judge that he had 'no objection **[*39]** and no additional requests [regarding the instructions].' Having directly bypassed an offered opportunity to challenge and perhaps modify the instructions, appellant waived any right to object to them on appeal." (alteration in original))). Appellant thus waived the objection he raises on appeal, *see id.*, and we determine to leave his waiver intact, *see* Chin, 75 M.J. at 223 (citation omitted).

E. Sentencing

Appellant assigns five errors he claims occurred in sentencing. First, Appellant claims he was denied his Sixth Amendment right to confront SB after she read an unsworn victim impact statement in presentencing. Second, he alleges the military judge abused his

[20] Appellant moved for appropriate relief to instruct that the members "should," and not "must," convict if they are convinced of Appellant's guilt beyond a reasonable doubt. The first military judge denied the motion in an Article 39(a), UCMJ, session without members. The military judge who presided on the merits instructed that the members "may find" Appellant guilty of an offense if they are firmly convinced of guilt.

discretion by sustaining an objection to documents Appellant wanted to attach to his written unsworn statement. Third, he claims he was deprived of due process and equal protection under the law in violation of his rights under the *Fifth Amendment* because he was prohibited from including the attachments in his unsworn statement, and yet SB could discuss the collateral consequences of Appellant's crime in her unsworn statement. Fourth, he claims that it was error for the military judge to allow Appellant to mention the consequence to him of having to register as a sex offender, **[*40]** and then instruct the members to disregard those consequences.[21] Lastly, Appellant claims his sentence that includes a mandatory dismissal was unconstitutional and inappropriately severe.

1. Additional Background

After the Government rested its sentencing case, SB read an unsworn statement. She described how "a lot of things changed" in her life after the sexual assault including her relationship with her best friend and her best friend's family. It also affected her "entire freshman year of college," which was "full of sadness, loss, doubt, and a lack of self-esteem." In the summer after her first year "she couldn't hold [her] part-time job because of [her] distress for strangers and fear of being alone." SB thanked the members for their "gift of closure" and conveyed optimism that with the trial over she could restore her friendship with her best friend, and could "start to live life as a normal college student" without interruptions to talk to investigators and attorneys. The military judge prefaced SB's statement with an instruction to the members about how they could use the information SB presented:

> The weight and significance to be attached to an unsworn statement rests with the **[*41]** sound discretion of each court member. You may consider that the statement is not under oath, it's [sic] inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter which may have a bearing upon its credibility. In weighing and [sic] unsworn statement you are expected to use your common sense, and your knowledge of human nature, and the ways of the world.

In the presentencing proceeding, Appellant elected to give a verbal unsworn statement in response to questions that were put to him by his counsel. The military judge first gave an instruction about the unsworn statement that was similar to the one he gave before SB's statement. Appellant said he thought about the day of the incident "[e]very day," and how "one lapse of judgment" "can screw everything up." He acknowledged understanding he would be a "registered sex offender just based on this conviction"[22] and that his status would impact his ability to go to meetings at his children's school, and also to be present at his children's gymnastics and cheerleading practices. Appellant explained to the members this was because, based on his understanding, "a registered **[*42]** sex offender isn't allowed anywhere near schools or anything like that regardless of it being a minor or an adult offense," and these limitations would last a "lifetime." Appellant told the members that the mandatory dismissal "as well as being a registered sex offender" would make it hard for him to find a job. He emphasized, that no matter how much time he would spend confined, "a dismissal and having to register is going to affect everything."

At the end of Appellant's verbal presentation, the trial defense counsel offered Appellant's written unsworn statement that was substantially the same as Appellant's verbal statement and marked it as a Defense Exhibit. The written presentation as offered included two attachments: a 5-page appendix to a Department of Defense Instruction (DoDI) listing offenses that require sex-offender processing;[23] and a 22-page article about the collateral consequences of sex-offender registry laws.[24] The trial counsel objected to the inclusion of these attachments on grounds that

---

[21] Appellant's appellate counsel does not assert instructional error on its own, but includes it as a footnote to the assignment of error that alleges the military judge erred when he excluded the two attachments. We consider the issue even though counsel did not raise a distinct claim that the military judge abused his discretion. *See* JT. CT. CRIM. APP. R. 18(a) (effective 1 Aug. 2019) ("Appellate Counsel for the accused may file assignments of error, setting forth separately each error assigned.").

[22] The trial defense counsel asked, "Now you know you'll have to be a registered sex offender just based on this conviction, correct?" Appellant answered, "Yes, ma'am."

[23] Department of Defense Instruction 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Encl. 2, App. 4 (11 Mar. 2013) ("Listing of Offenses Requiring Sex Offender Processing").

[24] Erika D. Frenzel, *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUST. POL'Y J. 2 (Fall 2014).

they were not Appellant's statements. Trial defense counsel defended their inclusion, in part, arguing it was the Defense's "understanding that [the members] are going to be given an **[*43]** instruction, essentially, to disregard this as part of the[ir] deliberation[s]" and that the instruction would place the attachments "in the proper context." The military judge sustained the objection for two reasons: (1) neither document was Appellant's own statement; and (2) admitting them as an exhibit and then charging the members to disregard collateral consequences of sex offender registration requirements in arriving at a sentence was inapposite. The military judge allowed the Defense to publish Appellant's written unsworn statement without the attachments that was marked as a Defense Exhibit. He instructed the members it was part of Appellant's unsworn statement and reminded them of the instructions he had given earlier regarding unsworn statements.

Trial defense counsel did not object to the military judge's sentencing instructions, which included this description of sex-offender registration requirements and that collateral consequences of Appellant's conviction should not be **[*44]** part of the members' deliberations in reaching a sentence:[25]

> Under DOD instructions when convicted of certain offenses, including the offense here, the accused must register as a sex offender for the appropriate authorities and the jurisdiction of which he resides, works, or goes to school. Such registration is required in all 50 states. The requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable. It is not your duty to attempt to predict sex offender registration requirements or the consequences thereof.
>
> While the accused is permitted to address these matters . . . in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense for which he has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends on possible requirements of sex offender registration and the consequences thereof in certain locations in the future.

Before issuing the above instruction to the members, the military judge gave both parties the **[*45]** opportunity to discuss his proposed sentencing instructions, including the one he gave in response to Appellant's unsworn statement regarding sex offender registration. Afterwards, in an *Article 39(a), UCMJ*, session, the military judge asked whether the Defense had any objections or requests for additional instructions. Other than a request to highlight a matter in mitigation involving Appellant's family, the Defense responded, "And that's it, Your Honor." After a brief recess during which the military judge finalized his instructions, the military judge asked again if the Defense had any objections or request for additional instructions. The trial defense counsel replied, "No, Your Honor." After argument by both sides, the military judge again asked if the Defense had any objections or request for additional instructions. The Defense replied it had no objections to the instructions that were given.

2. Victim's Unsworn Statement and Confrontation

Appellant claims R.C.M. 1001A(e), which authorizes a crime victim to give an unsworn statement in presentencing, is unconstitutional on its face and as applied on grounds that it deprives Appellant and those similarly situated of their *Sixth Amendment* right of confrontation **[*46]** at a critical stage of a criminal trial. Although Appellant did not object at trial, under any standard of review we disagree.

HN18[↑] "[T]he *Sixth Amendment* right of confrontation does not apply to the presentencing portion of a non-capital court-martial." *United States v. McDonald, 55 M.J. 173, 177 (C.A.A.F. 2001)*. In *McDonald*, a three-judge majority noted that "Congress would not be disabled from changing the sentencing procedures in the military." *Id. at 177*. Judge Sullivan, concurring in the result, agreed with the majority that "the *Sixth Amendment* does not require an adversarial sentencing proceeding with a right of confrontation." *Id. at 179* (Sullivan, J., concurring) (citation omitted).

In 2013, Congress revised presentencing procedures by enacting *Article 6b(a)(4)(B), UCMJ, 10 U.S.C. § 6b(a)(4)(B)*,[26] to give a crime victim the right to be reasonably heard. In a 2015 amendment to the *Manual*

[25] The instruction was modeled on the sentencing instructions in the *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 75 (10 Sep. 2014).

[26] ***National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14), Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (2013)***.

for Courts-Martial, United States,[27] R.C.M. 1001A was added to implement Article 6b(a)(4)(B), UCMJ, and to allow a victim to make an unsworn statement that is not subject to cross-examination, though either party may "rebut any statements of facts therein." R.C.M. 1001A(e). Accordingly, the right to confrontation did not extend to the presentencing proceeding of Appellant's court-martial, and we find no error.

3. Exclusion of Attachments to Appellant's Unsworn [*47] Statement

Appellant maintains the military judge erred in ruling to exclude the attachments to Appellant's written unsworn statement that referenced sex offender registration and its consequences.[28] Appellant claims the attachments would have explained the consequences of the Federal Sexual Offender Registration and Notification Act (SORNA)[29] to the factfinder and were permissible matters in mitigation under R.C.M. 1001(c)(1)(B).

HN19[↑] Our superior court has held that the consequences of sex offender registration are not a proper consideration for sentencing. United States v. Talkington, 73 M.J. 212, 216 (C.A.A.F. 2014) (addressing a military judge's instruction regarding an appellant's unsworn statement and observing that the proper focus of sentencing is on the offense and the character of the accused, and "to prevent the waters of the military sentencing process from being muddied by an unending catalogue of administrative information" (quoting United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991)) (internal quotation marks omitted)). Although an appellant may reference sex offender registration in his unsworn statement, id. at 217 (citations omitted), we find no authority and Appellant cites none for the proposition that an appellant has an unfettered right to attach anything he wants to an unsworn statement and then have it marked **[*48]** as an exhibit and admitted into evidence, or otherwise presented to the factfinder, to determine an appropriate sentence.

HN20[↑] The plain language of R.C.M. 1001(c)(2)(C) allows for an unsworn statement given "by the accused," his counsel, or both. Consistent with the rule, the military judge did not preclude Appellant from commenting on sex offender registration requirements, which Appellant brought to the attention of the members in his verbal unsworn statement and again in a written unsworn statement that the military judge admitted as a Defense Exhibit. The DoDI appendix and journal article are neither a statement by Appellant nor by counsel on his behalf and are instead the statements of others. We conclude that the military judge did not abuse his discretion in excluding evidence of statements not written by Appellant, which contained inadmissible information about collateral consequences of a court-martial conviction.

4. Instruction on Sex Offender Registration

At trial, Appellant's counsel argued that the attachments at issue were "within the scope" of the permissible bounds of an unsworn statement and that, as with Appellant's own statements about sex offender registration, in due course the military **[*49]** judge would just instruct the members to disregard the attachments as part of their deliberations. Although the trial defense counsel did not object to the limiting instruction the military judge gave, on appeal Appellant claims the military judge erred in giving the instruction.[30]

---

[27] On 17 June 2015, the President signed Executive Order 13,696 ("2015 Amendments to the Manual for Courts-Martial, United States"). Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (22 Jun. 2015).

[28] Appellant further claims he was deprived of due process and equal protection under the law, U.S. Const. amend. V, because he was prohibited from including the attachments, and yet SB could discuss the "collateral consequences" of Appellant's crime through her unsworn victim impact statement. SB's victim impact statement addressed victim impact matters authorized by R.C.M. 1001A. We find this issue does not require further discussion or warrant relief. *See* United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

[29] Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20901-962, formerly 42 U.S.C. §§ 16901-991.

[30] Appellant's appellate counsel claims as an assigned error that the instruction, *inter alia*, "amounts to legal schizophrenia":

> On one hand the members are told that the Accused can bring unsworn "information" to their attention; on the other hand they are then instructed to ignore it versus giving it "appropriate consideration." The ultimate effect on the members, and thus the Accused, is that they received no coherent or consistent judicial guidance or "instructions."

Furthermore, Appellant claims the instruction was "simply erroneous as a matter of law" in reply to the Government's answer.

HN21[] While an appellant's right of allocution in presentencing may be very broad, a military judge may provide instructions to the members to limit his statements and place them in their proper context. *See United States v. Grill, 48 M.J. 131, 133 (C.A.A.F. 1998)*. In *Talkington*, our superior court held that sex offender registration is a collateral consequence of the conviction alone and has no causal relationship to the sentence imposed for the offense. *73 M.J. at 216-17*. Thus, while an accused is permitted to raise this collateral consequence in his unsworn statement, "the military judge may instruct the members essentially to disregard **[*50]** the collateral consequence in arriving at an appropriate sentence for an accused." *Id. at 213* (citations omitted).

Appellant is resolute in his appeal that *Talkington* was wrongly decided and the military judge erred even if he "considered himself bound by it." Even so, HN22[] *Talkington* holds that the military judge is authorized to place sex offender registration in its proper context by informing the members that it is permissible for an accused to address sex offender registration in an unsworn statement, while also informing them that possible collateral consequences of a conviction should play no part in their deliberations. *Id. at 218* (citations omitted).

Considering the holding in *Talkington*, we find Appellant waived our review of the limiting instruction now complained of by making sex offender registration a key part of both unsworn statements, and conclude there is no error to correct on appeal. HN23[] Whether an appellant has waived an objection to an instruction is a legal question that this court reviews de novo. *See Davis, 79 M.J. 329, 2020 CAAF LEXIS 76, at *6-7* (findings instruction waived). In presentencing, the defense strategy was designed to highlight Appellant's understanding of having to register as a sex offender as a consequence of his conviction **[*51]** for sexual assault. When contesting the military judge's ruling on the inadmissible attachments, his counsel stated it was "so important" for Appellant to be able to "bring up [having to register as a sex offender] as a matter in his unsworn statement." A key argument the Defense made on this point was that collateral information should be permitted to be given to the members "understanding that [the members] are going to be given an instruction, essentially, to disregard [registration] as part of the[ir] deliberation[s]." To this end, Appellant reviewed the draft instructions at trial and was twice asked if there was any objection or request for additional instructions. Both times Appellant answered in the negative. On these facts, we find Appellant conceded to the instruction he now objects to on appeal. Appellant thus waived our consideration of the issue, *see id.*, and we determine to leave his waiver intact, *see Chin, 75 M.J. at 223* (citation omitted).

5. Mandatory Dismissal Required by Article 56(b)(1), UCMJ

Appellant claims his sentence that included a dismissal required by *Article 56(b)(1), UCMJ, 10 U.S.C. § 856(b)(1)*,[31] violates his right to equal protection under the *Fifth Amendment*.[32] Appellant argues that an officer who "stabs someone **[*52]** with a hunting knife" would not be required to be so punished, and it follows, Appellant contends, that his sentence that included a mandatory dismissal for sexual assault is "arbitrary, capricious, and unconstitutional."

We are unpersuaded by Appellant's analogy and find his sentence is not unconstitutional on grounds that his punishment included a mandatory dismissal. HN24[] In *Chapman v. United States, 500 U.S. 453, 467, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)*, the Supreme Court observed that a statutory sentencing scheme that eschewed "individual degrees of culpability . . . would clearly be constitutional." The Supreme Court noted a statute that imposed a fixed sentence for distributing any quantity of lysergic acid diethylamide (LSD), in any form, with any carrier, would be constitutional. *Id.* It follows that Congress has the power to require a minimum sentence for sexual assault as it does a fixed sentence for LSD. It also follows that whether Congress commanded a minimum sentence for an unrelated offense (e.g. homicide or assault) has no bearing on the constitutionality of a minimum sentence of a punitive discharge for sexual assault.

HN25[] The Supreme Court explained that "[a] sentencing scheme providing for 'individualized sentences rests not on constitutional **[*53]** commands, but on public policy enacted into statutes.'" *Id. at 467* (quoting *Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.*

---

[31] The NDAA for Fiscal Year 2014 modified *Article 56, UCMJ, 10 U.S.C. § 856*, and required that the punishment for, *inter alia*, violations of Article 120(b) "must include, at a minimum, dismissal or dishonorable discharge," subject to exceptions not relevant to Appellant's case. ***Pub. L. No. 113-66, § 1705(a)(1), 127 Stat. 672, 959 (2013)***.

[32] *U.S. Const. amend. V*.

Ct. 2954, 57 L. Ed. 2d 973 (1978)). "Congress has the power to define criminal punishments without giving the courts any sentencing discretion," and in fact, "[d]eterminate sentences were found in this country's penal codes from its inception." *Id.* (citations omitted). Although mandatory minimum sentencing schemes "fail to account for the unique circumstances of offenders who warrant a lesser penalty," the Supreme Court has nonetheless held them constitutional. Harris v. United States, 536 U.S. 545, 568-69, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), *overruled on other grounds by* Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (any fact that increases the mandatory minimum must be submitted to the jury); *see also* Harmelin v. Michigan, 501 U.S. 957, 996, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.")

Article 56(b)(1), UCMJ, commands that Appellant's punishment must include, at a minimum, dismissal from the service. This is akin to Article of War 95, the predecessor of Article 133, UCMJ, 10 U.S.C. § 933, in which Congress originally provided that "[a]ny officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," United States v. Timberlake, 18 M.J. 371, 377 (C.M.A. 1984) (Everett, C.J., concurring) (alteration in original). The law does not support Appellant's **[*54]** contention that a mandatory minimum sentence of a dismissal for sexual assault is unconstitutional on grounds that Congress has not proscribed the same minimum sentence for other crimes. We find no violation of equal protection under the Fifth Amendment from Congress' establishment of a minimum sentence for sexual assault.

6. Sentence Appropriateness

Appellant also claims his mandatory dismissal is inappropriately severe. ***HN26***[↑] We review issues of sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006) (citing United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)). Our authority to determine sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(c), UCMJ. Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

Appellant faced 30 years of confinement, but was sentenced to just six months, along with a mandatory dismissal, forfeiture of $1,000.00 pay per month for six months, **[*55]** and a reprimand. Appellant had known SB for only a few days after meeting her for the first time. We have given individualized consideration to Appellant, the nature and seriousness of his offense, his record of service, and all other matters contained in the record of trial, *see* United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted), and conclude Appellant's sentence is appropriate. Although we have the authority to disapprove a mandatory minimum sentence required by Article 56, UCMJ, we decline to do so. *See* United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018).

F. Military Judge's Alleged Conflict of Interest

Appellant contends his conviction must be set aside because Judge Spath's undisclosed employment negotiations with the United States Department of Justice (DoJ) created a disqualifying appearance of bias. For support, Appellant relies on Judge Spath's denial of his continuance request and ruling that excluded two documents Appellant wanted to attach to his written unsworn statement, both discussed *supra*. We find Judge Spath was not disqualified from presiding as the military judge at Appellant's trial.

1. Additional Background

After Appellant's arraignment and initial Article 39(a), UCMJ, session ended on 12 July 2017, Judge Spath, in his capacity as the chief trial **[*56]** judge of the Air Force, detailed himself, on 26 September 2017, to preside at Appellant's court-martial and ordered trial to reconvene on 8 January 2018 at 0830 hours. Judge Spath replaced the previous military judge who had presided over Appellant's arraignment on 11 July 2017 and then retired from active duty. Judge Spath himself was also preparing to retire to become an immigration judge employed by the DoJ.

Judge Spath applied for the DoJ position on 19 November 2015, well before Appellant's trial. As part of

his application, he stated he had 5 years of experience as a trial judge and another 15 years of extensive experience as both a prosecutor and criminal defense counsel. He stated he "tried over 100 sexual assault cases" among other felony trials and, as a military judge, he "presided over close to 100 sexual assault trials, and another 50+ trials involving other violent crimes."

The DoJ extended an initial job offer to Judge Spath in March 2017, and in mid-June 2017 established an 18 September 2017 start date. Judge Spath negotiated his salary and start date in a series of emails, including emails between 27 March 2017 and 3 July 2017 that are attached to the appellate record. **[*57]** The job offer and its terms were pending when Appellant's trial reconvened on 8 January 2018 with Judge Spath presiding as the military judge.

2. Analysis

HN27[] "An accused has a constitutional right to an impartial judge." *United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001)* (quoting *United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999)*). R.C.M. 902 outlines the circumstances when a military judge shall disqualify himself or herself in any proceeding. Two distinct grounds include when the "military judge's impartiality might reasonably be questioned," or the military judge has "an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." R.C.M. 902(a), 902(b)(5)(B). "'Proceeding' includes pretrial, trial, post-trial, appellate review, or other stages of litigation." R.C.M. 902(c)(1).

HN28[] When an appellant challenges a military judge's impartiality for the first time after trial, "'the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011)* (quoting *United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000)*). The appearance of impartiality is reviewed on appeal objectively and the military judge's conduct is tested to determine if it "would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality **[*58]** might reasonably be questioned." *United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982)* (quoting E. Thode, *Reporter's Notes to Code of Judicial Conduct* 60 (1973)) (internal quotation marks omitted); *see also United States v. McIlwain, 66 M.J. 312, 314 (C.A.A.F. 2008)* ("Whether the military judge should disqualify herself is viewed objectively, and is 'assessed not in the mind of the military judge [her]self, but rather in the mind of a reasonable man . . . who has knowledge of all the facts.'" (alterations in original) (quoting *United States v. Wright, 52 M.J. 136, 141 (C.A.A.F. 1999)*)).

HN29[] When the issue of disqualification is raised for the first time on appeal, we apply the plain error standard of review. *Martinez, 70 M.J. at 157* (citing *United States v. Jones, 55 M.J. 317, 320 (C.A.A.F. 2001)*). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.* (citing *United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008)*).

Appellant argues Judge Spath's "flaunting" of his experience as a judge advocate and military judge in his job application was disqualifying. In particular relevance to Appellant's case, he further claims "it is more than reasonable to logically infer" that (1) Judge Spath excluded two attachments that referenced sex offender registration consequences so as not to jeopardize his prospective DoJ employment; and (2) Judge Spath denied Appellant's motion for a continuance because he was clearing his docket **[*59]** in preparation to begin his immigration judge duties. We address each contention in turn.

First, we find no basis for disqualification in Judge Spath's job application or his negotiations with the DoJ. He described his trial and judicial experience by reference to his years of practice and the number and types of cases he tried. He did not gild his communications with DoJ personnel in a manner that could raise doubts about the legality, fairness, or impartiality of Appellant's trial—by boasting of, for example, a record of convictions or expediency in moving cases as a trial judge. Appellant draws parallels with the disqualifying interest Judge Spath was found to have in *In re Al-Nashiri, 921 F.3d 224, 440 U.S. App. D.C. 260 (D.C. Cir. 2019)*, where he presided over Al-Nashiri's military commission. The United States Court of Appeals for the District of Columbia Circuit observed that judges may not sit in judgment on cases in which their prospective employers are a party:

> the Attorney General was a participant in Al-Nashiri's case from start to finish: he has consulted on commission trial procedures, he has loaned out one of his lawyers, and he will play a role in defending any conviction on appeal. The challenge [Judge] Spath faced, then, was to treat the **[*60]**

> Justice Department with neutral disinterest in his courtroom while communicating significant personal interest in his job application. Any person, judge or not, could be forgiven for struggling to navigate such a sensitive situation. And that is precisely why judges are forbidden from even trying.

Id. at 236-37 (citation omitted). Ultimately, the court found that "[Judge] Spath's job application, therefore, cast an intolerable cloud of partiality over his subsequent judicial conduct." *Id. at 237*.

But the circumstances of Appellant's court-martial are different than Al-Nashiri's military commission. The DoJ was not a party to Appellant's trial and did not have an identifiable interest in its result, nor was the Attorney General or anyone in the DoJ a participant. Neither the DoJ nor the Attorney General has a close association with military courts-martial generally, or Appellant's case specifically. Appellant cites one connection with the DoJ: Appellant claims the DoJ's role overseeing and administering the SORNA was disqualifying because of Judge Spath's "rulings on various SORNA issues litigated below." In fact, just one of Judge Spath's rulings tangentially related to SORNA—a ruling excluding two attachments **[*61]** that referenced sex offender registration Appellant wanted to give to the members as part of his written un-sworn statement. However, the connection of this ruling and SORNA is tenuous. Judge Spath neither applied SORNA nor interpreted, much less undermined or reinforced, the Government's reliance on any provision. Rather, his ruling addressed the military presentencing procedures in R.C.M. 1001, a rule promulgated by the President, and related to the permissible bounds of an appellant's unsworn statement. There is no reason to believe that a DoJ hiring official would hear about the ruling and be pleased or displeased, or that Judge Spath believed a DoJ hiring official would be aware of his ruling or that it would be any matter of consequence. This case is therefore distinguishable from the disqualification found in *In re Al-Nashiri*.

Second, there is no evidence in the record that Judge Spath denied Appellant's continuance motion for personal reasons or that an objective observer knowing the facts would conclude that he did. No evidence or reasonable inference suggests that Judge Spath was under pressure to move Appellant's case hurriedly so that he could retire. As the chief trial judge, Judge **[*62]** Spath had plenary detailing authority which would have allowed him to identify any trial judge in the Air Force to preside at Appellant's trial if he concluded Appellant met his burden to show a continuance was warranted. *See* ***HN30***[↑] Air Force Manual 51-204, *United States Air Force Judiciary and Air Force Trial Judiciary*, ¶ 1.3 (18 Jan. 2008, Incorporating Through Change 2, 9 Oct. 2014) (the duties of the chief trial judge include "detailing judges to all Air Force General and Special courts-martial.").[33] Even if there was some evidence that Judge Spath was under pressure to keep a post-retirement timeline, and there is none, he could have detailed a judge other than himself to preside at Appellant's trial if a continuance was warranted.

We find Judge Spath was not disqualified from presiding at Appellant's court-martial. An objective observer knowing all of the facts would not question Judge Spath's impartiality, and there is no evidence in the trial or appellate record that Judge Spath had an interest that could be substantially affected by the outcome of the proceeding. *See* R.C.M. 902(a), 902(b)(5)(B). ***HN31***[↑] "There is a strong presumption that a judge is impartial, **[*63]** and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001)* (citation omitted). Appellant has not overcome the presumption. We find no error, much less plain and obvious error, on this issue.

G. Post-Trial

In the post-trial proceeding, Appellant was represented by both his CDC and military defense counsel, Captain (Capt) JK.[34] In an assignment of error raised by the CDC on Appellant's behalf, Appellant claims he was prejudiced by (1) the failure of the base legal office to serve the record of trial (ROT) and the staff judge advocate's recommendation (SJAR) on his CDC; and (2) the refusal by the convening authority's staff judge advocate to recall Appellant's case after the convening authority had taken action so that the convening authority would have the benefit of an *Article 38(c), UCMJ*, brief that the CDC submitted after the deadline to submit clemency. Appellant claims both procedural errors denied Appellant of his right to procedural due process.

---

[33] Superseded by Air Force Instruction 51-204, United States Air Force Judiciary and Air Force Trial Judiciary, ¶ 2.3.1 (10 Sep. 2018).

[34] Capt JK promoted to major after trial.

In a related issue raised by Appellant, he argues his military defense counsel was ineffective because he failed to "adequately **[*64]** communicate to the government the role and status of [the] CDC in post-trial proceedings."[35] Appellant avers that both he and his CDC "communicated to [Appellant's] detailed military defense counsel the role that [the] CDC had been retained to play in post-trial processing, and submission of clemency and related matters to the convening authority." Appellant explains, "If my detailed military defense counsel in fact informed the legal office that my CDC was only acting as appellate counsel, as alleged by the government, that would be false and contrary to my express wishes."

1. Additional Background

In a final session of the court held on 11 January 2018 while the members deliberated on their sentence, the military judge conducted an inquiry with Appellant and one of his two detailed military defense counsel, Capt JK, to ensure Appellant had been advised both orally and in writing of his post-trial and appellate rights. The military judge asked Capt JK if he was "going to be responsible for post-trial processing?" Capt JK responded in the affirmative and submitted a post-trial rights advisement dated the first day of trial that Appellant and both military counsel had signed.

a. Capt JK's [*65] Clemency Submission on Behalf of Appellant

Capt JK actively represented Appellant after the members sentenced Appellant to a dismissal, to be confined for six months, to forfeit $1,000.00 of pay per month for six months, and to be reprimanded. On 16 January 2018, Capt JK sent a request to the convening authority to defer the adjudged forfeitures until action and waive mandatory forfeitures for a period of six months for the benefit of Appellant's dependent children. *See* *Articles 57(a)(2)*, *58b(b), UCMJ*, *10 U.S.C. §§ 857(a)(2)*, *858b(b)*.[36] Capt JK also certified the transcript, receipted for the SJAR, requested and received an extension to submit matters, and submitted his own attorney clemency memo identifying himself as Appellant's defense counsel.

In his 3 May 2018 attorney clemency memo, Capt JK responded to the SJAR dated 16 April 2018. On Appellant's behalf, Capt JK advocated the military judge erred in (1) denying Appellant's motion for a continuance to allow Appellant to be represented at trial by the CDC; (2) denying Appellant's motion to compel discovery of text messages between SB and her friend FK; and (3) denying a request by a court member to receive evidence of a statement Appellant made to the Brevard **[*66]** County (Florida) Sheriff's Office on grounds that the statement was hearsay and its probative value was outweighed by other considerations under Mil. R. Evid. 403.

Capt JK correctly informed the convening authority that his power "to modify the findings and sentence in [Appellant's] case is greatly restricted." He noted the convening authority had the power to reduce or set aside the adjudged confinement, forfeitures, and reprimand, but could not set aside the findings of guilty or disapprove the dismissal. Capt JK asked the convening authority to grant clemency by disapproving the $1,000.00 forfeitures for six months and to reduce Appellant's confinement by 32 days. Along with the relief Capt JK requested as clemency,[37] Capt JK asked the convening authority to write a letter in support of Appellant's claims of error. As entreated, the letter would advocate that the convening authority would have set aside the findings or ordered a new trial if he had the power to do so; it also would have recommended that the Secretary of the Air Force (SECAF) substitute an administrative discharge for the dismissal as authorized by *Article 74(b), UCMJ, 10 U.S.C. § 874(b)*.

---

[35] In response to an order of this court, Appellant's three appellate counsel identified military appellate counsel as "primary" counsel on the assignment of error that Appellant raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

[36] On 19 January 2018, the convening authority denied the request to defer adjudged and mandatory forfeitures, and, effective 25 January 2018, granted waiver of $1,000.00 of the mandatory forfeitures for a period of six months, upon expiration of Appellant's term of service, or until release from confinement, whichever was sooner, to be paid for the benefit of Appellant's dependent children.

[37] *See* *Article 60(b)(1), UCMJ, 10 U.S.C. § 860(b)(1)* ("The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence."); *see also* R.C.M. 1105(b)(1) ("The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence, except as may be limited by R.C.M. 1107(b)(3)(C).").

Appellant's own submission, also dated 3 May 2018, echoed **[*67]** the clemency and other relief Capt JK requested on Appellant's behalf. Appellant requested the convening authority to "consider the letter from [his] Defense Counsel, Capt [JK]" along with other matters that were submitted in clemency. He also discussed the consequences of the mandatory dismissal and sex offender registration. Five days later, on 8 May 2018, the convening authority took action and denied the clemency and other relief that Appellant and Capt JK had urged the convening authority to grant. There is no evidence in the record or reason to believe that the convening authority wrote the letter to the SECAF that Appellant and Capt JK asked for, much less favored either outcome Appellant sought.

b. Conduct of Counsel in Appellant's Post-Trial Representation

Appellant's CDC learned that the convening authority took action a week after it happened. In a sworn affirmation to this court, the CDC provided emails exchanged with Capt JK, and with personnel at the base legal office who tried the case and the convening authority's legal staff. The CDC explained he received the SJAR sometime on 15 May 2018, when he learned the convening authority had already taken action, but did not receive **[*68]** a copy of the authenticated ROT he needed to finalize an *Article 38(c), UCMJ*, brief to identify legal errors to the convening authority.[38]

In response to the CDC's affirmation and Appellant's claims of ineffective assistance of his military defense counsel, the Government provided declarations from the assistant trial counsel and the chief of military justice on the convening authority's legal staff. Additionally, we ordered and received a declaration from Capt JK. We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes and are convinced such a hearing is unnecessary. *See* *United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*; *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411, 413 (C.M.A. 1967)* (per curiam). Pared down to the relevant facts, the post-trial affirmation, declarations, and attachments thereto are generally consistent and indicate the following facts.

After sentencing, the CDC and Capt JK ultimately resolved that both attorneys would represent Appellant in seeking clemency and other relief from the convening authority, and the CDC would represent Appellant in his appeal. Each attorney undertook to prepare and separately submit matters to the convening authority. Capt JK would assist Appellant with his personal clemency request and **[*69]** submit it along with a supporting attorney memorandum that Capt JK would prepare and sign. At the same time the CDC would prepare and submit an *Article 38(c), UCMJ*, brief, that identified errors in Appellant's trial.

Legal office personnel at the base where the case was tried and on the convening authority's staff had a different understanding. Above all, their actions show they relied on Capt JK's acknowledgement at trial that he was responsible for post-trial processing. The Government attorneys believed that Capt JK alone was responsible for representing Appellant on post-trial matters and that Appellant's CDC would be representing Appellant on appeal. Their beliefs were reinforced by two important facts evident from the declarations: first, that Appellant's CDC did not send a notice of representation to the Government or formally countermand Capt JK's acknowledgement on the record that Capt JK would handle post-trial processing; and second, Appellant identified his CDC as appellate counsel on AF Form 304, *Request for Appellate Defense Counsel*, on the day his court-martial adjourned. The understanding of the Government's attorneys apparently did not change when Capt JK, on 13 April **[*70]** 2018 and on the CDC's behalf, requested the legal office to make a copy of the authenticated ROT and send it to the CDC. Capt JK's request did not specify whether the CDC needed the ROT for the purpose of clemency, appeal, or some other purpose. Capt JK had been provided his own copy for use while preparing the response to the SJAR. *See* R.C.M. 1106(f)(3).

On 16 April 2018, and in accordance with R.C.M. 1106(f)(2), the legal office served Capt JK, by email, with the SJAR. Appellant receipted for his copy of the SJAR on 18 April 2018.[39] Appellant's CDC was not served with the SJAR. Capt JK erroneously believed the legal office would provide Appellant's CDC with a copy guided by the misunderstanding that the Government had a "responsibility to provide this type of document to all defense counsel involved in the post-trial process." Not coincidentally, the CDC asserts as much in this

[38] Appellant's CDC avers he did receive a copy of the "*unauthenticated* ROT for the January 2018 proceedings."

[39] Appellant receipted for a copy of the record of trial on 17 April 2018.

appeal.

Appellant had a ten-day period to submit clemency. *See* R.C.M. 1105(c)(1). As the 28 April 2018 deadline drew near, Capt JK "continued to work on [his] attorney memorandum for [Appellant]'s clemency submission" and "worked with [Appellant] on his clemency letter and was in communication with [Appellant's CDC]." Capt JK's "communication with [Appellant's **[*71]** CDC] included emailing [Appellant]'s draft clemency letter with [Capt JK's] suggestions for his input. This was done at [Appellant]'s request and was emailed to [Appellant's CDC] on 20 April 2018." There is nothing in the post-trial declarations to suggest that the CDC asked Capt JK to provide, or that Capt JK did provide, the SJAR he received by email from the Government.[40]

Capt JK "talked to [Appellant's CDC] about [Appellant]'s approaching clemency submission deadline." Even though Appellant's CDC supposed he would receive a copy of the SJAR from the Government and had not received one himself, nonetheless, on 24 April 2018, the CDC asked Capt JK to request an extension from the convening authority to allow for additional time to submit matters. Capt JK avers he had separate telephone conversations with two attorneys in the base legal office and let them know he "would be requesting an extension for [Appellant]'s clemency submission." He told one of the attorneys that the justification for the request was "due in part to [Capt JK's] workload and leave and in part for [Appellant's CDC] *who would also be submitting matters* for [Appellant]'s clemency." (Emphasis added). This is the first **[*72]** and only clear indication in the post-trial declarations that anyone in the Govern-ment should have been aware that Appellant's CDC expected to submit matters separate from the submission the Government expected to receive from Appellant and Capt JK.[41]

On the other hand, Capt JK's written extension request to the convening authority and his staff judge advocate (SJA) made no mention that more time was needed for Appellant's CDC to submit matters. It also did not reference that Appellant's CDC had not received an authenticated copy of the ROT or a copy of the SJAR and that more time was needed for the CDC's review of those documents. And, unlike Capt JK's verbal conversation with an attorney from the base legal office, his written request that was approved by the SJA to the convening authority—who was not the supervisor of the base legal office personnel whom **[*73]** Capt JK spoke to on the telephone—did not mention that Appellant's CDC was preparing a separate submission and also needed an extension. Rather, the request asked the Government for a delay until Friday, 4 May 2018 at 1630 hours because Capt JK simply needed "more time to speak with [Appellant] and coordinate with [Appellant's] civilian counsel." The extension was granted with a new deadline of 4 May 2018; significantly, on 25 April 2018, Capt JK informed the CDC of the new deadline.

On 2 May 2018, Capt JK let Appellant's CDC know he was prepared to submit Appellant's clemency matters with his accompanying attorney memorandum the next day so that the convening authority's legal staff would have it before 4 May 2018. Capt JK informed the CDC that he would ensure the CDC was copied on the submission so that the CDC would have the contact information for the attorneys at the base legal office and know to whom he should send his *Article 38(c), UCMJ*, brief.

True to Capt JK's intention to meet the 4 May 2018 deadline, on 3 May 2018, Capt JK's paralegal submitted Capt JK's attorney clemency memo along with Appellant's personal clemency submission. Appellant's CDC was copied on the email, which **[*74]** read, "Please see attached clemency request for [Appellant] and feel free to contact our office with any questions." Thereafter, neither the CDC, nor Capt JK on the CDC's behalf, alerted the Government that the submission was

---

[40] Included as an attachment to the affirmation of Appellant's CDC is an email he sent to a judge advocate on the convening authority's staff stating the CDC "received a copy of the SJAR from [Capt JK on 15 May 2018] when [Capt JK] found out that [the CDC] had not been served with a copy." We decline to speculate why one counsel did not share the SJAR with the other between 16 April 2018 and 3 May 2018, the date clemency was submitted. However, the SJAR was apparently of no consequence to the CDC's part of the representation as neither defense counsel aver that the CDC asked Capt JK to send him a copy.

[41] The CDC avers he:

> personally communicated with the Assistant *Trial* Counsel [ATC] the fact that he needed a copy of the RoT, which the ATC agreed to provide and CDC provided his office mailing address to him, as CDC was going to be submitting matters for the [staff judge advocate] and [convening authority]'s post-trial consideration in this case . . . .

It is unclear from the CDC's affirmation what exactly the CDC communicated to the ATC other than he required a copy of the record of trial.

incomplete as the CDC intended to submit a brief. Capt JK avers he "believed that [Appellant's CDC] would subsequently be submitting his Article 38[(c), UCMJ,] brief to them before the clemency deadline." In a memorandum for record Capt JK composed on 21 June 2018 that was attached to his declaration, Capt JK states "[i]t was not until on or about 14 May 2018, that [he] learned [Appellant's CDC] did not submit his brief since he was waiting for the ROT and SJAR to be served to him from the legal office." Coincidentally, Appellant was released from confinement on 14 May 2018.

In the days that followed, Appellant's CDC was unsuccessful in convincing the Government to withdraw the action and recall Appellant's case so that the convening authority would have the benefit of his Article 38(c), UCMJ, brief. Appellant's record of trial was docketed with this court on 22 May 2018. On 30 May 2018, this court received a memorandum from the Air Force Legal Operations Agency, **[*75]** Military Justice Division, Appellate Records Branch (AFLOA/JAJM), identifying the CDC's 40-page brief dated 14 May 2018 for inclusion in the original record of trial.[42] The JAJM memorandum was signed as having been received by representatives of the Appellate Government Division (JAJG) and the Appellate Defense Division (JAJA). The brief is included in the record of trial.

2. Law

HN32[↑] "The standard of review for determining whether post-trial processing was properly completed is de novo." United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing United States v. Kho, 54 M.J. 63 (C.A.A.F. 2000)). An error in post-trial processing results in material prejudice to the substantial rights of an appellant under Article 59(a), UCMJ, 10 U.S.C. § 859(a), if an appellant "makes some colorable showing of possible prejudice." United States v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting United States v. Chatman, 46 M.J. 321, 323-34 (C.A.A.F. 1997)). Given our superior court's reliance on "the highly discretionary nature of the convening authority's clemency power, the threshold for showing prejudice is low." United States v. Lee, 52 M.J. 51, 53 (C.A.A.F. 1999).

HN33[↑] The Sixth Amendment guarantees an accused the right to effective assistance of counsel. United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, we apply the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Gilley, 56 M.J. at 124 (citing United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000)).

HN34[↑] We review allegations of ineffective assistance of counsel de novo. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)). "To prevail on an ineffective **[*76]** assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient" and that this deficiency resulted in prejudice. United States v. Captain, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing Strickland, 466 U.S. at 698). Accordingly, we consider "whether counsel's performance fell below an objective standard of reasonableness." United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008) (citations omitted). An appellate court must "evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel." United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004) (citing United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001)).

3. Analysis

All too often we see careless mistakes by government attorneys and defense counsel during post-trial processing. But this is the unusual case where an appellant and his civilian counsel fault the Government and the military defense counsel for the CDC's own missed deadline—one that the military defense counsel timely requested in part on the CDC's behalf and the CDC knew had been granted. Still, resolution of Appellant's assigned errors are straightforward even if the reasons underlying the failures in communication on Appellant's team are peculiar. Pared down to the relevant facts, the declarations reveal the Government complied with standards applicable to post-trial processing, and Appellant has shown neither **[*77]** deficiency in the combined performance of his defense counsel nor a colorable showing of possible prejudice by the convening authority taking action without the benefit of the Article 38(c), UCMJ, brief the CDC had

[42] A second document included with the brief was a 3-page memorandum regarding "Excess Appellate Leave Issues" that was signed by Appellant's CDC, which the court accepted for inclusion in the record of trial.

prepared.

HN35[] Rule for Courts-Martial 1106(f)(2) lists the order of precedence on whom the SJAR is served if an accused fails to designate a specific counsel at trial. The SJAR is served on one counsel only, and civilian counsel is first in the order of precedence if an accused does not so designate. Because Capt JK identified he was counsel of record for post-trial processing, the order of precedence is inapplicable, and the Government met its obligation under R.C.M. 1106(f)(2) by serving the SJAR on Capt JK and him alone. *See* United States v. Washington, 45 M.J. 497, 498 (C.A.A.F. 1997) (finding error after appellant requested his military counsel be served with the SJAR and ROT, but service was accomplished on appellant's civilian counsel instead). There is no evidence in the record of proceedings—or indication in any declaration or affirmation—that the CDC sent notice of representation to the Government that might have changed this designation or the understanding of any legal office personnel.[43] On these facts it was not error for the Government to refuse to withdraw the action after **[*78]** faithfully observing the R.C.M. 1106(f)(2) procedures and granting in full Appellant's request for an extension to submit matters.

Appellant had a 4 May 2018, 1630 hour deadline to submit clemency, which both defense counsel knew had been extended once. Each counsel undertook a well-defined responsibility. Capt JK capably met his. Despite asking Capt JK to request an extension and knowing a new deadline had been set, Appellant's CDC did not submit his Article 38(c), UCMJ, brief or request a second extension so that his brief would be timely.[44] Once the clemency deadline passed, Government attorneys could reasonably conclude Appellant's clemency submission was complete: the matters the Government did receive, which the CDC also received because the defense paralegal included him on the email, made no reference to a separate submission that would be forthcoming from the CDC. For these reasons, we find the Government did not err in post-trial processing and Appellant was not denied his right to procedural due process.

Even if we presume deficiency of the defense team, *see* Garcia, 59 M.J. at 450, we find no colorable showing of possible prejudice, *see* Wheelus, 49 M.J. at 289, and thus no grounds to order post-trial processing anew. The convening authority **[*79]** had the power to reduce or set aside Appellant's adjudged confinement, forfeitures, and reprimand, but could not set aside the findings of guilty or disapprove the dismissal. Consistent with these restrictions, and citing the power the convening authority did have under Article 60, UCMJ, 10 U.S.C. § 860, Capt JK's submission asked the convening authority to disapprove the $1,000.00 forfeitures for six months and to reduce Appellant's confinement by 32 days. His request was in harmony in all respects with the relief Appellant wanted and the clemency the convening authority had the power grant.

In contrast to Capt JK's submission, the Article 38(c), UCMJ, brief is silent about clemency and advocates for relief that the convening authority had no power to grant. Its focus, much like Appellant's appeal to this court, are errors Appellant claims occurred at trial. Appellant's CDC advocated for retrial on grounds that Appellant was denied the right to be represented by his civilian counsel of choice. He advocated for the findings and sentence to "be disapproved and reversed, as constitutionally invalid" and that Appellant's "sentence herein should be set aside and a rehearing as to an appropriate sentence **[*80]** for this Accused, ordered." The convening authority did not have the power to do these things.[45] Appellant's CDC did not address, as Capt JK did, either the power the convening authority did have or the clemency Appellant asked the convening authority to grant.

More to the point, although Appellant's Article 38(c), UCMJ, brief identifies errors, it does not seek clemency

---

[43] Appellant faults his military defense counsel for failing to make clear to the Government that the scope of the CDC's representation included preparing a post-trial submission to the convening authority. We find this was the CDC's responsibility, and his alone, and is customarily done by sending notice to an adverse party that defines the scope of the representation undertaken by the attorney. As discussed previously, the military judge also found Appellant's CDC did not enter a formal appearance during trial, even after receiving a retainer fee.

[44] Appellant's CDC could have asked the convening authority to push the deadline to 18 May 2018. *See* R.C.M. 1105(c)(1) ("If, within the 10-day period [to submit matters], the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days.").

[45] *See* R.C.M. 1102 (proceedings in revision and Article 39(a), UCMJ, post-trial sessions); R.C.M. 1107(e) (ordering rehearing or other trial); R.C.M. 1210 (new trial); *see generally* Articles 60(f) and 73, U.C.M.J, 10 U.S.C. §§ 860(f), 873.

or any other relief the convening authority might have given. Even so, Appellant's CDC argues "prejudice *per se*" and remand for post-trial processing anew because the action "fails to acknowledge that the Military Judge ordered that [Appellant] be credited with 16 days of pretrial confinement in the Brevard County [Florida] Jail." (Second alteration in original). This too misses the mark. The convening authority's action was not incomplete because ***HN36***[] the convening authority must only include credit for *illegal* pretrial confinement in the action. R.C.M. 1107(f)(4)(F). The action was thus proper without stating the 16 days of administrative credit Appellant was due. In fact Appellant was properly credited with these days on the DD Form 2707-1, *Department of Defense Report of Result of Trial*, which is included in the record of trial with the confinement **[*81]** order. Further, Appellant's CDC notes in his Statement of the Case as part of his *Article 38(c), UCMJ*, brief that Appellant had been released from confinement on 14 May 2018 after serving a six-month sentence that began on 11 January 2018.

Because Capt JK submitted clemency on Appellant's behalf and his request was clemency Appellant sought and the convening authority could grant, this is not a case where an appellant was effectively without representation during the post-trial process and prejudice is presumed. *See United States v. Knight, 53 M.J. 340 (C.A.A.F. 2000)* (citations omitted).

HN37[] We evaluate trial defense counsel's performance not by the success of their strategy, *see United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001)* (quoting *United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998))*, but by an objective standard of reasonableness. *Gutierrez, 66 M.J. at 331* (citations omitted). Having evaluated the combined actions of both defense counsel in their post-trial representation of Appellant, *see Garcia, 59 M.J. at 450*, we find their performance as a whole did not fall below applicable standards even though the convening authority took action without the benefit of the *Article 38(c), UCMJ*, brief.

H. Remaining Allegations of Ineffective Assistance of Counsel

After Appellant submitted his assignments of error and the Government answered, Appellant submitted a declaration pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, personally **[*82]** setting forth nine allegations of ineffective assistance of counsel by the two military defense counsel who represented him at trial. One of the counsel, Capt JK, assisted Appellant in post-trial processing as described above. In response to Appellant's claims, we ordered and received declarations from both trial defense counsel, which refute Appellant's claims and are generally consistent with one another. We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes and are convinced such a hearing is unnecessary. *See Ginn, 47 M.J. at 248*; *DuBay*, 37 C.M.R. at 413.

As discussed previously, Appellant personally alleges that the military defense counsel who represented him in clemency was ineffective in that he failed to adequately communicate with Appellant's retained CDC and the Government regarding post-trial representation and the desire of the CDC to submit matters in clemency. In addition, Appellant contends that his military defense counsel were ineffective in eight assignments of error, which we considered and summarily resolve here. Appellant declares his second team of detailed military defense counsel failed to: (1) investigate the alleged offense; (2) challenge the Government's **[*83]** denial of Appellant's request for investigative assistance; (3) refrain from dissuading Appellant that hiring an investigator at personal expense was not necessary or worthwhile; (4) make timely objections at trial; (5) challenge the general prohibition on using the good-soldier defense and offer evidence and present argument of a good-soldier defense; (6) present photographs or a to-scale floor plan of the scene of the alleged crime; (7) advise Appellant of the advantages of taking the stand in his own defense; and (8) clarify and preserve the record regarding the retention of civilian defense counsel.[46]

We find these issues do not require further discussion and are without merit. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. We further conclude from our review of the record and all post-trial declarations that Appellant was neither deprived of a fair trial nor was the trial outcome unreliable. *See Strickland, 466 U.S. at 696*. Accordingly, we find Appellant's claims of ineffective assistance of counsel do not warrant relief.

I. Timeliness of Appellate Review

[46] Although Appellant was represented by two former detailed military defense counsel when the deficiencies underlying the first three of these alleged errors occurred, Appellant claims ineffective representation from his second defense team only.

HN38[] We review de novo whether an appellant has been denied the due process right to a speedy post-trial review and appeal. United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). A presumption of unreasonable delay arises when appellate **[*84]** review is not completed and a decision is not rendered within 18 months of the case being docketed. Id. at 142. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." Moreno, 63 M.J. at 135 (citations omitted).

Appellant's case was originally docketed with the court on 22 May 2018. The overall delay in failing to render this decision by 22 November 2019 is facially unreasonable. *See* Moreno, 63 M.J. at 142. However, we determine no violation of Appellant's right to due process and a speedy post-trial review and appeal. Analyzing the *Barker* factors, we find the delay is not excessively long. The reasons for the delay include the time required for Appellant to file his brief on 23 July 2019, and the Government to file its answer on 5 September 2019. After Appellant's reply on 30 September 2019, ten days later on 10 October 2019, Appellant submitted a declaration identifying nine allegations of ineffective assistance of counsel, which the Government answered on 2 January 2020, and Appellant replied **[*85]** on 14 January 2020. We granted 12 enlargements of time—11 for Appellant and 1 for the Government—resulting in the scheduling of a status conference with all appellate counsel before a panel judge. This court issued 11 orders, ruled on 6 out-of-time filings submitted by Appellant and 1 from the Government, and returned 4 of Appellant's filings with no action for non-compliance with this court's Rules of Practice and Procedure.

The court affirms the findings and sentence in this case after carefully examining numerous assignments of error, including nine alleged deficiencies of Appellant's trial defense counsel that the parties had not completed briefing by 22 November 2019, after which date the appellate delay was facially unreasonable. *See id.* However, Appellant has not asserted his right to speedy appellate review or pointed to any particular prejudice resulting from the presumptively unreasonable delay, and we find none. Finding no Barker prejudice, we also find the delay is not so egregious that it adversely affects the public's perception of the fairness and integrity of the military justice system. *See* United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). As a result, there is no due process violation. *See id.* In addition, we determine **[*86]** that Appellant is not due relief even in the absence of a due process violation. *See* United States v. Tardif, 57 M.J. 219, 223-24 (C.A.A.F. 2002). Applying the factors articulated in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we find the delay in appellate review justified and relief for Appellant unwarranted.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

End of Document

Neutral
As of: November 23, 2020 3:01 PM Z

United States v. Snyder

United States Court of Appeals for the Armed Forces

November 13, 2020, Decided

No. 20-0336/AF.

Reporter
2020 CAAF LEXIS 628 *

U.S. v. Brandon L. Snyder.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: CCA 39470 **[*1]** .

United States v. Snyder, 2020 CCA LEXIS 117 (A.F.C.C.A., Apr. 15, 2020)

Opinion

Petition for Grant of Review Denied

End of Document

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KRIMBILL, RODRIGUEZ, and FLEMING
Appellate Military Judges

Former Staff Sergeant CHARLES G. WILLENBRING,
United States Army, Petitioner
v.
RYAN D. MCCARTHY, et al.,
Secretary of the Army,
United States Army, Respondent

and

UNITED STATES
Real Party in Interest

ARMY MISC 20200430

ORDER

WHEREAS:

On 5 August 2020, petitioner filed a petition with this Court seeking extraordinary relief in the form of a writ of *coram nobis* "to correct an error committed decades ago" in his case.[1] Petitioner requested oral argument on the matter. For the reasons set forth below, the request for oral argument is denied and the petition is also denied.

Background

In 1982, petitioner enlisted in the Army's regular component. Immediately after his honorable discharge from the regular Army in 1982, he served in the Army's reserve component until 1997, when he was ordered back on active duty to face charges he committed three rape offenses against adult women in 1987 and 1988 in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [hereinafter UCMJ].

---

[1] Petitioner also requests alternative relief in the form of habeas corpus or a writ of mandamus. However, the parties do not dispute that this case is final pursuant to Article 76, UCMJ. Because we deny relief pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) and *Schriro v. Summerlin*, 542 U.S. 348 (2004), any such discussion is moot. We thus decline to discuss any jurisdictional concerns regarding alternative forms of relief.

At trial, petitioner moved to dismiss the charges, in part, on the grounds that the prosecution of the rape charges was barred by Article 43, UCMJ. The military judge denied the motion and petitioner then filed a motion with us for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a) (1948). In an unpublished opinion we denied petitioner's petition for extraordinary relief, and the United States Court of Appeals for the Armed Forces [the CAAF] affirmed our decision, holding in part that the rape charges against petitioner were offenses then punishable by death and as such exempt from the 5-year statute of limitations in Article 43, UCMJ. *Willenbring v. Neurauter*, 48 M.J. 152, 178-180 (C.A.A.F. 1998).

A military judge sitting as a general court-martial then convicted petitioner, in accordance with his pleas, of three specifications of rape, in violation of Article 120, UCMJ, sentencing him to a dishonorable discharge, confinement for thirty-six years, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The convening authority approved the findings and, pursuant to a pre-trial agreement, approved twenty years of petitioner's confinement sentence and the remainder of his sentence as adjudged. We affirmed petitioner's findings and sentence, pursuant to Article 66, UCMJ, which the CAAF also affirmed. *United States v. Willenbring*, 56 M.J. 671 (Army Ct. Crim. App. 2001); *United States v. Willenbring*, 57 M.J. 321 (C.A.A.F. 2002). The U.S. Supreme Court denied a petition for certiorari in petitioner's case on 13 January 2003. *Willenbring v. United States,* 537 U.S. 1112 (2003). On 11 May 2004, the convening authority ordered petitioner's dishonorable discharge executed.

Separately, in 1999 petitioner was convicted by the state of North Carolina of committing four rapes and two kidnappings. As a result of those convictions, he is now serving a life sentence in a North Carolina prison. *Willenbring v. United States,* 559 F.3d 225 (4th Cir. 2009). The convening authority, pursuant to his authority under Article 57a, UCMJ, deferred petitioner's military confinement sentence until his release from civilian confinement in North Carolina and issued a writ of detainer for his transfer upon release, if ever applicable.[2]

On 6 February 2018, the CAAF issued its decision in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), overruling its own decision twenty years earlier concerning the applicable statute of limitations in *Willenbring,* 48 M.J. at

[2] Petitioner also presents an alternative argument requesting confinement credit to result in an adjudicated completion of his military sentence of confinement. Because this question is one of administration, and there is no evidence that petitioner has exhausted appropriate avenues to pursue such relief, we decline to consider the issue and find that, to the extent it creates an alternative argument for extraordinary relief, it is barred by the jurisdictional limitations set forth in *United States v. Denedo*, 66 M.J 114, 123 (C.A.A.F. 2008) (*Denedo I)*; *United States v. Denedo*, 556 U.S. 904, 917 (2009) (*Denedo II).*

178-180. The CAAF in *Mangahas* concluded that "the period of limitations for rape of an adult woman under the version" of the UCMJ in effect from 1986 until 2006 was "five years." *Mangahas*, 77 M.J. at 222.

Petitioner then filed a motion with the CAAF to permit him to file a petition for reconsideration "out of time." The CAAF denied petitioner's motion to file for reconsideration stating such petition was "16 years out of time in a case that is final for all purposes under Articles 71 and 76, UCMJ." *United States v. Willenbring*, No. 02-0274/AR, 2019 CAAF LEXIS 75 (C.A.A.F. 4 Feb. 2019).[3]

Although petitioner agrees that his case has completed direct review pursuant to Article 71, UCMJ, and is final under Article 76, UCMJ, he contends the *Mangahas* decision applies retroactively in his "extreme" case "that begs extraordinary relief."[4] We distill this question as to simply whether the CAAF's decision in *Mangahas* should extend and thus apply retroactively to cases on collateral review that are final. We find in the negative in denying the petition.

Law and Discussion

I. Jurisdiction To Issue and Requirements for Writ of Coram Nobis

We first note that a writ of error *coram nobis* is an extraordinary remedy intended to achieve justice when "errors of the most fundamental character" have occurred in a criminal proceeding. *United States v. Morgan*, 346 U.S. 502, 522-12, 74 S. Ct. 247, 252-43 (1954) (quoting *United States v. Mayer*, 235 U.S. 55, 69, 35 S. Ct. 16, 19 (1914)). It is available to a petitioner no longer in custody who seeks to vacate his conviction in circumstances where "the petitioner can demonstrate that he is suffering civil disabilities as a consequence of the criminal convictions and that the challenged error is of sufficient magnitude to justify the extraordinary relief." *United States v. Marcello*, 876 F.2d 1147, 1154 (5th Cir. 1989) (citations omitted); see also *United States v. Castro*, 26 F.3d 557, 559 n. 3 (5th Cir. 1994). The remedy of *coram nobis* "should issue to correct only errors which result in a complete

[3] Recognizing that petitioner did not bring forth the present petition until 5 August 2020, eighteen months after the CAAF's denial, and more than two years after the decision in *Mangahas,* we are hard-pressed to determine how this present action is not likewise time-barred.

[4] Although petitioner does not allege a statutory challenge based upon the applicable Articles at the time of his offenses (1987 and 1988) or at the time of preferral (1997), we have reviewed the legislative history of Articles 71 and 76, UCMJ, and find no substantive basis for challenge. Article 71, UCMJ was entirely repealed by the Military Justice Act of 2016.

miscarriage of justice." *Marcello*, 876 F.2d at 1154 (citing *Morgan*, 346 U.S. at 512, 74 S. Ct. at 253).[5]

Next, we determine whether we have a general basis for exercising jurisdiction as it applies to entertaining petitions for writ of *coram nobis*. "Because *coram nobis* is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired." *Denedo II*, 556 U.S. at 912-13. As the Supreme Court held, "Article I military courts have jurisdiction to entertain *coram nobis* petitions to consider allegations that an earlier judgment of conviction was flawed in a fundamental respect." *Denedo II*, 556 U.S. at 917 (citing *Morgan,* 346 U.S. at 508). We therefore find that we have a general basis for exercising jurisdiction to entertain petitions for writ of *coram nobis.*

The CAAF established six prerequisites as threshold criteria for petitioner to obtain *coram nobis* review of his claim. First, (1) the alleged error must be "of the most fundamental character;" (2) no remedy other than consideration of *coram nobis* is available; (3) valid reasons exist for petitioner to not seek relief earlier; (4) the new information presented in the instant petition "could not have been discovered through the exercise of reasonable diligence prior to the original judgment;" (5) the writ "does not seek to reevaluate previously considered evidence or legal issues;" and (6) petitioner's "sentence has been served, but serious consequences persist." *Denedo I*, 66 M.J. at 126-127 (citations omitted); *United States v. Casa-Garcia*, 71 M.J. 586, 588-89 (Army Ct. Crim. App. 2012).

We are not persuaded that petitioner has met the *coram nobis* threshold criteria and established eligibility for review of his petition. For instance, and as discussed below, we do not deem the alleged error to be "of the most fundamental character." Further, we note the alleged retroactive impact of *Mangahas* on petitioner's case was brought before the CAAF and petitioner failed to pursue the resulting order with any diligence. Even assuming the *Mangahas* decision is a *post hoc* change in law that is fundamental in character, petitioner has previously sought

---

[5] *Coram nobis* is available only to remedy "factual errors material to the validity and regularity of the legal proceeding itself." *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (internal quotation marks omitted). This extraordinary writ is used where "no other remedy may be available," and an "error of the most fundamental character" has occurred. *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988). *Coram nobis* relief may be granted "in light of a retroactive dispositive change in the law" which undermines the basis for a prior conviction. *Id.* The Supreme Court has stated that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *Carlisle*, 517 U.S. at 429 (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)) (alteration in original).

habeas relief in federal district court of this very claim, and this remedy still remains available to him in seeking review of the instant claim of retroactive application of *Mangahas*. *See*, *Denedo I,* 66 M.J at 126 ((citing *Morgan*, 346 U.S. at 512-13; *Loving v. United States*, 62 M.J. 235, 252-53) (remaining citations omitted).

However, even assuming petitioner has met the above *Denedo I* threshold criteria for his *coram nobis* writ petition to allow us jurisdiction, we find, for the reasons set forth below, the writ should not issue on its merits. *See, e.g., Denedo II*, 556 U.S. at 917 ("[A]n extraordinary remedy ... should not be granted in the ordinary case.") (Citing, *Niken v. Holder*, 556 U.S. 418 (2009) (Kennedy, J., concurring)).

II. Whether Mangahas Has Retroactive Application on Collateral Review

Since the standard for granting extraordinary relief requires a petitioner to establish that issuance of the requested writ is "necessary and appropriate within the meaning of the All Writs Act," we interpret this to mean a petitioner must do more than merely *allege* error. *See,* 28 U.S.C. § 1651(a); *Denedo I*, 66 M.J. at 126. Petitioner has the burden to establish the error occurred.

In the instant petition for writ of error *coram nobis*, petitioner again seeks to challenge his convictions on grounds that jurisdiction over his offenses was precluded by the Article 43, UCMJ statute of limitations. He reiterates the grounds he previously raised in his pretrial motion for extraordinary relief, again on direct appeal, in a federal petition for habeas corpus, pursuant to 28 U.S.C. § 2441, and most recently with the CAAF following its decision in *Mangahas*.

However, the new rule articulated in the CAAF's holding in *Mangahas* cannot be applied retroactively on collateral review to cases that have completed direct review pursuant to Article 71, UCMJ, and are final under Article 76, UCMJ. When a court decision results in a new rule, that "rule applies to all criminal cases still pending on direct review," but "[a]s to convictions that are already final ... the rule applies only in limited circumstances." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)(internal citations omitted).

The Supreme Court has established the analysis to determine a rule's retroactive application for cases on federal collateral review. *Teague v. Lane*, 489 U.S. 288 (1989). The bar to retroactive application is presumptive and *Teague* establishes two limited exceptions to this general bar. New substantive rules generally apply retroactively. New rules of procedure, on the other hand, generally do not. *Schriro*, 542 U.S. at 351-352 (internal citations omitted). In determining whether a new rule is substantive or procedural, the Court must consider the function of the new rule, not its underlying constitutional source. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (stating that this analysis depends on "whether

the new rule itself has a procedural function or a substantive function – that is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes.").

At least two federal district courts have declined to extend *Mangahas* in this manner. "The rule in *Mangahas* does not alter the fact that Petitioner was the person who committed the rape, and the rape for which he was convicted still constitutes a criminal offense. This case does not fit within the first *Teague* exception." *Nixon v. Hilton*, No. 18-3139-JWL, 2018 U.S. Dist. LEXIS 183106 (D. Kan. Oct. 25, 2018) (unpub. op.).[6] Likewise, our sister court addressed this exact question and held that *Mangahas* does not apply retroactively. *In re Best,* 79 M.J. 594 (N-M Ct. Crim. App. 2019).[7]

Petitioner more heavily focuses on the second *Teague* exception, i.e., whether the change in rule is a watershed rule of criminal procedure, which should thus implicate both the accuracy and the fundamental fairness of petitioner's court-martial. *See, Teague*, 489 U.S. at 311-15. For this court to find the CAAF's opinion in *Mangahas* was a "watershed rule" we must find both (a) the rule was necessary to prevent an impermissibly large risk of an inaccurate conviction; and (b) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. *See, Nixon v. Hilton*, at *7 (citing *Whorton v. Bockting*, 549 U.S. 406, 418 (2007). As noted in *Whorton*, the standard to warrant watershed status is all but unattainable, and in any event, has not been granted by either the CAAF or the Supreme Court on this issue. We enjoy no authority to do so now.

NOW, THEREFORE, IT IS ORDERED:

On consideration of the request for oral argument, we find this petition involves a question of law and further argument unnecessary to the adjudication of this matter. Therefore the request for oral argument is DENIED.

On consideration of the Petition for Extraordinary Relief in the Nature of either a Writ of *Coram Nobis* or the alternative, that petition is DENIED.

---

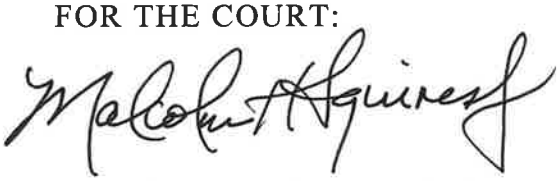
[6] *See also*, *Hill v. Rivera*, 2018 WL 6182637 (E.D. Ark., November, 27, 2018) (unpub. op.) (wherein the federal district court, having been ordered by the Eighth Circuit Court to determine whether *Mangahas* may be raised on collateral review, found it may not).

[7] To the extent *Best* considers a similar question of jurisdiction, we note that *Best* bore a unique distinction as related to the statutory and regulatory definition of finality, pursuant to Article 76, UCMJ. Because the petitioner in *Best* was entitled to a mandatory clemency review, his punitive discharge was not yet executed and arguably not final. *Best*, 79 M.J. at 599.

WILLENBRING —ARMY MISC 20200430

DATE: 26 October 2020

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-DA
JALS-GA
JALS-CCR
JALS-CCZ
JALS-CR3
JALS-TJ
Petitioner
Respondent