Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

Public Comment Materials

September 21, 2022

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
24th Public Meeting

September 21, 2022
Public Comment Materials

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Tab 2

From:	Clarence Anderson III
To:	WHS Pentagon EM Mailbox DACIPAD
Cc:	Clarence Anderson III
Subject:	[URL Verdict: Neutral][Non-DoD Source] Opportunity to speak to the DAC IPAD
Date:	Wednesday, August 31, 2022 7:56:33 AM

Good morning,

My name is Clarence Anderson III, a former Major in the United States Air Force.

My US Congressman, Barry Moore (R-AL) here in Alabama, recently petitioned President Biden to have the Department of Justice investigate the United States Air Force for lying to Congress and withholding exculpatory evidence I could have used to prove my innocence during my 2015 court martial.

My case has been highlighted on One American News and numerous stories across several media outlets in the country.

In 2020, I was offered a Presidential Pardon from President Trump that I declined, instead requesting him to order me a new trial. Those efforts were set in place until the incident on January 6th derailed those efforts.

I also filed a Human Rights Complaint against the Department of Defense to the Inter-American Commission for Human Rights in 2017 for the Department of Defense's own admission how they move the meter of due process in order to manufacture convictions against innocent service members accused of sexual assault. I really want the DAC-IPAD to read my Human Rights Complaint as these unlawful patterns and practices are still being used in the Department of Defense.

My Human Rights Complaint is about a 10 minute read and can be found at my website along with my Congressman's request to President Biden at my website: Caution-www.majorandersoniii.com < Caution-http://www.majorandersoniii.com >

I wish to speak on record to the DAC-IPAD next month on 21 September 2022, to discuss my case and recommendations to make sure what happened to me will never happen to another service member.

Any questions or concerns, I stand by to answer them.

Respectfully,

Clarence Anderson III

BARRY MOORE
2ND DISTRICT, ALABAMA

COMMITTEE ON AGRICULTURE

COMMITTEE ON VETERANS' AFFAIRS

WASHINGTON, DC OFFICE:
1504 LONGWORTH OFFICE BUILDING
WASHINGTON, DC 20515
202-225-2901

Congress of the United States
House of Representatives
Washington, DC 20515–0102

DISTRICT OFFICES:
WETUMPKA:
408 S. MAIN STREET, SUITE 200
WETUMPKA, AL 36092

DOTHAN:
217 GRACELAND DRIVE, SUITE 5
DOTHAN, AL 36305

ANDALUSIA:
505 E. 3 NOTCH STREET, SUITE 322
ANDALUSIA, AL 36420

June 27, 2022

President Joseph R. Biden
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Biden:

As Commander in Chief, I appreciate that you have a duty and interest to ensure our men and women who serve this great nation are treated fairly and guaranteed the protections outlined in our Constitution. For this reason, I write to again bring your attention to the case of Major Clarence Anderson III.

As you know, on April 22, 2015, Major Anderson was convicted of sexual assault and other related charges in a general court-martial trial. Since his conviction, Major Anderson has maintained his innocence and produced accounts of alleged bribery, evidence suppression, and witness tampering throughout his court-martial, military appeal, and Federal appeal.

In October 2015, the Air Force responded to an inquiry from former-Congressman Martha Roby (AL-02), appearing to affirm that Major Anderson would be granted a post-trial hearing and the assigned judge would have full authority to rule on any motions the defense counsel submitted.

At the post-trial hearing, the military judge ruled that he had no authority to hear evidence of prior perjured testimony or order a new trial because the trial record was previously authenticated and did not allow Major Anderson to submit evidence of perjury nor order a new trial. This ruling seems to contradict what the Air Force affirmed to Congresswoman Roby when they stated there were no restrictions on the judge's authority.

- Was the Air Force's response to former-Congressman Roby also submitted as discovery to Major Anderson's defense counsel, per discovery rules outlined in the 2012 Military Court Martial Manual, in effect at the time of Major Anderson's court martial in 2015?

Enclosed are two documents regarding this matter. I would appreciate a response regarding this contradiction and how it impacted Mr. Anderson's ability to submit new evidence or have a new trial ordered on his behalf. My office has twice presented this matter to the Air Force and has not yet received a clear answer to this specific question, which is why I am again appealing to you and ask that you appoint an independent investigator outside of the Air Force to review this matter.

If Major Anderson was unlawfully prohibited from presenting exculpatory evidence that would have presumably affected the outcome of his trial, and the Air Force did not follow discovery laws to aide Major Anderson in presenting this exculpatory evidence, then a retrial would appear to be in order. If you or your staff have questions regarding this request, please do not hesitate to contact my Chief of Staff, Shana Teehan, at 202-225-2901.

Sincerely,

Barry Moore
U.S. Representative

HON. LOUIE GOHMERT
FIRST DISTRICT, TEXAS

WASHINGTON OFFICE:
2267 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3035
FAX: (202) 226-1230

COMMITTEES:
NATURAL RESOURCES
REPUBLICAN LEADER, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
SUBCOMMITTEE ON NATIONAL PARKS, FORESTS, AND PUBLIC LANDS

JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

Congress of the United States
House of Representatives
Washington, DC 20515

December 9, 2020

Brigadier General Christopher E. Finerty
Director of Legislative Liaison Secretary of Air Force
U.S. Department of the Air Force
1160 Air Force Pentagon Washington, DC 20330-1160

Re: Update on Inspector General investigation into Major Clarence Anderson's court martial

The purpose of this letter is to request an update on the Inspector General's investigation into potential prosecutorial misconduct and evidentiary discovery consideration during Major Clarence Anderson's Court Martial, Military and Federal appeals process.

It is my understanding that the Air Force Inspector General is conducting a thorough investigation into allegations of bribery, evidence suppression, and witness tampering. I am personally following this investigative report and have detailed staff to report back on the findings. At the conclusion of this report we formally request a copy of the finding so that we may determine next steps.

Respectfully,

Rep. Louie Gohmert

LONGVIEW OFFICE:
101 EAST METHVIN STREET, SUITE 302
LONGVIEW, TX 75601
PHONE: (903) 236-8597

LUFKIN OFFICE:
300 EAST SHEPHERD
LUFKIN, TX 75901
PHONE: (936) 632-3180

MARSHALL OFFICE:
102 WEST HOUSTON STREET
MARSHALL, TX 75670
PHONE: (903) 938-8386

NACOGDOCHES OFFICE:
101 W. MAIN, SUITE 160
NACOGDOCHES, TX 75961
PHONE: (936) 715-9514

TYLER OFFICE:
1121 ESE LOOP 323, SUITE 206
TYLER, TX 75701
PHONE: (903) 561-6349
TOLL FREE: (866) 535-6302

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

CLARENCE ANDERSON III 190 Wilson Avenue Ozark, AL 36360 Petitioner, v. HONORABLE MATT DONOVAN Acting Secretary United States Air Force 1670 Air Force Pentagon Washington, D.C. 20330 JEFFREY A. ROCKWELL, Lt Gen The Judge Advocate General United States Air Force 1420 Air Force Pentagon Washington, D.C. 20330 MARK NOWLAND, Lt Gen Deputy Chief of Staff for Operations, Plans and Requirements United States Air Force 1670 Air Force Pentagon Washington, D.C. 20330 Respondents.	)	Civ. No. **PETITION AND BRIEF IN SUPPORT OF REQUEST FOR DECLARATORY AND INJUCTIVE RELIEF IAW 28 U.S.C. 1361**

By:/s/ Sarah Kathryn Ikena
Sarah Kathryn Ikena, VSB No.: 77905
Golden Law, Inc.
27702 Crown Valley Pkwy, Suite D4 #414
Ladera Ranch, CA 92694
(202)888-5599 (Tel.)
(949)491-1467 (Fax)
Email: sarah@goldenlawinc.com
Attorney for Petitioner

Additional counsel listed on signature page

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STATEMENT OF THE CASE

After he was convicted in a military court-martial without any physical or forensic evidence, the Petitioner, Clarence Anderson III, discovered that a key witness against him had committed perjury. The key witness's perjury concerned that witness's romantic relationship with the alleged victim in the case after he was paid $100,000 by the alleged victim's mother prior to his testimony at trial. Petitioner informed Respondents of this possible fraud upon the court. In response, Respondent Lieutenant General Mark Nowland, the convening authority, ordered a post-trial hearing in which the circumstances surrounding this payment were supposed to be fully explored. In fact, in response to an official inquiry by a U.S. Congresswoman, Respondents promised that Petitioner would be able to present evidence (at a post-trial hearing) of witness tampering at his general court-martial. *See* Appendix 1, *Response to Congressional Inquiry.* Respondents further promised that the military judge assigned to preside over the post-trial hearing "also may rule on any motions the defense counsel submits." *Id.* (emphasis added).

Despite these promises, the military judge denied Petitioner's lawful motion and prohibited him from presenting evidence that the two key witnesses against him had perjured themselves regarding their relationship during his court-martial. In addition to refusing to allow the Petitioner to present substantive evidence of the circumstances surrounding the payment and the perjury, the military judge refused to consider Petitioner's request for a new trial, claiming it was beyond his authority in that hearing. Petitioner only subsequently discovered evidence of Respondents' promise to the Congresswoman. The Petitioner seeks relief requesting this Court to either dismiss all charges with prejudice, order a new trial, or, in the alternative, direct the Secretary of the Air Force, The Judge Advocate General of the Air Force, and the Convening Authority in Petitioner's Case to order a post-trial hearing pursuant to Article 39(a), Uniform

Code of Military Justice, where he is allowed to present the exculpatory evidence discovered and raise all necessary motions for appropriate relief.

I. PREFATORY STATEMENT

1. On April 22, 2015, Petitioner was convicted at a General Court-Martial of allegations related to sexual assault and other related charges of his ex-wife, K.A., based almost entirely on the testimony of K.A. and her minor son C.B., without any physical or forensic evidence, and with testimony at trial from civilian law enforcement officials stating there was no additional evidence that Petitioner committed a crime.

2. Central to the credibility of K.A. was the fact that Petitioner was prohibited from confronting K.A. about her motive to fabricate connected to a new relationship because K.A. denied any such relationship in a pretrial M.R.E. 412 hearing, and evidence to impeach her denial was not discovered until after the conclusion of trial.

3. By all accounts, the mother of K.A. paid J.M., $100,000 before he testified against the Petitioner. The $100,000 transfer ostensibly was so that J.M. could renovate his home to better accommodate K.A. and their unborn child. However, before trial and after the renovations were finally complete, K.A. lived with J.M. for only one day immediately preceding the preliminary hearing, held pursuant to Article 32, UCMJ, before she inexplicably moved out and suddenly broke off their engagement. This payment of $100,000 is sufficiently suspicious that the finder-of-fact should have had an opportunity to consider the evidence in assessing the credibility of key witnesses' testimony.

4. Post-trial, and upon learning about the payment, Petitioner's mother contacted U.S. Congresswoman, the Hon. Martha Roby (R-Ala.), who in turn contacted Respondent through an official Congressional inquiry. Respondent promised Rep. Roby that Petitioner would get a chance to present this evidence of witness tampering at a post-trial hearing. However, the

military judge presiding over that hearing stymied Petitioner's attempts to present relevant and material evidence, ultimately denying him a reasonable opportunity to gather sufficient evidence for a petition for a new trial.

5. The military, and the Air Force specifically, have been plagued by scandals and public outcry regarding their handling of sexual assault cases, leading to prosecution of cases even where probable cause is not found at preliminary hearings.[1] Around the same time as allegations were made in this case, the former Judge Advocate General of the Air Force pushed guidance to Air Force attorneys that "victims are to be believed and their cases referred to trial." *United States v. Wright*, 75 M.J. 501, 503 (A.F. Ct. Crim. App. Jan. 13, 2015).

6. Petitioner hereby moves this Court to Issue an order dismissing all charges with prejudice, order a new trial, or in the alternative, order a post-trial hearing during which Petitioner will be afforded his promised opportunity to confront key witnesses about their testimony during a closed session and file all appropriate motions in pursuit of meaningful relief. Petitioner also seeks award of court costs and attorney's fees pursuant to 5 U.S.C. § 504, and any other appropriate relief.

II. JURISDICTION

7. This Court has jurisdiction to entertain Petitioner's collateral attacks to his court martial convictions under 28 U.S.C. § 1331, the federal question jurisdictional statute. In *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the Supreme Court held that an individual could collaterally challenge a court-martial conviction through an action for declaratory or injunctive relief using

[1] *See generally*, *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017); *United States v. Barry*, 78 M.J. 70 (C.A.A.F. Sep. 5, 2018); *United States v. Vargas*, No. ACM 38991, 2018 CCA LEXIS 137 (A.F. Ct. Crim. App. Mar. 15, 2018) (unpublished).

the federal question statute as the basis for jurisdiction. *Id*. at 748-753, Since then, at least two circuit courts have held that a plaintiff may bring a non-habeas collateral challenge to a court-martial conviction under § 1331. *Allen v. U.S. Air Force*, 603 F.3d 423, 430 (8th Cir. 2010) ("[I]t is clear that § 1331 provides us with subject matter jurisdiction to review [the plaintiff's] challenge to the court-martial proceedings…."); *U.S. ex rel New v. Rumsfeld*, 448 F.3d 403, 406 (D.C.Cir. 2006) ("[T]he district court had subject matter jurisdiction to hear [the plaintiff's collateral attack under § 1331….").

8. Within the D.C. Circuit, district courts regularly hear such challenges. *See, e.g., Penland v. Mabus*, 78 F. Supp. 3d 484, 486 (D.D.C. 2015) (reviewing a non-habeas collateral attack of former Navy officer convicted of adultery and other misconduct and resultantly dismissed from the service); *Luke v. United States*, 942 F. Supp. 2d 154, 162 (D.D.C. 2013) ("Collateral attacks on court-martial proceedings are not confined to habeas petitions.").

9. Thus, federal question jurisdiction under 28 U.S.C. § 1331 is the appropriate avenue for Petitioner to seek collateral review of his concluded court-martial proceeding, and this Court thereby has subject matter jurisdiction to review Petitioner's claim.

III. VENUE

10. Venue is proper under 28 U.S.C. § 1391(e). This is an action against officers and agencies of the United States in their official capacities, brought in the district where a substantial part of the events or omissions giving rise to Petitioner's claim occurred. Respondent, the Honorable Matt Donovan, is sued in his official capacity as the Acting Secretary of the Air Force, a United States federal agency and resident in this district. Respondent, Lieutenant General Jeffrey Rockwell, is sued in his official capacity as the Judge Advocate General of the Air Force—the office empowered by Article 73, Uniform Code of Military Justice (UCMJ), 28 U.S.C. § 873, to grant petitions for new trial for individuals convicted in military courts-martial. The Office of

The Judge Advocate General of the Air Force is a resident in this district. Respondent, Lt Gen Nowland, is sued in his official capacity as the convening authority ultimately responsible for approving Petitioner's military conviction, and, by extension, the individual ultimately responsible for granting the type of new trial or post-trial hearing requested by Petitioner here.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

11. Petitioner has exhausted all of his administrative remedies. Upon learning of the potential fraud perpetrated upon the court-martial, Petitioner sought—and was granted—a post-trial hearing, which was held on December 14, 2015. During the post-trial hearing, Petitioner's counsel sought a new trial on the basis that K.A. and J.M had perjured themselves during Petitioner's court-martial. The military judge held that such request was beyond the scope of the post-trial hearing into the circumstances surrounding the payment of money to the witness, and terminated the proceedings. Petitioner was not allowed to fully address the circumstances surrounding the perjury in connection to the $100,000 payment to a key witness in his case because the military judge prohibited the presentation of evidence regarding the history and nature of the relationship between the witnesses that was discovered post-trial, and which would have demonstrated evidence of impeachment by bias and prior inconsistent statements that should have been presented to the finder of fact.

12. Petitioner then asked the convening authority (Respondent Nowland) to either grant a new trial or order a second post-trial hearing. The convening authority denied these requests, and approved the findings and sentence as adjudged.

13. Petitioner timely appealed to the Air Force Court of Criminal Appeals (A.F.C.C.A). Among the issues Petitioner raised on appeal was the denial of his request for a second post-trial hearing or a new trial based on the post-conviction information that J.M. had been paid $100,000

by K.A.'s mother. On May 31, 2017, the Air Force court denied Petitioner's appeal. *United States v. Anderson*, ACM No. 39023 (A.F.C.C.A., 31 May 2017).

14. The Petitioner then timely filed a petition for review with the U.S. Court of Appeals for the Armed Forces (C.A.A.F.). On August 18, 2017, the C.A.A.F. denied the petition. *United States v. Anderson*, USCA Dkt. No. 17-0429/AF (C.A.A.F., 18 August 2017).

15. In addition to his direct appellate review, Petitioner sought recourse via a petition for a new trial. The petition initially was denied by the A.F.C.C.A. Petitioner then filed a petition for a new trial to the C.A.A.F. The appeal was denied by the C.A.A.F. on October 11, 2017. *United States v. Anderson*, USCA Dkt. No. 17-0429/AF (C.A.A.F., 11 October 2017). Petitioner asked the C.A.A.F. to reconsider its denial, which it declined to do.

16. Petitioner previously applied to this Court for a writ of mandamus, which was dismissed on 2 May 2019, as Petitioner had not exhausted all other remedies available to him for relief at that time.

V. PARTIES

17. Petitioner, Clarence Anderson III, resides at 190 Wilson Avenue, Ozark, AL, 36360.

18. Respondents—Honorable Matt Donovan, Lt Gen Jeffrey Rockwell, and Lt Gen Mark Nowland—all are assigned to, and work at, the Pentagon, which is located in Arlington, Virginia. Importantly, Respondent Nowland is the individual who, in his official capacity, responded to the U.S. Congresswoman and who denied Petitioner's request for a new trial or a second post-trial hearing (after the military judge specifically instructed Petitioner to ask Respondent Nowland to order an additional hearing). As the harm Petitioner seeks to redress began with a decision by an individual who "resides" in this District, venue is proper. Further, both Respondents Donovan and Respondent Rockwell have the authority to remedy the harm perpetuated upon Petitioner, and both officials "reside" in this District.

VI. FACTS AND PROCEDURAL HISTORY

19. Petitioner was convicted at a general court-martial in 2015 for offenses involving his then-wife, K.A. Two of the offenses arise from a single incident of alleged sexual assault, involving the purported rubbing of the breasts and digital penetration of K.A. The sexual offenses allegedly occurred on September 1, 2013. These allegations were reported by K.A. to Air Force officials in mid-September 2013, four days *after* Petitioner called the police to report he had been struck by K.A. This affray occurred amidst an argument about whether K.A. was having an affair with J.M. Notably, K.A. never reported to on-the-scene civilian law enforcement officials, that she was sexually assaulted weeks prior when the Petitioner reported she had struck him, and the police refused to arrest or charge Petitioner for any of the other crimes that K.A. later reported to Air Force officials. The Florida District Attorney also declined to prosecute the Petitioner.

20. With no forensic evidence or eyewitnesses to the alleged sexual assault, the Government's case depended entirely on K.A.'s credibility. Prior to trial on the merits, Petitioner filed a motion in limine pursuant to M.R.E. 412 to examine K.A. regarding an alleged affair with J.M., and the timing of such. Petitioner theorized that K.A. was motivated to lie about a sexual assault in order to both (1) gain leverage in their contentious divorce and child-custody battle and (2) deflect attention from her romantic interest in and adulterous behavior with J.M. Around the same time, K.A., through her divorce attorney, attempted to bribe Petitioner by offering to forego her testimony in the court-martial in exchange for Petitioner agreeing to give K.A. custody of their child. Petitioner declined the offer of K.A.

21. At the pretrial hearing held pursuant to M.R.E. 412, K.A. and J.M. testified that their relationship did not begin until the time of her divorce from the Petitioner, roughly 6-8 months *after* Petitioner allegedly committed the offenses against K.A. As a result of this timeline, the military judge ruled that evidence of the romantic relationship between K.A. and J.M. was

irrelevant and immaterial, and thus inadmissible. The military judge also sealed the testimony presented during the M.R.E. 412 hearing, as well as the transcript of the same.

22. A month after the trial, Petitioner's mother recorded two phone calls with J.M. During the calls, J.M. admitted his sexual relationship with K.A. had started much sooner than what he and K.A. had testified to under oath during the pretrial M.R.E. 412 hearing—and that the romantic relationship had begun as early as a month before the alleged September 1, 2013 incident while K.A. was still residing with, and married to, the Petitioner. J.M. also revealed that shortly before trial K.A.'s mother had given him $10,000. K.A. later testified under oath at the post-trial hearing that her mother actually had given J.M. *$100,000* before he testified in Petitioner's court-martial.

23. In the military justice system, a party may move for a post-trial hearing to address certain issues—such as the existence of newly discovered evidence. On September 15, 2015, the Petitioner moved for a post-trial hearing to investigate the circumstances of the payment to J.M. *See* 10 U.S.C. § 839(a); Rule for Courts-Martial (R.C.M.) 1102(b)(2) and 1102(d). The convening authority, Respondent Nowland, ordered the hearing "to address the circumstances regarding a $10,000 payment made to Mr. [J.M.], a witness who testified during a pretrial motion hearing, by Ms. [K.H.], the mother of the victim in this case." *See* Appendix 2, *Post-Trial Hearing Transcript* at 2.

24. At this post-trial hearing K.A. admitted that there was an exchange of money, but disclosed that the amount given to J.M. was actually $100,000. *Id.* at 32. K.A. insisted, however, that her mother had transferred the money directly to J.M. to pay for renovations to his home. *Id.* at 30. According to K.A., she and J.M. intended to live in J.M.'s home once they married, and would thereafter repay her mother together. *Id.* K.A. testified she may have personally contributed just $20 to the renovation. *Id.* at 32.

25. K.A. was asked why her mother had wired money to J.M.'s account rather than directly paying the renovation contractor. *Id*. K.A. replied that her mother's bank was out of town and that it was easier to pay a third party (J.M.) than paying the renovation contractor directly. *Id.* at 90. K.A. did not know if the couple's agreement with her mother had been reduced to writing, just as she could not remember the amount of her mortgage payment, car payment, auto loans, or credit-card payments. *Id*. at 17, 36. K.A. also still could not remember exactly when her romantic relationship with J.M. began. *Id.* at 25, 50-54.

26. Unlike K.A., J.M. provided testimony that directly contradicted prior testimony regarding the timeline of the relationship between K.A. and J.M. He testified that, at the very latest, he and K.A. were dating by November or December 2013. *Id*. at 105. He added that he and K.A. began discussing marriage, and, by the end of the summer of 2014, they were living together in the Petitioner's former home. *Id.* at 105-06. J.M. said he and K.A. lived in the Petitioner's former home because J.M.'s house was being remodeled, and that they planned to move in together when the renovations were complete. *Id*. at 107.

27. Importantly, J.M. denied that he and K.A. ever planned to repay the $100,000. *Id*. at 116. He testified, "My understanding is it was a gift" and added that the money was not loaned because, as a school teacher, he "could never afford that kind of money." *Id.*

28. Once the renovations were complete, K.A. spent a total of just one night in the house. After an argument, K.A. moved out the next day. *Id.* at 121. According to J.M., he and K.A. did not speak again until February 2015. *Id*. at 122-23. In February 2015 J.M. testified at the M.R.E. 412 hearing in Petitioner's court-martial that his sexual relationship with K.A. did not start until her divorce from the Petitioner in the spring of 2014, which was 6-8 months after the alleged incident between the Petitioner and K.A.

29. During the post-trial hearing, K.A. confirmed her relationship with J.M. ended a few nights after moving into the renovated home. *Id.* at 49. When asked in October 2015 why their engagement was called off, she replied: "I don't know why. I don't know—I don't know why." *Id*. at 28. She also could not remember the last time she had spoken with J.M. *Id*. at 40.

30. With J.M. still on the stand, Petitioner sought to elicit additional testimony covered in the M.R.E. 412 hearing in this case—specifically, that J.M. and K.A. had offered drastically different stories about the nature of their romantic relationship. *Id*. at 124. The military judge, however, prohibited Petitioner's attorneys from confronting the witnesses on this new timeline—and even barred Petitioner from proffering what questions the attorneys wished to ask. Rather than allow Petitioner to establish any objections on the record, the military judge went off the record and insisted the parties discuss the matter in a conference held pursuant to R.C.M. 802.[2] *Id*. at 128-29. When Petitioner's attorneys repeatedly insisted that they be allowed to make the record with a proffer, even in a closed hearing for purposes of Military Rule of Evidence 412, the military judge refused to allow them to do so. *Id*. at 128-29, 135-36, 155-56, 159-60, 164. The military judge ruled that he would not "entertain follow-on motions or subsequent motions as part of this post-trial 39(a) session." *Id*. at 175. He explained that he believed follow-on motions to be "outside the scope of this post-trial 39(a) session," and directed Petitioner's attorneys to file

[2] Under Rule for Court-Martial 802, "the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial." As the discussion to the rule makes clear, [t]he purpose . . . [is] *not to litigate or decide contested issues*." *Id.* (emphasis added). Further, R.C.M. 802(c) states that "[n]o party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial."

a second motion for a new Article 39(a) session with the convening authority to address defense motions related to a motion for a new trial and perjury committed during the M.R.E. 412 hearing. *Id*. at 177.

31. Petitioner followed the military judge's direction and requested a second post-trial hearing. Before action was taken on this request, J.M. submitted a letter to all reviewing authorities admitting that he and K.A. were dating and had engaged in sexual intercourse by November 2013—which differed substantially from his testimony at Petitioner's court-martial. Despite this evidence—and despite the military judge's direction that Petitioner move for a second post-trial hearing—Respondent Nowland denied Petitioner's request.

Congressional Inquiry

32. Prior to post-trial hearing in 2015, Petitioner had contacted his Congresswoman, Rep. Roby. He informed her of the newly discovered evidence that J.M. had been paid $10,000 by K.A.'s mother, and Petitioner asked Rep. Roby for help to bring this newly discovered evidence to the attention of Air Force officials.

33. In response to Rep. Roby's Congressional inquiry, Major General (Maj Gen) Thomas W. Bergeson (Respondent Donovan's Legislative Liaison) informed Rep. Roby that the convening authority had ordered a post-trial hearing in the Petitioner's case. *See* Appendix 1.

34. Maj Gen Bergeson explained that "[t]his hearing will take testimony and evidence to determine if this post-trial information impacted the validity of the court martial results. The military judge also may rule on *any* motions the defense counsel submits." *Id*. (emphasis added). As described above, this is not what happened at Petitioner's post-trial hearing, as the military judge prohibited the defense from even raising additional motions.

35. Maj Gen Bergeson's response to Rep. Roby was not provided by the government to the Petitioner before the post-trial hearing was held. In fact, Petitioner did not discover the

response—or the promise it contained—until four months *after* the post-trial hearing concluded and after Respondent Nowland had affirmed the Petitioner's conviction.

36. Based on the discovery of the response to Rep. Roby, Petitioner filed a petition for a new trial to the C.A.A.F. The request was denied by the C.A.A.F. Petitioner unsuccessfully appealed this denial to the Judge Advocate General of the Air Force.

VII. CAUSE OF ACTION

37. Petitioner seeks declaratory and injunctive relief under 28 U.S.C. § 1331. *Sanford v. United States*, 586 F.3d 28, 31 (D.C. Cir. 2009) provides the standard of review applicable to "collateral attacks on court-martial proceedings by persons who are not in custody."

38. In *Sanford*, the Court explained, "This court has recognized that the standard of review in non-custodial collateral attacks on court-martial proceedings is 'tangled.'" *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 406, 371 U.S. App. D.C. 107 (D.C. Cir. 2006) ("*New II*"). Two lines of precedent are relevant: the first deals with the "full and fair consideration" standard that applies for habeas review of courts-martial, and the second deals with the "void" standard that applies to collateral attacks on court-martial proceedings by persons who are not in custody. The court in *New II*, which was faced, as here, with a non-custodial plaintiff, attempted a synthesis of the two standards, looking primarily to the military courts' analyses of the merits of the plaintiff's claim. Because the first standard ("full and fair consideration") is, if anything, less deferential than the second ("void"), the court observed that a claim that fails the former *a fortiori* fails the latter. *Id*. at 408. In that situation, the court did not need to address how much more deference, if any, was due to the military court's judgment on non-custodial review. Sanford at 31.

39. In *Burns v. Wilson*, 346 U.S. 137 (1953) the Supreme Court first articulated the "full and fair consideration" standard, stating in the context of military *habeas* proceedings that "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not

open to a federal civilian court to grant the writ simply to re-evaluate the evidence." *Id*. at 142. In *Kauffman v. Sec'y of Air Force*, 135 U.S. App. D.C. 1, 415 F.2d 991 (1969) the Circuit Court interpreted that standard, observing that "[t]he Supreme Court has never clarified the standard of full and fair consideration, and it has meant many things to many courts." *Id*. at 997. The court reasoned that the standard should not differ "from that currently imposed in habeas corpus review of state convictions," and held that "the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Id*.

40. The second line of precedent follows *Schlesinger v. Councilman*, 420 U.S. 738 (1975), which held that federal courts have jurisdiction to review the validity of court-martial proceedings brought by *non-custodial* plaintiffs who cannot bring habeas suits, *id*. at 752-53. However, for a court to grant any relief to such plaintiffs, the military court judgment must be "void," *id*. at 748; *see id*. at 753, meaning the error must be fundamental. The Supreme Court stated that "whether a court-martial judgment properly may be deemed void . . . may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress." *Id*. at 753. This court adopted the *Councilman* standard as law for the circuit for non-custodial collateral attacks on court-martial judgments in *Priest v. Secretary of the Navy*, 570 F.2d 1013, 1016, 187 U.S. App. D.C. 104 (D.C. Cir. 1977).

The Military Courts Did Not Give Petitioner Full and Fair Consideration

41. There are three clear violations of Petitioner's right to a full and fair consideration of his case. First, the military judge erred when he prohibited Petitioner from meaningfully exploring whether key government witnesses lied during the M.R.E. 412 hearing. The judge then

compounded this initial error by reaching a dispositive conclusion of law despite denying Petitioner the ability to present the evidence that underpinned said conclusion. Second, Respondents have wrongfully denied Petitioner the ability to present evidence of perjury and fraud upon the court despite Respondents' binding promise to Rep. Roby that Petitioner would be allowed to raise *any* motion in a post-trial hearing related to the payment of a key witness. Finally, the prosecution failed to disclose favorable and material evidence.

42. At the post-trial hearing, Petitioner sought to develop the record regarding evidence of the timing of the sexual relationship between K.A. and J.M., demonstrate that K.A. had previously offered false testimony in this regard, and generally demonstrate the bias of these key witnesses in a manner that was unavailable at the time of trial because the timing and nature of the relationship between K.A. and J.M. was now known to be substantially different than had been previously represented. However, the military judge and military appellate courts ignored exculpatory evidence presented at trial from testimony by the Petitioner himself, civilian law enforcement officials, and J.M.'s own words to the mother of the Petitioner on the recorded phone call after trial, that inferred evidence of a sexual relationship between K.A. and J.M. prior to K.A.s reporting to military officials. The U.S. Supreme Court has recognized that impeachment evidence "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 76 (1985).

43. The military court argued that, "a newly convened court-martial in this case could not find or infer that by reporting Petitioner's crimes K.A. was attempting to preserve a sexual relationship with J.M. because, at the time she reported Petitioner's offenses, no such relationship existed." *U.S. v. Anderson*, 2017 CCA LEXIS 382 at 11 (A.F.C.C.A. 2017). The military court also states that K.A.'s credibility was not the only reason the Petitioner was convicted, arguing that other testimony supported the conviction, but failing to acknowledge the

defense arguments to each of those matters of corroborations that appear substantially more credible in favor of the Petitioner when viewed through the light of a slashing and effective cross examination regarding the credibility of K.A. that the Petitioner was deprived of at trial.

44. This Court should grant Petitioner's prayer for relief because the military court system clearly deprived Petitioner of the right to full and fair consideration in light of *Burns*. The military courts first refused to allow Petitioner the right to have developed the details of the inappropriate relationship between key prosecution witnesses in the motion hearing. Next, it made findings about what that evidence would have shown despite Petitioner having been expressly disallowed from contradicting such a conclusion through the presentation of evidence, and on a matter that should have been in the province of the finder of fact.

45. The question regarding the timing of the relationship between K.A. and J.M. should have been a matter for the finder of fact to decide, not the appellate court, and certainly not without substantial development of the record on that matter. The courts also view the timing of a relationship with an unreasonable degree of definition regarding the manner in which relationships develop. The courts view it as a black-and-white matter, when, in actuality, relationships are often a fluid concept that can only be defined through a detailed exploration of the various interactions between two individuals, and even more ill-defined when relationships begin amongst adulterous circumstances.

46. To put it simply, the courts decided that because K.A. declared that the relationship with J.M. didn't start until after the alleged criminal conduct, K.A.'s testimony could not be questioned or further developed. This analysis amounts to pandering to the whims of an alleged sexual assault victim who substantially deprived Petitioner of his Constitutional right to confrontation by lying about critical facts. The court blatantly disregards the recorded conversation between J.M. and Petitioner's mother in which J.M. admits that he was in a

relationship with K.A. in August of 2013, which occurred unambiguously *before* the alleged criminal conduct. This matter involves the Constitutional right to confrontation. The courts did not give adequate consideration because they both disallowed the presentation of evidence by Petitioner and reached conclusions that could have been different had they received Petitioner's evidence, and they selectively considered evidence which yields unreasonably to the credibility of one witness and not the actual evidence presented on the record.

47. Petitioner easily satisfies the requirement that his judgment was not given "full and fair consideration," as the military judge specifically refused to consider the full quantum of impeachment evidence that existed against the key witnesses in Petitioner's court-martial, despite a specific order from the convening authority to do so. By extension, then, the military appellate courts were likewise unable to give "full and fair" consideration to the judgment because they did not have the benefit of this crucial impeachment evidence in the record.

48. Thus, having satisfied the *Burns* standard, this Court must next determine whether the *Schlesinger* standard is met.

The Military Court Judgement is Void

49. Petitioner's Court-Martial Judgment is void. As the Supreme Court held in *Schlesinger*, "whether a court-martial judgment properly may be deemed void . . . may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress." 420 U.S. at 753.

Respondents Wrongfully Denied Petitioner the Ability to Present Evidence of Fraud and Perjury

50. The military judge wrongfully failed to allow Petitioner to present key impeachment evidence when he concluded that he did not have the authority to consider any additional motions or issues outside the convening authority's direction that he "address the circumstances"

of the payment to J.M. Not only did Respondent Donovan—through his legislative liaison—express that he intended for the military judge to entertain *any* motions, but as explained below the military judge had a regulatory obligation to grant appropriate relief. Instead of fulfilling both Respondents Donovan and Nowland's intent, the military judge narrowly interpreted his authority to be virtually nil as the record of trial had been authenticated and therefore closed. The military judge narrowly interpreted the scope of the post-trial hearing by failing to consider the actual stated intent of the convening authority.

51. The military judge was required to permit additional questioning of K.A. and J.M. regarding their respective motives to fabricate—and the military judge clearly abused his discretion when he determined he did not have authority to allow such questions. *See United States v. Meghdadi*, 60 M.J. 438, 442 (C.A.A.F. 2005) (explaining that "on an issue related entirely to witness credibility, the military judge declined the opportunity personally to hear the testimony of witnesses and, in the process, denied counsel the opportunity to develop that testimony in an adversarial forum"); *United States v. Webb*, 66 M.J. 89, 91 (C.A.A.F. 2008) (military judges are authorized to order new trials); *see also United States v. Roy*, 2013 CCA LEXIS 620 n. 2 (A.F. Ct. Crim. App. 2013) (military judge properly granted a defendant a new trial at a post-trial hearing ordered by the convening authority, even though the military judge's actions occurred *after* authentication).

52. Because of this overly narrow view of his authority, the military judge improperly halted Petitioner's attorneys at the post-trial hearing when they attempted to question both K.A. and J.M. about their prior testimony. He based this erroneous conclusion on R.C.M. 1102(d), which provides that the "military judge may direct a post-trial session any time before the record is authenticated." As the record in this case already had been authenticated, the military judge thought he was powerless to do anything outside receive evidence that J.M. had been given

money by K.A.'s mother which was an obviously erroneous interpretation of the convening authority's intent given the response provided to Rep. Roby. Furthermore, the convening authority had directed the military judge to conduct a post-trial session to "address the circumstances" regarding the $10,000 payment which later was discovered to be $100,000 upon receipt of testimony; in other words, it was not the military judge who was directing the session but rather a competent military authority. Essentially, by relying on R.C.M. 1102(d), the military judge implicitly determined that he had no authority to preside over the post-trial hearing because (1) he was a military judge and (2) the record already had been authenticated. This conclusion, however, ignored binding military jurisprudence. *United States v. Lofton*, 69 M.J. 386, 391 (2011).

53. Not only did the military judge, and the appellate courts through their affirmation of the verdict, violate Petitioner's right to confrontation, the courts then found that the very evidence Petitioner was not allowed to explore probably "would not produce a substantially more favorable result" for the Petitioner. *See* R.C.M. 1210(f) (specifying that a new trial will be granted based on newly discovered evidence if the evidence probably would produce a "substantially more favorable result for the accused" in the light of all other pertinent evidence). In other words, the military judge simultaneously (1) prevented Petitioner from introducing evidence that would have potentially given rise to a new trial and (2) determined that there was no evidence justifying a new trial. Had the military judge properly applied R.C.M. 1102(e), Petitioner would have been able to develop the type of evidence that would produce a more favorable result; namely, that the Government's star witness had lied under oath about when her adulterous affair began.

54. In the post-trial session ordered by the convening authority, the intent of the convening authority – as demonstrated in the written Congressional response – was that the Petitioner

would have a full opportunity to "address the circumstances" regarding the payment to J.M. The trial court and the subsequent military appellate courts' decision on this question is void because it was all premised on factual determinations that were made in light of an unlawfully limitation on Petitioner's right to present evidence post-trial which dealt with the right to confrontation.

55. The trial court determined that the additional evidence Petitioner sought to introduce would not have been Constitutionally required. However, the trial court erred in making that decision without hearing the powerful impeachment testimony, which reasonably may have influenced a determination by any finder of fact. The appellate court based their decision to not grant Petitioner relief heavily on the trial court's fundamentally erroneous determination that the additional credibility evidence would not have been persuasive, without actually reviewing such evidence directly.

56. The post-trial hearing amounted to a comedy of errors that devolved into a travesty of justice. In summary, the newly discovered evidence, brought forth post-trial, was sufficient for the convening authority to demand answers regarding the matter, and which resulted in confirmation of the matter at the post-trial hearing, but the military judge then failed to seek clarification from a competent authority regarding the scope of the proceeding and instead prejudiced Petitioner by not permitted further inquiry.

57. The Court in *Schlesinger* refers to the deference that must be afforded the "carefully designed military justice system established by Congress." 420 U.S. at 753. This is precisely the issue that arose in this case: the military justice system – which affords convening authorities an extreme amount of power over active courts-martial cases – failed here due to the trial judge's refusal to comply with the clear order of the convening authority to consider impeachment evidence in the post-trial hearing. Thus, the presumption of regularity that may otherwise attach to actions in the military justice system cannot be relied upon here. As such, it is within the

province of this Court to step in and remedy the failure of the military justice system to appropriately address the complaints of Petitioner that resulted in grave harm to him.

58. The trial court's error was fundamental, and ultimately voids the judgment in this case. The credibility of the alleged victim is single-handedly the only substantive evidence that the alleged crimes occurred– there was no confession, forensic evidence, or other damning information that could have otherwise secured Petitioner's conviction. Thus, any additional evidence regarding her motive to fabricate, or which highlighted other potential credibility issues with her testimony or that of J.M. would have been absolutely critical for a fact finder to consider in determining the viability of the allegations, particularly in light of the convening authority's direct order to have such information considered.

Respondents have reneged on their promise to Congress.

59. Petitioner did not learn of the Congressional response on behalf of the Air Force to Rep. Roby until several months after the conclusion of his illusory post-trial hearing. That response is a promise from Respondents that Petitioner would have a meaningful opportunity to present evidence and raise *any* motion at the post-trial proceeding. The Air Force Legislative Liaison, Maj Gen Bergeson, speaks on behalf of, and represents Respondent Wilson in the halls of Congress[3]. Thus, when Maj Gen Bergeson promised Rep. Roby that Petitioner would have a meaningful post-trial hearing during which he would be able to raise any motions related to the possible bribery of a key government witness, Maj Gen Bergeson was reflecting the views of Respondent Wilson and her subordinates.

[3] See Jonathan Turley, THE MILITARY POCKET REPUBLIC, 97 Nw. U.L. Rev. 1, 83 (explaining that military branches use their legislative liaison offices "as a direct conduit to Congress").

60. Maj Gen Bergeson's promise to Rep. Roby's inquiry provides critical evidence of Respondents' intent: that Petitioner would be able to pursue issues (related to the transfer of money to J.M.) in an adversarial forum. It also represents the Respondents' interpretation that R.C.M. 1102(e) did allow the military judge to entertain all motions and not just those he believed were specifically permitted by the order of the convening authority. Notably, the order of the convening authority did not explicitly limit the military judge in any way from considering any motions. Military courts are remarkably unique in that the trial (i.e. Court-Martial) is directed and conducted under the order of the convening authority. Courts-Martial proceed through "a 'tunnel of power' where, depending on the locus of the case, a particular authority has power over the substance of the case." *United States v. Diaz*, 40 M.J. 335, 343 (C.M.A. 1994) (citation omitted). Thus, at the very least, all Petitioner asks of this Honorable Court is to enforce Respondents' intent and promise because the convening authority returned "the train" to the military judge's "station—stoked and ready to move[.]" *Id.*

Respondents violated their* Brady *obligations.

61. Further compounding the various errors here is Respondents' failure to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). As this Court is aware, *Brady* mandates that the Government turn over to a criminal accused certain information—and that failure to do so "violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." *Id.* at 87. On appeal, there are three essential components to a claim of *Brady* violation: (1) the evidence was favorable to the accused; (2) it was suppressed by the prosecutor; and (3) it was material. *See*, *e.g.*, *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Hein v. Sullivan*, 601 F.3d 897, 906 (9th Cir. 2010). Evidence is "favorable" if it is advantageous to the defendant or could tend to call the Government's case into doubt. *Strickler*, 527 U.S. at 281-82; *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Evidence

is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.*

62. Here, during Petitioner's post-trial hearing, the Air Force prosecutor repeatedly asserted—on the record—that the purpose of the hearing was narrowly limited to exploring the payment made to J.M. *E.g.*, Appendix 2 at 136-140. But these assertions directly conflicted with Respondents' congressional response. As the Air Force's official response to Rep. Roby made clear, Respondents intended to allow Petitioner to raise any motions at the post-trial hearing—a fact that the prosecutor either knew or should have known. This official response, however, was not disclosed to Petitioner until well after the post-trial hearing already had concluded. The prosecutor asserted repeatedly to the tribunal that the intent of the convening authority was not to allow for any motions to be considered, which was refuted by the Air Force's official response prior to that very hearing.

63. By its very terms, this information was favorable to Petitioner: it detailed exactly what Respondents (and, particularly, Respondent Donovan) expected to occur at the post-trial hearing. Given that the military judge repeatedly prevented Petitioner from raising any motions outside of the prosecution's narrow interpretation of the convening authority's direction, the Congressional response would have been advantageous to Petitioner in this unique context. Respondents' response to Rep. Roby clearly recognized Petitioner's rights to raise any motions, and would have served as the vehicle for him to do so.

64. The Congressional response also was material: had the response been disclosed to Petitioner *before* the post-trial hearing, there is a reasonable probability that the military judge would have allowed Petitioner to raise an additional motion and, therefore, have a true and meaningful

opportunity to explore the perjury that occurred during the pretrial M.R.E. 412 hearing. As the defense strenuously argued during the post-trial hearing, "without being able to get into that relatively limited portion of testimony"—wherein J.M. and K.A. perjured themselves—"there's going to be less evidence from which to seek meaningful relief." *See* Appendix 2 at 126. The defense added, "In order to add context and make it actually worth what we need to develop here, there has to be additional testimony to show why what happened in point A is now different when we're talking about point B." *Id.* at 126-27. Had the prosecution disclosed Respondents' memorandum to Rep. Roby, with the clear statement that Petitioner would get to raise any motion at the post-trial hearing, it is sufficiently probable that the military judge would have allowed the defense to explore the very issue it was foreclosed from pursuing. From the transcript of the post-trial hearing, it is clear the military judge struggled to understand the left and right limits of his authority to take evidence during the proceeding. Was he supposed to narrowly construe the convening authority's order, as argued by the prosecution? Or was he to allow the defense to get to the heart of the alleged perjury even though the perjury occurred during a pretrial hearing sealed pursuant to M.R.E. 412? Ultimately, the military judge determined it was the former. But had the prosecution disclosed Respondents' memorandum to Rep. Roby, it would have been clear to the military judge that Respondents wished to afford Petitioner the ability to <u>fully</u> explore alleged perjury—even if that exploration was dependent on a subsequent (albeit related) motion filed pursuant to M.R.E. 412. By failing to disclose the response to Rep. Roby, the prosecution violated its obligations under *Brady* to turn over favorable and material evidence to the defense.

<u>Relief is Appropriate Here.</u>

65. As discussed above, Petitioner satisfies the requirements for relief under 28 U.S.C. § 1331, the federal question jurisdictional statute, as he has demonstrated that he was deprived a full and

fair consideration of his case by the military appellate courts, and furthermore that his conviction is void due to the fundamental errors that transpired post-trial in direct contravention to the convening authority's intent.

66. Respondent Nowland inexplicably refused to grant a second post-trial hearing after the military judge erroneously determined he did not have the authority to conduct the hearing. At this point, granting relief to Petitioner would not be directing Respondent Nowland to exercise his discretion, but would rather be enforcing the ministerial duty he set in motion when he ordered a meaningful post-trial hearing in Petitioner's case. *See Burnett v. Tolson*, 474 F.2d 877, 882 (4th Cir. 1973), (quoting *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925)) (noting that "[m]andamus issues to compel an officer to perform a purely ministerial duty"). As the military judge's clear abuse of discretion usurped Respondents' intent that Petitioner be afforded the opportunity to explore the payment to J.M. and raise any subsequent motions, this Court now must step in to prevent a clear transgression by the Government of a petitioner's constitutional right to due process, and to correct the fundamental errors that occurred.

VIII. CONCLUSION AND RELIEF SOUGHT

67. WHEREFORE, Petitioner Clarence Anderson III, respectfully prays that this Court:

a. Issue an order dismissing all charges with prejudice, order a new trial, or in the alternative, order a post-trial hearing during which Petitioner will be afforded his promised opportunity to confront key witnesses about their testimony during a closed session of his court-martial and file all appropriate motions in pursuit of meaningful relief;

b. Award Petitioner court costs and attorney's fees pursuant to 5 U.S.C. § 504; and

c. Grant such other relief as may be appropriate as law and justice require.

Respectfully Submitted,

Dated 3 September 2019

By:/s/ Sarah Kathryn Ikena
Sarah Kathryn Ikena, VSB No.: 77905

Golden Law, Inc.
27702 Crown Valley Pkwy, Suite D4 #414
Ladera Ranch, CA 92694
(202)888-5599 (Tel.)
(949)491-1467 (Fax)
Email: sarah@goldenlawinc.com
Attorney for Petitioner

By:/s/ Andrew David Cherkasky
Andrew David Cherkasky,
CA Bar 290501 & IL Bar 6289219
Golden Law, Inc.
27702 Crown Valley Pkwy, Suite D4 #414
Ladera Ranch, CA 92694
(949)491-1661 (Tel.)
(949)491-1467 (Fax)
Email: admin@goldenlawinc.com
Attorney for Petitioner
Pro Hac Vice

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO LOCAL CIVIL RULE 7 FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT

Pursuant to Local Civil Rule 7 for the United States District Court Eastern District of Virginia, I certify as follows:

1. This Petition for Relief complies with the type-volume limitation of Local Civil Rule 7 *Briefs Required* because this writ does not exceed the thirty (30) 8-1/2 inch x 11 inch page, double spaced limitation; and

2. This Petition complies with the typeface requirements of Local Civil Rule 7 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 12-point font in Times New Roman font.

Dated: September 3, 2019

/s/ Sarah Kathryn Ikena

Sarah Kathryn Ikena

CERTIFICATE OF SERVICE

I do hereby certify that on June 14, 2019, I electronically transmitted Petitioner Clarence Anderson III's Petition and Brief in Support of Request for Declaratory and Injunctive Relief under 28 U.S.C. 1361, to the Clerk's Office using the CM/ECF System for filing, forwarding to a judge pursuant to the Court's assignment and will transmit a Notice of Electronic Filing accompanied with Petitioner's Petition and Brief by certified mail to the named Respondents in the above-referenced matter.

/s/ Sarah Kathryn Ikena

Sarah Kathryn Ikena

6 November 2017

Major Clarence Anderson III
PO Box 452136
San Diego, CA 92145-2136

Inter-American Commission on Human Rights
1889 F Street, N.W.
Washington, D.C. 20006

Subject: Supporting Documentation for Human Rights Complaint

Similar to the proposed ban of transgenders serving in the United States Armed Forces that was ruled unconstitutional by a Federal District Court, the United States, specifically the Department of Defense, in the past few years has implemented patterns and practices for investigating and prosecuting allegations of sexual assault misconduct, that violate the human rights for members of its Armed Forces (almost exclusively men) accused of sexual assault misconduct. These patterns and practices violate Article 7 paragraphs 3 and 6, Article 8 paragraphs 1 and 2, and Article 24 of the American Convention on Human Rights ("the American Convention"). The United States Secretary of Defense (SecDef) has published two reports from the Defense Department's Subcommittee of the Judicial Proceedings Panel (JPP) titled, "Report on Sexual Assault Investigations in the Military" (February 2017) (see Attachment #1) and "Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases" (May 2017) (see Attachment #2). Both reports substantiate the United States is violating Article 7 paragraphs 3 and 6, Article 8 paragraphs 1 and 2, and Article 24 of the American Convention on Human Rights ("the American Convention") for members of its Armed Forces accused of sexual assault misconduct.

The report titled "Report on Sexual Assault Investigations in the Military" (at Attachment #1), discloses if a Sexual Assault Response Coordinator (SARC) receives a complaint of an allegation and then reports the allegation to an investigator, the investigator must treat the allegation as a sexual assault, even if the facts do not meet all the elements of the crime (e.g. what occurred was actually simply assault or no crime at all). (see page #2 "Report on Sexual Assault Investigations in the Military"). The report highlights there is no such thing as an "alleged" victim; all accusations substantiate an assault actually occurred and investigators are taught not to probe too deeply into the details of a sexual assault victim's account. (see page #8 "Report on Sexual Assault Investigations in the Military"). Investigators are discouraged from asking alleged victims questions that might be seen as confrontational and investigators expressed a concern that they are no longer interviewing the alleged victim in a manner that is best suited to elicit all the facts and circumstances necessary to discover what occurred. (Id). In addition investigators are discouraged from "confronting" a complaining witness with aspects of his or her account that do not make logical sense or that conflict with other evidence, including the victim's own inconsistent statements. (see page #9 "Report on Sexual Assault Investigations in the Military").

These patterns and practices from the Department of Defense, give investigator's the guidance they have to accept the complainant's account at face value, without thoroughly exploring discrepancies or seeking more detail in the complainant's account. (Id). One investigator described being trained to investigate the sexual assault "that did happen" and not the possibility that it did not happen. (Id). This approach is problematic, the agent implied, because the training leads them to overlook important facts and evidence, obscuring the reality of what occurred. (Id). The findings from this report state the

imposition of bureaucratic obstacles from the Department of Defense on interviewing an alleged victim, was widely viewed as a deterrent to conduct investigations properly and thoroughly. (*Id*).

In addition, the report indicates investigator's claim that Special Victim's Counsel (SVCs), who attend the investigative interviews, sometimes object to certain necessary or relevant questions or advise the complainant not to answer them. (*Id*). (please note*; SVCs are government provided counsel for alleged victims of sexual assault who work independently from the government legal counsel at trial; the Department of Defense does not assign SVCs to victims of other alleged crimes e.g. victimization due to one's race, ethnicity or religion are not assigned SVCs*). Other investigators reported that the mere presence of the SVC dissuades them from asking probing questions "out of fear" that they will be accused of being inappropriate or being too hard on the victim. (*Id*). At one site visit, a SVC objected every time an agent asked the victim what sort of resolution of the case he or she wanted, even though training had taught the agent that this was an important and routine question to ask. (*Id*). The SVCs position was that the clients answer could be later exploited by a defense attorney on cross-examination. (*Id*). The Subcommittee acknowledged this is not a reason to curtail appropriate questioning of a victim. (*Id*).

Service members accused of sexual assault misconduct, human rights are further violated as the report shows investigators indicated that if inconsistencies in the victim's statement arise during the course of the investigation, they must ask the SVC to speak with the client to clarify the points because the SVC do not permit investigators to speak directly to the victim even in follow-up interviews. (*Id*). Indeed, investigators also pointed out that follow-up interviews are the norm in the private sector during sexual assault investigations. (see page #10 "Report on Sexual Assault Investigations in the Military"). On the advice of SVCs, victims limit their participation and fail to provide investigators with evidence relevant to the investigation. (*Id*). Denying follow-up interviews therefore prevents investigators from fully exploring and understanding what could potentially become very important issues in a case.

The human rights for service members are even more violated as the report substantiates both trial counsel and investigators recounted cases in which victims, on advice from their SVC, declined to turn over evidence to investigators. (*Id*). SVCs openly admit that they advise clients to obstruct justice and not to turn over their cell phones to investigators, even when it is likely to contain critical information. (*Id*). The subcommittee notes in the report that investigators need to have credible information establishing probable cause to believe an item such as a cell phone contains evidence that corroborates a victim's statement or bears on the guilt or innocence of the accused. (*Id*). Another alarming note to prove the unlawful patterns and practices that violate the human rights of service members, counsel at one installation said they will sometimes charge an accused just to hasten the receipt of digital or DNA evidence from the lab, even when the sum total of existing evidence may not support a successful prosecution. (see page #11 "Report on Sexual Assault Investigations in the Military").

The report on sexual assault investigations conclude when a victim either declines subsequent investigative interviews, or refuses to turn over relevant evidence such as photographs, text messages, or social media information contained on the victim's cell phone, investigators and prosecutors make decisions about investigating and charging without possessing all available evidence. (see page #15 "Report on Sexual Assault Investigations in the Military"). These unlawful patterns and practices from the Department of Defense, as outlined in the American Convention on Human Rights that violate the human rights of service members, force investigators and prosecutors to press forward without a victim's full cooperation, an approach that the subcommittee raises concerns about not just the fairness

of the investigation, but also the overall fairness of a prosecution that ultimately erode away the human rights for members of the Armed Forces accused of sexual assault misconduct. (*Id*).

Additional evidence on the patterns and practices that violate the human rights for service members accused of sexual assault misconduct, is found in the second report from the Subcommittee of the Judicial Proceedings Panel titled, "Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases" (May 2017) (see Attachment #2). The title of the report alone is self incriminating as it references "Barriers" (a word which could be easily replaced with another self incriminating word i.e. "Obstructions"), which suggests members of the Armed Forces accused of sexual assault misconduct do not receive the fair administration of justice. This report substantiates the United States, specifically the Department of Defense, manufacture and secure convictions by mandating its members of the Armed Forces train on knowingly fraudulent and victim-centric material, as those members later serve as fact-finders at trial. (see page #19 "Barriers to the Fair Administration of Military Justice in Sexual Assault Cases"). Findings from the report substantiate members of the Armed Forces receive knowingly false and victim-centric training, that instructs them improperly on consent. (*Id*). The report indicates because members of the Armed Forces are inculcated with military training and predisposed to believe victims, the vior dire at jury selection does not completely expose the biases of potential panel members. (*Id*).

Furthermore, the report substantiates that often the Department of Defense does not require probable cause for members of the Armed Forces when moving a case forward to trial and instead relies on non-attorney "Convening Authorities" who are able to arbitrarily decide who goes to trial. (see page #14 "Barriers to the Fair Administration of Military Justice in Sexual Assault Cases"). Additionally the report shows many military attorney's are forced to violate their state bar ethics when taking many sexual assault cases to trial, in which they feel the charges are not supported by probable cause. (*Id*). The findings also conclude military courts are pressured to prosecute all sexual assault allegations because Convening Authorities are under immense pressure from the United States Congress to prosecute any allegation, even those without merit, for fear members of Congress will make them an example and not promote them unless they prosecute all allegations. (see page #12-#14 "Barriers to the Fair Administration of Military Justice in Sexual Assault Cases").

This report concludes, additionally, these unlawful patterns and practices are affirmed with many counsel who expressed that the merits of the case, have become less important than the victim's preference regarding disposition. One commander acknowledged that there is pressure to go to trial if the victim wants to go to trial, regardless of the case's merits. (see page #14 "Barriers to the Fair Administration of Military Justice in Sexual Assault Cases"). Ironically members of the Armed Forces, have fewer laws protecting them in a federal court room than their enemies foreign or domestic, who may also face federal charges in the United States. These unlawful command directed patterns and practices, erode the trust and faith the public has in the military justice process.

Lastly and personally, these human rights violations substantiated in both reports, have led to my unlawful prosecution and conviction. Not only was I prosecuted with no probable cause, as the government at my previous duty assignment and state attorney affirmed no crime was ever committed and declined to prosecute (see Attachment #3), but civilian law enforcement also testified at my trial that no crime was ever committed thus why an arrest was never ordered. I even testified in my own defense that I never committed the charged offenses. To make matters worse, a post-trial hearing was held after my trial, and a key civilian witness in my case was shown to have received a payment of $100,000 in benefits from the alleged victim's mother prior to him testifying. (see Attachment #4). The alleged victim is my ex-wife who made sexual assault accusations against me (and other assault claims),

once I discovered she was having an affair, and after I was awarded custody of our minor child. (*Id*). Her mother later paid the man she had the affair with $100,000 in benefits prior to him testifying at trial. (*Id*). In spite of this alarming evidence further proving my innocence, the United States Air Force broke not only the rules of the military courts, but also the federal law pursuant to 18 USCS § 1001, when it falsely reported to Congresswoman Martha Roby (R-AL) the military judge had full authority to rule on any motion from my counsel (to include a motion for a new trial), but during my hearing (and appeals) ruled the military judge was *not* granted full authority to rule on any motion because the record of trial was previously authenticated prior to my post-trial hearing. (*Id*).

Moreover, the United States Air Force has refused to request a federal civilian investigative agency (i.e. the FBI) to investigate these matters and the United States Department of Justice has refused to intervene, even when petitioned by a United States Senator. (see Attachment #5). Obstructing my human rights even further, my appellate attorney was forbidden from allowing me to view my brief to the Air Force Court of Criminal Appeals, unless the brief was redacted. (see Attachment #6). When I submitted an Extraordinary Writ to the Court of Appeals for the Armed Forces for permission to view an unredacted version of my brief to the Air Force Courts, my request was denied. (see Attachment #7). The United States, specifically the Department of Defense, for the past few years has implemented patterns and practices for investigating and prosecuting allegations of sexual assault misconduct, that violate the human rights of members of its Armed Forces (almost exclusively men) accused of sexual assault misconduct.

I pray you help me resolve these human rights violations substantiated by the patterns and practices confirmed in the aforementioned reports from the Department of Defense, that continue to keep me incarcerated. I pray one day I may receive justice and freedoms unlawfully withheld from me and other members of the Armed Forces wrongfully prosecuted for sexual assault misconduct, guaranteed by the American Convention on Human Rights. These violations are not sanctioned by Article 1 Section 8 (14) of the United States Constitution and must end.

Signed on this 6th day of November 2017.

CLARENCE ANDERSON III, Major, USAF

7 Attachments:

Attachment #1 ("Report on Sexual Assault Investigations in the Military") (18 pages)
Attachment #2 ("Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases") (29 pages)
Attachment #3 (Letter from Previous Command Confirming Why Charges Were Not Filed) (1 page)
Attachment #4 (Petition for a New Trial to the Judge Advocate General of the Air Force) (24 pages)
Attachment #5 (Letter from Senator Luther Strange to Department of Justice) (1 page)
Attachment #6 (Extraordinary Writ to Court of Appeals for the Armed Forces) (10 pages)
Attachment #7 (Denial of Extraordinary Writ) (1 page)

Tab 3

From:	Darin Lopez
To:	WHS Pentagon EM Mailbox DACIPAD
Cc:	Bovarnick, Jeff A COL USARMY OSD OGC (USA); Carson, Julie K CIV OSD OGC (USA); McKinney, Anna M (Marguerite) CIV OSD OGC (USA)
Subject:	[URL Verdict: Neutral][Non-DoD Source] Re: Inquiry to Speak Before the Committee
Date:	Monday, September 12, 2022 4:12:44 PM

Honorable Members of the Staff,

After further reading the site and options I realize that I would also like to respectfully request to submit documents in writing to be published for public record in addition to my request for speaking in the public comments.

Thank you for your time and consideration in this matter as it is greatly appreciated.

Very Respectfully,

Darin G. Lopez, MBA
[redacted]

From: Darin Lopez <darin.lopez@yahoo.com>
Sent: Thursday, July 21, 2022 5:16 PM
To: WHS Pentagon EM Mailbox DACIPAD <whs.pentagon.em.mbx.dacipad@mail.mil>
Subject: [Non-DoD Source] Inquiry to Speak Before the Committee

Good afternoon,

I have recently been in contact with William Cassara J.D. who is a defense attorney on this committee. I asked if it would be beneficial to share my story dealing with an accusation of sexual assault which resulted in a guilty finding.

I believe it would be beneficial for the board to hear and learn of aspects that haven't been brought up in other cases, and to know the whole series of events while enabling a way to also provide feedback and answer any questions the committee may have. If one member of the Armed Forces can be saved from an injustice by me speaking before the committee I believe it it my duty to do so.

Very Respectfully,

Darin G. Lopez, MBA
[redacted]

To The Honorable Members of the Committee:

INTRO

Thank you very much to the staff and committee for granting me the opportunity to speak on such an important matter for both the Military, Veterans, and the public. I also advocate for a service free of sexual assault, as well as fair and impartial processes of justice. As stated, my name is Darin Lopez, and I am a former Navy Intelligence Specialist who honorably served by country for 12 years. I was convicted of a sexual assault in 2014 against my plea of not guilty and was sentenced to three years confinement and a bad conduct discharge where consent was the argued point. Today I am here in the interest of Justice and respectfully request the pursuit of a conviction integrity unit, such could be named the Armed Forces Falsely Accused Individual Review (FAIR) subcommittee. The committee should be granted fact-finding authority and make necessary recommendations to the appellate services and/or board of corrections for adjudication. Although my initial my plight is based upon relief for those believed to be affected by Unlawful Command Influence, I believe there is a need beyond that single scope and that such review committee should be permanently commissioned in the interest of all service members and military justice.

KEY POINTS

I stress **two integral parameters to be reviewed by the proposed conviction integrity unit**.

UCI

First, in short the armed forces has experienced **the largest account of Unlawful Command Influence (UCI) in US history**. UCI has many variants and has been exerted by the President, SECDEF, Congressional officials. Service leaders, the JAG Corps, jury pools, and

service members of every armed force who through mandatory briefings, and policy memos (*see US v Kish*). Explicit and implicit guidance has been a real problem manifested in undue command influence. Moreover, UCI has reached extremes where those who are supposed to embody the spirit of justice; the Judge Advocate Generals of the Navy and Air Force were found to individually intercede in cases (*see US v SOC Keith Barry*). The alarm has been sounded repeatedly, and despite slow incremental changes, little substantive change has occurred. Specifically, the UCI agenda pervaded because of a perception that the Armed Forces couldn't manage sexual assault cases. In my case that statement is correct, but not as the agenda presented. The military system failed even after presenting civilian authorities the opportunity to pursue but dropped for a lack of evidence. A problem that took months of misinformation to create, has reached a decade of damage, and I am here today to say that there is still time to do the right thing for the future and **ensure progress toward a path where none are left behind**.

Rights Violations

The military justice system has violated individual rights for the accused as defined by the Constitution and I ask the committee to look at cases such as mine. What occurred cannot be purely explained as a series of unfortunate events such as ineffective council, prior inconsistent statements, testimony changing, storytelling, phone muting during testimony, but **a series of events disregarding my rights to fit an agenda enabled by UCI.**

The burden at trial is **beyond a reasonable doubt** and in less a trial lasting only several hours prefaced by 2 years of investigation and fact finding my fate was determined by a Navy Judge alone. The judge determined that the burden was met based on a single statement by the accuser; "don't worry, I used a condom." Despite all of the inconstancies in provided evidence and testimony, he describes the accuser as credible and explains "critically significant" in his

rationale proves that the word "used" is past tense and implies that I was aware of her inability to consent. At most if that statement were true that was the most overwhelming evidence that a crime had occurred. Still, that does not reach the burden of an inability to consent beyond a reasonable doubt. The standard for the burden would have been substantial incapacitation proven beyond a reasonable doubt, and the record shows the accuser drank three drinks between 3-4 hours and **has many memories however intermittent on record before, during, and after our consensual sexual activity**. What makes the Judges finding even more severely separated from the truth is that **this particular statement evolved from the initial interviews** with Army CID in Dec 2012 of her having an account of me saying **"I have a condom on" during sexual activity, which would be a direct answer from a question to a conscious person.** But the account of that statement changed somewhere after being assigned a personal attorney or Special Victim Advocate (SVA). That statement and the oddly tactical responses of an accuser to say "I don't know" in response to particular lines of questioning offer more than mere suspicion, because without them there would have been no way to narrate a case at all **due to a lack of any factual evidence**. This would be a tactic aligned with UCI guidance to achieve a conviction to get past the burden shift of court-martial and into appeals where that shift further makes justice increasingly difficult. These tactics were necessary because there was not and is not anything that implies our activity was not consensual but fit the agenda of that time. The accuser stated on the record that "I don't remember saying no or stop" (Article 32) because she didn't.

After what has been revealed from the scope of the UCI, the handlings, and the result of my case given the lack of evidence, it is more than apparent that **the true tragedy was the chain of command creating a crime and ensuring a conviction**. The violation of my rights ruined my career, sent me to prison, put me through a decade of emotional and mental distress, and

makes every day a challenge due to accommodating circumstances and yet, there is no avenue for relief.

Solution

As stated, I am here today advocating for my own individual path for relief and for every Veteran who has been subject to the damages of injustice with no clear path to redemption. I have been in recent contact with military prosecutors, and they are in agreeance that a case like mine by todays standard would not be pursued, yet I remain suffering and penalized by injustice. As stated, I believe in something such as the proposed (FAIR) committee composed of non-reservist nor active-duty military to ensure integrity where self-preservation of career cannot be a factor in the process of justice. I imagine this is much like what Member Jim Markey has mentioned as a conviction integrity project that would seek that everybody's victims are supported, and everybody's rights are also respected and is the correct course of action for the future. Thank you for your time.

Very Respectfully,

Darin G. Lopez

In a continued effort to seek relief whether it be by further inquiry of my submitted application for Presidential Pardon or some other means, I have produced further detailed explanation of important key facts and amplifying details to assist in understanding the nature of Unlawful Command Influence, the timeline of events, and how my case was handled at the height of it all.

I have never had a voice in what occurred as I exercised my Constitutional right to remain silent due to the volatile and uncertain environment that was. Before going forward I can say without a doubt, as a former intelligence professional and marketing professional this agenda was executed with the elegance of a well-orchestrated symphony. It was like a computer operating system put in all the elements of shaping military environments such as an information operation (IO), propaganda, media exploits, the use of technology and the vastness of its reach, and the mainstream media. Everyone knew what they were capable of, and although it spread like a viral pandemic, the inception was only the initiator because in the military. people were going to do what they were told by their superiors, or they would suffer injury to their careers.

My case was clearly handled during the most critical times of the entire sexual assault agenda and related Unlawful Command Influence, yet it has never been brought up that the handling and results of my case were subject to the UCI environment, however the record shows not one mention of it and that fact of the story is likely the most critical. Additionally, as I continue to advocate it is my duty to also be remindful that this matter is not solely a problem of mine, but of many service men and women who suffered damages in the name of politics and not justice who may be still seeking relief.

There is an abundance of information out about the sexual assault environment and UCI occurring in this past ten-years so here I try to keep it simple. Here is the Problem: The roots caught ground and began to grow rapidly.

Unlawful Command Influence Timeline and Key Events

· April 2010 Michell Obama assigning April as Sexual Assault Awareness month. A virtuous cause but part of a much larger agenda. An agenda that is arguably the most sloppy and damaging agendas in military history.

· **The most significant strategic level influence and UCI was conducted by President Obama May 2013 where he made remarks publicly identifying the military as a target** for rooting out whoever is engaging that type of activity while also **directing then Secretary Chuck Hagel not only to step up their game, but to "exponentially go after it**," in an extended effort to support campaign against sexual assault.

· If remembered correctly the actual loudest noise and most critical piece in this campaign was the film The Invisible War. A non-profit film that wasn't funded but was made based upon the assumptive head nod that there would be a future private screening that would get the foot in

the door for sparking the draft of a bill with the help of influential political friends, and it eventually did.

First of all **actual private film screenings are few and far between** so much so that I could only learn of 2 through historical research. Also these are separate from Hollywood working with the government and CIA or special ops types for the last 80 years or so for accuracy.

· The private screening in 2012 held on Capitol Hill in Washington, DC a month after Sundance, provoked increased conversation in Congress.

The screening itself in hindsight was a big red flag so finding out why and how was important. The why is quite robust and subject to many perspectives but largely its agreed that sexual assault is bad, and the perceived problem in the military is adequate for this, but what can't be disputed is the who and how.

· The obvious beginning that put this agenda into the DoD and military reality is the private screening with Congress made possible by Leon Panetta and those he invited or set up for viewing.

The connection between the film and the government:

California Senator Barbara Boxer who held office from 1993 - 2017, the mother of executive producer Nicole Boxer who was the Executive Producer of the film. The private screenings created a convincing word of mouth campaign, which led in part to Secretary of Defense Leon Panetta seeing the film. In a statement by the producers of the film the message and the call to action was as follows:

We encourage Secretary Panetta and the DoD to take the following additional actions:

1. Move the decision to investigate and prosecute a sexual assault claim outside the victim's chain of command.

2. Create a sexual assault database within the Department of Defense that is required to share information with the Department of Justice civilian sexual offender database.

3. End the practice of diagnosing victims of sexual assault with personality disorders and then discharging them from the military without being eligible for benefits.

4. And finally, as The Invisible War conclusively shows, the vast majority of sexual assaults are committed by a small minority of service members who are serial perpetrators. The DoD must aggressively investigate, prosecute and incarcerate these 'enemies within' who are debilitating our fighting force."

Here I call out call to action encouragement #1 because that has been one of the chief complaints since 2010.

· My case was handled by civilian authorities **outside any of my chains of command and they determined there the case did not reach the burden of proof to pursue** however this was not "good enough" for the service and they went beyond what the root cause of the UCI argument called for. **Why they did this is explained by the by the UCI conducted by LtCol Palmer after the list of attendees of the private viewing.**

People interviewed in The Invisible War include:

Members of Congress

Chellie Pingree, (D, Maine)
Louise Slaughter (D, New York)
Mike Turner (R, Ohio)
Loretta Sanchez (D, California)
Jackie Speier (D, California)
Ted Poe (R, Texas)
Susan Davis, (D, California)
Niki Tsongas, (D, Massachusetts)

Military personnel

Major General Mary Kay Hertog, Director, Sexual Assault Prevention and Response Office
Dr. Kaye Whitley, Former Director, Sexual Assault Prevention and Response Office
Rear Admiral Anthony Kurta, Director, Military Plans and Policy
General Claudia J. Kennedy, US Army (retired)
Brigadier General Wilma L. Vaught, US Air Force (retired)
Brigadier General Loree Sutton, M.D., US Army (retired)
Major General Dennis Laich, US Army (retired)
Staff Sergeant Stace Nelson, NCIS Special Agent, USMC (retired)
Veteran Robinlynne Mabin-Lafayette, USAF Disabled Veteran

Senator Kirsten Gillibrand credits The Invisible War with inspiring her to create legislation to reduce sexual assault in the military. In her 2014 memoir Off the Sidelines further complicated the environment as its provided further pressure against an accused and leadership who's careers are hinged upon congressional approval. This was the year I was prosecuted, and my appeals were affected by the further growth of the agenda and its efforts followed by changes in command as members of the JAG Corps would assume higher authority to positions such as the appellate courts.

To understand why my specific case would want to be picked up and charged by the military is attributed to the words directly spoken from by Gen. Amos CMC Marine Corps

· In April 2012, General James F. Amos, the Commandant of the Marine Corps (CMC), and Sergeant Major Michael P. Barrett, the Sergeant Major of the Marine Corps (SMMC), embarked on a tour of all major Marine Corps installations, as well as a few other locations where Marines were stationed, to deliver a lecture that came to be known as the Heritage Brief. The CMC's target audience for the Heritage Brief was "every single staff NCO and officer in the Marine Corps."

· The key witness in my case and alleged victim was a Marine, whereas this persons chain of command was unarguably under the influence of misguidance by the UCI. The actual accuser in my case was a third party.

These briefings were followed by training and advice to new judge advocates.

· **Among the first influential UCI comments the influential Judge Advocate Lieutenant Colonel Palmer include following:**

1. You must have a willing suspension of disbelief of the victims once the convening authority has decided to proceed with the charges.

2. The defendant is guilty. We wouldn't be at this stage if he wasn't guilty.

3. As trial counsel, it is your job to prove the defendant is guilty with the fullest veracity. Don't hold back. Once convicted, we need to crush these Marines and get them out.

4. Defendants are scumbags.

5. If a trial counsel loses a child pornography case, that trial counsel will go to hell.

Court record also found that this same influential JAG stated that a **trial counsel needs to list *any* charges on the charge sheet just to get the charges before the members, even if the elements of the charges cannot be proven**, or words to that effect **while also stating that "Jury members are stupid, knuckle-dragging morons that need to have the drool wiped away from their mouths. I don't hate them, I despise them"**, and "Juries don't have to follow the law and they know it."

For the handlings of my case, it is odd yet not surprising that **at each decision point** in the flow of my case **followed like a prescription from the statements derived from the UCI events**. For example:

· **Put charges on paper even if unprovable. If you read my charge sheet it was written in this manner, the last caveat being the most unprovable among all the unprovable charge.**

· **Once charges are made they will go to court martial because the Convening Authorities (which we would later find out) were not making the recommendations based on the merits of the case but forced by the hand leadership above them (whether for career reasons or out of fear) of the agenda as seen in the case of US vs SOC Keith Barry carried by the influence that "it wouldn't be this far if he wasn't guilty".**

· **It was the job to find me guilty beyond all reason, because "the defended is guilty" and that happened.**

· **Jury members are stupid, don't follow the law, and this influential leader hates them. This makes sense as to why my counsel would have me take trial by judge alone.**

The remarks were implicit as to suggest how to build and win a case from nothing. The call to action? After getting any kind of improvable charge on paper, ensure trial by judge alone because juries are stupid and are not to the advantage of a guilty finding, which is what happened in my case. This also makes sense of my defense attorneys guidance and rational of "we will go judge alone because he is expected to know the law". That was what was being fed through the JAG Corps.

· With all of the things going on in the environment, several high-profile cases occurring around the same time as mine, the media propaganda, the influence of the agenda and its players, etc. **the judge never stated anything about clearing the air of the UCI type statements nor did he ever acknowledge the existent of the UCI ripe environment** which is unusual given it was the most heavily prosecuted and scrutinized events of the time.

It appears my case was less about justice and more about prejudice. At the time the agenda lead by a polar Democratic political congress weaponized any organization that is had the power of the purse over, namely the Department of Defense (DoD) and the Department of Education (DOE). For better, **the Department of Education cases didn't last long when the lawsuits began, and it started hurting the money**. Accused students could sue and won in many cases to be granted large sums of money for damages which crippled the agenda and the government's ability to manipulate outcomes. Notably, it was also civilian lawyers which require a lot of resources and funding who were able to bring to light the occurrences of UCI as a quasi-form of oversight.

It was eventually found that DOE leadership had made all guidance and rules without any consent and on their own free will and were not "actual rules". Sadly, some young men perished because of the confusing misinformation much like the military, however one cannot sue the military for such a thing. This is an important talking point because at the core military and civilians are protected at the federal level by the U.S. Constitution, however once a military tribunal is done, there is no avenue for relief less new evidence such as a member of the service in leadership speak out. This would be a validator and new evidence much like Admiral Lorge in the case of US vs SOC Keith Barry. Then the Admiral admitted that he had not acted in good faith given the circumstances that everyone faced at that time. This is a prime example of how

easily one can clearly explain prejudice due to the environment as related to apparent or actual UCI.

It is my greatest hope that what I convey is not a finger pointing event; **my intent is to summarize key facts that I know affected how my case was handled and ended and the holistic view requires much more than what I can convey in several pages, or 5 minutes of free speech**. I have been living as an honorable veteran who also served my country honorably but have been living with the terrible consequences of this injustice. The best that has come from this is, my experience in total, and my plight is that it has provided red flags of concern to counter the agenda with reason where others much after me were able to be relieved, but where I have not.

Thank you for your time and consideration reading and learning of this matter as it is greatly appreciated, I look forward to the opportunity of continued dialogue, as I believe my first-hand account of the entire process from the lens of an informed and trained observer.

Very Respectfully,

Darin G. Lopez, MBA
Former Navy Intelligence Veteran

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

United States,
Appellee

v.

Darin G.
Lopez,
Appellant

USCA Dkt. No. 17-0291/NA
Crim.App. No. 201400373

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is by the Court, this 28th day of June, 2017,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Cassara)
Appellate Government Counsel (Keller)

UNITED STATES NAVY–MARINE CORPS
COURT OF CRIMINAL APPEALS

No. 201400373

UNITED STATES OF AMERICA
Appellee

v.

DARIN G. LOPEZ
Intelligence Specialist Second Class (E-5), U.S. Navy
Appellant

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge: Commander Ian K. Thornhill, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate: Captain A.R. House, JAGC, USN.
For Appellant: William E. Cassara, Esq.; Lieutenant Doug Ottenwess, JAGC, USN.
For Appellee: Major Cory A. Carver, USMC; Major Suzanne M. Dempsey, USMC.

Decided 18 January 2017

Before PALMER, MARKS, and FULTON, *Appellate Military Judges*

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Practice and Procedure 18.2.

PALMER, Chief Judge:

At a general court-martial, a military judge convicted the appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The convening authority approved the adjudged sentence of three years' confinement and a bad-conduct discharge.

The appellant raises three assignments of error (AOE): (1) the evidence was legally and factually insufficient to sustain the conviction; (2) the trial defense counsel (TDC) was ineffective in failing to investigate and present evidence that the victim experienced memory blackouts before, during, and after the alleged sexual assault; and (3) the TDC was ineffective post-trial for failing to consult with the appellant before submitting clemency matters, thus entitling the appellant to a new post-trial review and action.

Regarding the third AOE, on 7 October 2015, we returned the case for remand to an appropriate convening authority to order a *DuBay* hearing[1] into the TDC's post-trial efforts or, alternatively, to withdraw the original action and complete new post-trial processing with a substitute TDC representing the appellant. The convening authority completed new post-trial processing and again approved the adjudged sentence on 11 February 2016. On 10 May 2016, the appellate renewed his original AOEs but raised no new error. The convening authority's new, unchallenged action renders the third AOE moot.

After reviewing the record and pleadings, we are satisfied that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

I. BACKGROUND

The appellant and the victim, Lance Corporal (LCpl) EH were casual friends who first met off-base, exchanged text messages, and had gone on a dinner date. LCpl EH was attending her entry level service school aboard an Army installation and was not in the same command as the appellant. On 24 November 2012, LCpl EH invited the appellant to join her at a nightclub. They socialized, and LCpl EH recalls drinking two mixed drinks and a shot of liquor. She became intoxicated, blacked out, and then awoke to find herself on a bed with the appellant on top of her engaging in sexual intercourse. She heard him say, "don't worry, I used a condom"[2] before she passed out again. LCpl EH ultimately reported the sexual assault to a Uniformed Victim's Advocate and to the Army's Criminal Investigation Command.

II. DISCUSSION

A. Legal and factual sufficiency

We review questions of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal

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[1] *United States v DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[2] Record at 131; Appellate Exhibit (AE) XX at 3.

sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173-74 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In applying this test, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

The test for factual sufficiency is whether "after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt." *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006) (citing *Turner*, 25 M.J. at 325 and Art. 66(c), UCMJ), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). In conducting this review, 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." *Washington*, 57 M.J. at 399. While this is a high standard, the phrase "beyond a reasonable doubt" does not imply that the evidence must be free from conflict. *Rankin,* 63 M.J. at 557.

A conviction for this sexual assault offense requires proof beyond a reasonable doubt of two elements: (1) that the appellant committed a sexual act upon LCpl EH, and (2) that LCpl EH was incapable of consenting to the sexual act due to impairment by an intoxicant and this condition was known or reasonably should have been known by the appellant. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 45.a(b)(3).

The appellant argues that the government failed to introduce sufficient evidence to prove LCpl EH was so impaired by intoxicants that she was incapable of consenting to the sexual act. Specifically, he argues the three drinks LCpl EH recalls consuming were insufficient to cause the requisite impairment. The appellant also points to a drug screen of LCpl EH's urine occurring less than two days after the assault that tested negative for any drugs that could have contributed to LCpl EH's impairment. The appellant argues LCpl EH's memory gaps and varying recollection of details before, during, and after the assault indicated she was either too intoxicated to form memories of the time of the alleged offense (yet not incapacitated) or was being untruthful in recounting her memories of the evening. Finally, the appellant asserts that because LCpl EH reported only having three drinks, and because she apparently departed the bar and went to his third-floor walk-up apartment under her own power, he had a reasonable belief that she consented to the sex acts. We disagree.

The military judge issued special findings, which we find are fully supported by the evidence. The special findings indicate the military judge correctly understood the burden of proof and the elements the government was required to prove in this case. In weighing the evidence, we too find LCpl EH to be highly credible as she testified to: feeling dizzy and extremely intoxicated; blacking out while "just standing there"[3] in the bar; waking up unable to move or speak; finding the appellant on top of her with his penis in her vagina; and hearing the appellant tell her, "don't worry, I used a condom,"[4] before she passed out again. LCpl EH awoke the following morning, alone, in the same room; she felt sick to her stomach, and her head hurt and was spinning; she was still wearing her dress, but a sleeve was pulled down and the bottom of the dress was "bunched up across her waist;"[5] and she was lying in vomit and urine.[6] The evidence shows, and the military judge found, that LCpl EH immediately took a shower still wearing the dress. While showering she noticed bite marks on her breasts and scratches on her back that had not been there the day before. After she showered, LCpl EH sat on the couch in the living room, wrapped in a towel while her dress was in the dryer. Although she could hear the appellant's voice, she did not see him in the apartment that morning. Eventually, without waiting for her dress to fully dry, she re-donned it and departed in a taxi. The taxi driver testified that LCpl EH appeared confused, desperate, and to have been crying. The driver offered to take LCpl EH to the police or hospital, but LCpl EH declined.

Finally, a subsequent search of the appellant's apartment revealed two used condoms in the trash, and the appellant stipulated the semen DNA profile inside both condoms matched his and the DNA profile from the outside of both condoms matched LCpl EH.[7]

Based on all the testimonial evidence presented at trial, and in particular LCpl EH's testimony that the appellant's penis was in her vagina, coupled

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[3] Record at 129; AE XX at 3.

[4] Record at 131; AE XX at 3.

[5] Record at 133; AE XX at 3.

[6] The appellant takes issue with this conclusion, arguing that LCpl EH only "[a]t the time . . . believed [the bed] was wet with urine" but that she did not know it was, in fact, urine. Reply Brief on Behalf of Appellant dated 1 Sep 2015 at 3; Record at 159 and 162; AE XX at 3. We conclude that LCpl EH passing out in her own urine is a permissible inference reasonably drawn from the evidence. RULE FOR COURTS-MARTIAL 918 (c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012), Discussion.

[7] Prosecution Exhibit (PE) 4 at 2; AE XX at 4.

with the corroborating physical and forensic [DNA] evidence,[8] we easily find the charged sexual act occurred. Moreover, like the military judge, we find that the appellant's statement to LCpl EH, "don't worry I used a condom," while engaged in sexual intercourse with her, established that LCpl EH was at least initially not aware the sexual act was taking place because she was unconscious as a result of her intoxication—thus unable to consent.[9]

We are unpersuaded by the appellant's argument that the government was required to prove exactly *how* LCpl EH became intoxicated on the three drinks she recalls consuming. The government must only prove that her intoxication rendered her incapable of consenting and that her condition was known or reasonably should have been known by the appellant. The law is well settled that a "sleeping, unconscious, or incompetent person cannot consent." Art. 120(g)(8)(B), UCMJ; *United States v. Pease*, 74 M.J. 763, 770, (N-M. Ct. Crim. App. 2015). We are convinced beyond a reasonable doubt that LCpl EH was incapable of consenting when the appellant engaged in sexual intercourse with her. That she was incapable of consenting is supported by her testimony that she consumed alcohol, quickly became intensely intoxicated, was unable to remember how she left the bar and arrived at the appellant's apartment, awoke to the appellant engaging in sexual intercourse with her, passed out, and awoke again lying in urine and vomit,[10] still wearing the dress from the previous evening. And, most importantly, we find the appellant's statement that he was wearing a condom, made in the midst of sexual intercourse, establishes his awareness that she had been unable to comprehend his sexual advances and consent to his penetration.

Thus, after weighing all the evidence, the pleadings, and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt.

B. Ineffective assistance of counsel

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[8] PE 4 at 2.

[9] We agree with, without deferring to, the military judge's rationale that "[b]y attempting to 'comfort' her anticipated fears upon discovering he was performing sexual intercourse on her, [the appellant's] statement, including the word 'used' in the past tense, illustrates [the appellant] was aware LCpl E.H. was not able to consent, and in fact did not consent, to the sexual act from the outset." AE XX at 5.

[10] We are unpersuaded that the substance in LCpl EH's hair was semen or another bodily fluid discharged during sexual acts, particularly in light of the appellant's use of two condoms.

The appellant argues his TDC's failure to develop or present evidence that LCpl EH may have experienced a memory blackout before, during, and after the sexual assault constituted ineffective assistance of counsel. The appellant also faults the TDC's failure to "investigate whether any of the drugs . . . in [LCpl EH's] medical records could have interacted with the alcohol she consumed to cause memory blackouts."[11]

We review claims of ineffective assistance of counsel *de novo*. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015). The appellant must clear a high bar to prevail by showing: (1) that his counsel's performance was deficient, and (2) that, but for his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

The first prong of the *Strickland* test requires the appellant to show that counsel's performance fell below an objective standard of reasonableness, indicating that counsel was not functioning within the meaning of the Sixth Amendment. *United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002). Our review of counsel's performance is highly deferential and is buttressed by a strong presumption that counsel provided adequate representation. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). In assessing the claim of ineffective assistance, "[w]e do not look at the success of a trial theory or tactical decision, but whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." *United States v. Williams*, No. 200202264, 2005 CCA LEXIS 320, at *3, unpublished op. (N-M. Ct. Crim. App. 19 Oct 2005) (citing *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)).

The second *Strickland* prong requires a showing of prejudice resulting from counsel's deficient performance. *Strickland*, 466 U.S. at 687. Such prejudice must be "so serious as to deprive [the appellant] of a fair trial," producing "a trial whose result is unreliable." *Dewrell*, 55 M.J. at 133 (citation and internal quotation marks omitted). The appropriate test for this prejudice is "whether there is a reasonable probability that, but for counsel's error, there would have been a different result." *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004) (citation omitted).

The TDC addressed the appellant's allegations via our court-ordered affidavit. He explained that in addition to reviewing the evidence and repeatedly interviewing his client, he worked extensively with Dr. KM, a defense toxicology expert with whom the TDC had consulted and called to testify in multiple cases. Dr. KM extensively reviewed the case file, LCpl EH's medication history, and the results of her drug screening conducted

[11] Brief on Behalf of Appellant dated 20 Apr 2015 at 16.

shortly after the assault before concluding that LCpl EH was not on any narcotics that would facilitate her blacking out or passing out. Further, given the available evidence, Dr. KM was unable to estimate LCpl EH's blood alcohol content at the time of the assault. The TDC explained he originally intended to call Dr. KM to discuss the issues of blacking out versus passing out, but at the conclusion of the government's case, made the tactical decision to not call Dr. KM.[12] The TDC explained he did so because: 1) they did not believe the government had met its burden, 2) Dr. KM did not believe LCpl EH's prescription medications affected her memory, and the toxicology report similarly confirmed the absence of any recreational drugs that would make blacking out or passing out more likely, and 3) they did not want to expose Dr. KM to questions about "date-rape" drugs—questions which the trial counsel had previously asked Dr. KM in a pretrial interview. Had LCpl EH been given a date-rape drug, its presence would not appear on the toxicology report and it would have explained LCpl EH's memory issues and other behaviors. The TDC stated "the only chance of rebuttal of such testimony [about date rape drugs] would be in redirect examination and this might very well be deemed inculpatory by the factfinder."[13]

The TDC extensively cross-examined LCpl EH on her inability to remember events before, during, and after the assault. Then, during his summation, the TDC repeatedly attacked LCpl EH's lack of memory and argued her testimony was so unreliable as to not be believable.

We find, contrary to the appellant's assertions, that the TDC actively investigated the phenomenon of alcohol-induced blackouts, to include consultations with an expert with whom he had a close working relationship. Further, we find the appellant's tactical decision to not call his expert witness to discuss blackouts was an "objectively reasonable choice in strategy from the alternatives available at the time." *Williams*, at *3. The TDC was rightly concerned that cross-examination of his expert witness would reveal that prescription and recreational drugs did not contribute to LCpl EH's impairment, thereby increasing the likelihood that she was impaired by alcohol consumed in the appellant's presence. Further, the tactical decision to not risk "opening the door" to evidence that LCpl EH may have ingested a

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[12] During his opening statement, the TDC told the military judge he intended to call an expert witness to discuss blackouts. The appellant now argues the TDC's subsequent decision to not call the expert supports the claim that the TDC was ineffective. Appellant's Brief at 16. We disagree. The appellant offers no evidence indicating that the military judge considered the TDC's change in case presentation in a manner prejudicial to the appellant.

[13] Appellee's Response to Court Order filed 29 Sep 2015, TDC Affidavit dated 28 Sep 2015 at 2.

date rape drug in the appellant's company was prudent and well within "the wide range of professionally competent assistance." *United States v. Smith*, 48 M.J. 136, 138 (C.A.A.F. 1998) (citation and internal quotation marks omitted).[14]

Assuming *arguendo* that the performance of the TDC was deficient, the appellant has not demonstrated prejudice. The military judge's special findings, supported by the record, indicate he was fully aware of LCpl EH's inability to remember key events related to the sexual assault. He certainly accepted the proposition that LCpl EH was blacked out but still mobile for much of the evening, noting that LCpl EH and the appellant left the nightclub and ended up in the appellant's "upstairs apartment which was accessed by stairs."[15] But Dr. KM could not testify to how much LCpl EH drank after she blacked out, could not estimate her blood alcohol content, and based on the toxicology report, could not attribute her lack of memory to anything other than alcohol. Even if the TDC had called his expert witness to testify, he would have been unable to challenge the reason for LCpl EH's memory loss or explain why she would fabricate her lack of memory. We are thus unable to conclude that "there is a reasonable probability . . . there would have been a different result." *Quick*, 59 M.J. at 386-87.

The appellant has failed to show that his TDC's performance was deficient or that he was in any way prejudiced by TDC's representation. We therefore find the appellant has not met his burden of demonstrating that his TDC was ineffective.[16]

III. CONCLUSION

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[14] The appellant also argued his TDC was ineffective in failing to investigate whether LCpl EH's prescription hydrocodone could have contributed to her memory blackout, yet has not offered any evidence that LCpl EH was prescribed or taking hydrocodone on the night of the incident. At trial she testified that she was not on any medications that could affect her memory at the time. Record at 157. Additionally an exhibit attached to the Article 32, UCMJ, record reveals only that LCpl EH was prescribed hydrocodone on 5 Dec 2012, more than 10 days after the assault. Art. 32, UCMJ, Investigation Report dated 31 Mar 2014, Exhibit 7 at 3.

[15] AE XX at 3.

[16] The appellant did not rebut or otherwise challenge his TDC's affidavit. Brief on Behalf of the Appellant dated 10 May 2016. Accordingly, we find no requirement for additional fact-finding on this issue. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

The findings and the sentence as approved by the convening authority are affirmed.

Senior Judge MARKS and Judge FULTON concur.

For the Court

R.H. TROIDL
Clerk of Court

22 Sep 14

From: LT Paul T. Hochmuth, JAGC, USN, Detailed Defense Counsel
To: Commander, Navy Region Mid-Atlantic

Subj: MATTERS SUBMITTED BY THE ACCUSED ICO US V. IS2 DARIN G. LOPEZ, USN

Ref: (a) UCMJ, Article 60(c)
(b) R.C.M. 1105
(c) R.C.M. 1107(d)

Encl: (1) Transcript of LCpl H., USMC testimony from the Court-Martial

1. On 25 June 2014, IS2 Darin G. Lopez was found guilty at a General Court Martial by a military judge. IS2 Lopez was sentenced to three years of confinement and a Bad Conduct Discharge. Through counsel, he now respectfully requests that you to set aside the finding of guilty and dismiss the specification and charge.

2. As the Convening Authority, you have the absolute power to disapprove a sentence adjudged at court-martial for any reason or for no reason at all. United States v. Boatner, 43 C.M.R. 216 (1971) and Rule for Court-Martial 1107(c). R.C.M. 1107(c)(2) specifically allows you, as the Convening Authority, to set aside any finding of guilty and dismiss the specification and, if appropriate, the charge." This is a unique and valuable aspect of our military criminal justice system. United States v. Bono, 26 M.J. 240, 243 (C.M.A. 1988). It should be remembered that a granting of clemency is not reviewed by higher authority. The Defense understands that decisions of this type in sexual assault cases garner increased military and public scrutiny. Despite that, I request a keen evaluation of the evidence in this case in reaching your decision.

3. I have attached the testimony of LCpl H. from the Court-Marital and ask that you personally read it. Enclosure 1. Justice was not served in this case and IS2 Lopez now faces a Federal Conviction, Sex Offender Registration and a punitive discharge from the Naval service for the rest of his life, based upon insufficient evidence. The American legal system and that of the military has been set up to help ensure that the innocent are not found guilty, yet we all know that at times mistakes are made. In this case, you as the Convening Authority have the absolute power to correct this injustice. You have a case

before you in which there was not legal or factual sufficiency to convict. Legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offense, viewing the evidence in a light most favorable to the Government. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test used by the appellate court for factual sufficiency is whether they are convinced of IS2 Lopez's guilt beyond a reasonable doubt, allowing for the fact that they did not personally observe the witnesses. *Id.* at 325. The term "reasonable doubt" does not mean that the evidence must be free of any conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007) (citation omitted). When weighing the credibility of a witness, this court, like a fact-finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, including lapses in memory, or a deliberate lie. *United States. v. Goode*, 54 M.J. 836, 844 (N.M.Crim.Ct.App 2001). Additionally, the members may "believe one part of a witness's testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

4. To convict IS2 Lopez of sexual assault at trial, the Government was required to prove the following: (a) that the appellant committed a sexual act upon LCpl H; and (b) that LCpl H was incapable of consenting to the sexual act due to impairment by alcohol and that condition was known or reasonably should have been known by IS2 Lopez.

5. In this case, we know a sexual act occurred as the defense stipulated to such before the trial even began. There were two condoms found matching the DNA of IS2 Lopez and LCpl H. However, we do not know if LCpl H was incapable of consenting to the sexual act. We also do not know if IS2 Lopez should have reasonably known that she was incapable of consenting. We do not know this because there is not any valid or credible evidence to show one way or the other. The Government produced three witnesses in this case. The first was SA Hallet from the U.S. Amry CID, who testified regarding a sketch of IS2 Lopez's apartment that was made, that two condoms that were found in the trash, that IS2 Lopez lived on the third floor, and there was no elevator at the apartment complex. Second, Ms. Ruiz (cab driver) testified that she picked up LCpl H the next morning, a male called for the cab, a male waived for her to wait until LCpl H walked downstairs, LCpl H was upset, LCpl H stated that she thought she was drugged and raped, Ms. Ruiz took LCpl to 7 Eleven where LCpl bought a soda and a pack of cigarettes for Ms. Ruiz, and Ms. Ruiz offered to take LCpl H to the hospital and

police and both were turned down by LCpl H. The third witness was LCpl H. When you read LCpl H's testimony you will notice a trend that she does not remember what happened. To summarize LCpl H's testimony: she remembers having three drinks at the bar, then waking up with IS2 Lopez having sex with her, him saying "I used a condom," the next morning the bed was wet, and that she thinks she threw up because she has a clear, sticky substance in her hair and on her. Her testimony is not credible. It is common for a witness to have some memory lapses, but not to the extent of LCpl H.

6. There are so many questions still left unanswered;-- questions that should have been answered for a just conviction to take place. To find that LCpl H was incapable of consenting and that IS2 Lopez should have reasonably known that she was incapable of consenting, the military judge needed proof of such elements. Instead, the military judge made the conclusion that LCpl H wet the bed, vomited, that IS2 Lopez said "Don't worry, I used a condom," and that LCpl H was unconscious due to her state of intoxication. There are many problems with these conclusions made by the military judge. The only evidence before the court regarding LCpl H's alcohol intake that night is that she had three drinks. There is no evidence regarding her speech, ability to walk, or ability to interact with others. We do not know what she was capable of doing that night because we do not have any evidence of it.

7. In addition, LCpl H said that she may have wet the bed, but there is no physical evidence that she did. We do not know how wet the bed was, if the sheets were soaked through, or if the bed was only a little wet. It could have been natural bodily fluid that develops due to intercourse or she could have been sweating. There is no evidence to say one way or another. Also, she did not say, "My legs were sticky from urine," "I could smell urine," or "I know I urinated in the bed." LCpl H says that she vomited; she describes the substance as clear, thick and sticky. Once again, this could be fluid from intercourse. She mentioned that she ate the night before, but she did not see any chunks of food in the substance. She never said, "I could smell vomit." If one was to vomit and then sleep in their vomit, it would stand to reason that they would have a distinct smell of vomit the next morning. In this case, there is no evidence of it. Once again, we do not have any physical evidence that either of these events took place.

8. The military judge made the conclusion that LCpl H was unconscious. Yet we only have evidence of memory loss, not that

she was unconscious. The Government did not call any medical personnel to testify to her state during the trial. In addition, there was not a single eye witness that could describe her physical condition. It is entirely possible that LCpl H was in a blackout state in which she was not recording memories but outwardly appeared willing and able to make decisions (i.e. consent to sexual activity). To make the conclusion that a person was unconscious versus blacked out without any supporting evidence is too great of a leap to make in the absence of any expert analysis on LCpl H's symptoms. The reason why this difference is so vital is because it goes to the reasonable doubt burden that the Government must overcome to prove that IS2 Lopez knew or reasonably should have known that LCpl H was incapable of consenting. If a person is blacked out, they could have sex, walk, talk, etc. without the other person ever knowing that they were in a blackout state. The Government, not the defense, bears the burden. In this case we have no evidence that indicates she was unconscious, and there remains many unanswered questions that cast doubt on the theory that she was unconscious: If LCpl H was unconscious, how did she make it out of the bar? How did she walk up two to three flights of stairs to IS2 Lopez's apartment? How did she get into the bed that night? There is no evidence that IS2 Lopez carried or dragged LCpl H out of the bar, up two-three flights of stairs and put her in his bed. Surely if IS2 Lopez carried her out of the bar, unconscious, there would be some eyewitness testimony to support this claim. There is none. The more probably explanation is that LCpl H's testimony is not credible, or that she was blacked out and not recoding memories during this portion of the evening. If she was blacked out, then IS2 Lopez would not have known it.

9. Lastly, there is the conclusion that IS2 Lopez said, "Don't worry, I used a condom." The only evidence of this comes from the testimony of LCpl H. Yet her memory is limited and unreliable. This conversation may not have happened or it could have happened the next morning after they woke up. If it did happen the next morning and LCpl H did not remember, that does not automatically mean that LCpl H was not able to consent, as the military judge stated, and that IS2 Lopez was aware that she was not able to consent. This is the only evidence the military judge specifically points to. Yet, such a statement does not make that point. At worst, it shows that he became aware *after the fact* that she does not remember what happened. It does not prove what he knew at the time of the sexual intercourse. The Government must prove that he knew or reasonably should have known that LCpl H was unable to consent. This is a vital legal

requirement. To believe that this conversation happened in the first place, we would have to find LCpl H credible. Yet LCpl cannot remember if she went to dinner with IS2 Lopez a week before this incident or not. She could not tell us what she had for dinner the night of the incident. She could not tell us how she left the bar or how she got to IS2 Lopez's apartment. She could not tell us where IS2 Lopez was the next morning. She just remembers his voice and that is it. This is a small apartment, even by LCpl H's own admission. She took a shower, dried her dress, sat on the couch in nothing but a towel, but does not remember seeing or talking to IS2 Lopez. She only remembers hearing his voice. She cannot remember what she talked to the cab driver about, or that they went to 7 Eleven. She cannot remember what happened at medical the day after the incident. She said that she had injuries, but she never showed the injuries to anyone, including medical. She does not remember IS2 Lopez telling the cab to wait for her to come downstairs. She does not remember IS2 Lopez calling a cab for her. She cannot tell us the type of shoes she was wearing the next day. If she was wearing heels, did she walk out of the bar, up the stairs to IS2 Lopez's apartment in heels? We do not know. If none of these things can be remembered, how can we know what part of her memory is accurate and what is made up, either intentionally or unintentionally, in order to fill in the gaps?

10. Prior to his court-martial, IS2 Lopez was never in any legal trouble, either prior to the military or while in the military. Two officers spoke to his good military character at the trial. This is a young man who is now sitting in the brig because a military judge made conclusions without a sufficient amount of evidence. If his conviction is not disapproved, IS2 Lopez will be a sex offender most likely for the remainder of this life, have a federal conviction and a punitive discharge from the Naval service. Justice can still be accomplished in this case. As the Convening Authority, you have the absolute authority and power to disapprove the finding of guilty. I ask that you make this decision and not wait to see what the Navy and Marine Court of Appeals does with the case. This is the only chance the Convening Authority has to take action and I ask that you take action on behalf of IS2 Lopez and do what is right and just.

11. This request is forwarded for inclusion in the record of trial. I respectfully request that this clemency request and any response be attached to the record of trial.

Subj: MATTERS SUBMITTED BY THE ACCUSED ICO US V. IS2 DARIN G. LOPEZ, USN

12. I greatly appreciate your consideration of this request, which I submit on behalf of IS2 Lopez. I can be reached at 850-452-5573, or by e-mail at paul.hochmuth@navy.mil.

Paul T. Hochmuth

Paul T. Hochmuth

DEPARTMENT OF THE NAVY
CENTRAL JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. DARIN G. LOPEZ IS2/E-5 USN	SPECIAL FINDINGS 28 JUNE 2014

1. Introduction.

a. Trial by Military Judge alone in this case was conducted 25-26 June 2014, on board Naval Station Norfolk, Virginia. After the return of a general verdict of guilty on the Charge and Sole Specification of Sexual Assault, Accused, through counsel, requested the Court make special findings pursuant to R.C.M. 918(b).

b. Although noting the request is untimely,[1] the Court, in its discretion, now enters special findings as a supplement to its general verdict of guilty. In reaching both its general finding and the special findings contained herein, the Court applied its own reason and common sense; considered the applicable law, the credible testimony presented at trial, the documentary evidence received in the form of Prosecution Exhibits 1-6 and Defense Exhibit A; and has drawn all reasonable inferences from the evidence. Additionally, from its observations of the testimony and demeanor of LCpl E.H. and Ms. Tamara Ruiz, the Court notes it found the testimony of these two witnesses to be highly credible.

2. Applicable Law.

a. Accused was charged with sexually assaulting then PFC E.H. (hereafter LCpl E.H.) on or about 24 November 2012, at or near Sierra Vista, Arizona, in violation of Article 120(b)(3)(A), Uniform Code of Military Justice, 10 U.S.C. § 920(b)(3)(A).

b. To establish guilt, the United States had the burden to prove Accused committed each of the following elements of the charged offense beyond a reasonable doubt:

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[1] R.C.M. 918(b) reads, in pertinent part: "Special findings may be requested at any time before general findings are announced." (emphasis added).

(1) On or about 24 November 2012, at or near Sierra Vista, Arizona, Accused committed a sexual act upon LCpl E.H., that is, the penetration of her vulva with his penis; and

(2) Accused did so when LCpl E.H. was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Accused.

c. The following definitions[2] apply to the alleged offense:

(1) "Sexual act" means the penetration, however slight, of the vulva by the penis.

(2) The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips."

(3) "Consent" means a freely given agreement to the conduct at issue to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. 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.

3. Special Findings.

a. In November 2012, LCpl E.H., United States Marine Corps, was in a duty status at Ft. Huachuca near Sierra Vista, Arizona.

b. In November 2012, Accused was in a duty status in Sierra Vista, Arizona.

c. Sometime before 24 November 2012, LCpl E.H. was outside a shopping mall in Sierra Vista waiting for a taxi. Accused approached LCpl E.H. and offered her a ride. She accepted. LCpl E.H. did not know Accused prior to this time. Accused gave LCpl E.H. a ride to the barracks at Ft. Huachuca, they exchanged telephone numbers, and communicated thereafter. At some point, Accused and LCpl E.H. also went out for dinner together.

d. On Saturday, 24 November 2012, LCpl E.H. had plans to meet up with fellow Marines for a birthday party at the Peacock Lounge in Sierra Vista. LCpl E.H. arrived at the Peacock Lounge later in the evening but did not meet up with her friends because they were not there. LCpl E.H. called Accused and invited him to join her. Accused did so.

e. While together at the Peacock Lounge, both LCpl E.H. and Accused consumed alcohol. LCpl E.H. remembers having two mixed drinks containing coconut rum and pineapple juice and one shot of goldschlager. LCpl E.H. had eaten earlier in the evening and had not had

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[2] See Article 120(g), Uniform Code of Military Justice, 10 U.S.C. § 920(g).

any other alcohol prior to arriving at the Peacock Lounge. It is unclear how much alcohol Accused consumed. LCpl E.H. and Accused mutually ordered their drinks together directly from the bar. LCpl E.H. remembers going to the restroom on one occasion and then returning to the bar where she continued to drink.

f. 24 November 2012 was not the first time LCpl E.H. had consumed alcohol. During the time frame leading up to this incident, LCpl E.H. would drink alcohol once or twice per week, having "a few" mixed drinks on those occasions. LCpl E.H. has been intoxicated on alcohol in the past.

g. After drinking alcohol at the Peacock Lounge on 24 November 2012, LCpl E.H. began to feel dizzy and experienced a level of intoxication more intense than she had upon drinking in the past. Her last memory of the Peacock Lounge was "just standing there." LCpl E.H. does not remember leaving the bar or going to any other location.

h. At some point in the evening LCpl E.H. and Accused left the Peacock Lounge. They ultimately ended up together at Accused's apartment in Sierra Vista. Accused lived in an upstairs apartment which was accessed by stairs.

i. LCpl E.H.'s next memory is of waking up with Accused on top of her. She was unable to move and unable to say anything. Accused's penis was inside her vagina. Accused said to LCpl E.H.: "don't worry, I used a condom." LCpl E.H. again passed out.

j. Sometime thereafter, LCpl E.H. again woke up. She was alone in bed in the same place she remembers Accused being on top of her. LCpl E.H. was sick to her head and her stomach. Her head hurt and was spinning. She was laying in her own vomit and urine. She was still wearing the black dress she had on the night before. One sleeve was pulled down and the bottom of her dress was bunched up around her waist.

k. LCpl E.H. got out of bed, found a shower, and climbed in with her dress still on. While in the shower, she discovered a bite mark on her breast and scratch marks on her lower back. These marks were not there prior to meeting Accused at the Peacock Lounge. LCpl E.H. did not know when or how she got these marks. At some point LCpl E.H. wrote "I'm in hell, help me" on the steamed up mirror in the bathroom. After showering, LCpl E.H. wrapped herself in a towel and put her dress in a clothes dryer. She did not wait for the dress to completely dry, put the dress on, and left the apartment. It was daylight the next day.

l. There was a taxi cab waiting outside and it was driven by Tamara Ruiz. LCpl E.H. does not know who called the cab and does not remember any interaction with Accused that morning. She does remember hearing and recognizing Accused's voice in the apartment prior to leaving. LCpl E.H. did not know Ms. Ruiz.

m. Ms. Ruiz had been dispatched to Accused's apartment complex to pick up a male. She did not see anyone waiting for a taxi when she first arrived, but after confirming the call

with her dispatch and driving around the complex, she spotted a male waiving her down from the second floor of the complex. LCpl E.H. come down and got in Ms. Ruiz' cab.

n. From her initial observations of LCpl E.H.'s demeanor, Ms. Ruiz immediately concluded something was wrong with LCpl E.H. LCpl E.H. appeared confused, desperate, and looked as though she had been crying. Based upon these observations and her interactions with LCpl E.H., Ms. Ruiz asked LCpl E.H. if she wanted to be taken to the police or to a hospital. LCpl E.H. declined both offers. Ms. Ruiz spent significant time with LCpl E.H. during this time period, including stopping at a convenience store where LCpl E.H. bought a soda for herself and cigarettes for Ms. Ruiz. At some point during their interaction, LCpl E.H. grabbed and hugged Ms. Ruiz. Ms. Ruiz eventually dropped LCpl E.H. off at Ft. Huachuca.

o. LCpl E.H. ultimately reported this matter to the authorities and Army CID began an investigation. As part of their investigation, Army CID Special Agent Chad Hallett was able to locate Accused's apartment and conduct a search. This search took place on 12 December 2012. During the search, law enforcement seized a trash bag from the deck just outside Accused's apartment. Two used condoms were found in this trash bag and submitted to USACIL for forensic testing. Both condoms contained DNA on one side, the profile of which matched that of Accused. The other side of both condoms contained DNA, the profile of which matched LCpl E.H. One of the condoms contained semen, the profile of which matched Accused. Accused stipulated the DNA found on these condoms were a match for both himself and LCpl E.H.

p. From the credible evidence presented at trial, and the facts set forth above, the Court finds beyond a reasonable doubt that on or about 24 November 2012, at or near Sierra Vista, Arizona, Accused committed a sexual act upon LCpl E.H., that is, the penetration of her vagina with his penis when LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant, a condition that was known or reasonably should have been known to Accused.

(1) In finding a sexual act had taken place, the Court relies upon the credible testimony of LCpl E.H. where she said Accused's penis was in her vagina, coupled with the corroborating physical and forensic evidence found during a search of Accused's apartment, that is, the two condoms and the DNA contained on those condoms matching both Accused and LCpl E.H.

(2) In finding LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant and that this condition was known or reasonably should have been known to Accused, the Court relieves upon the credible testimony of LCpl E.H. and Ms. Ruiz supporting the facts outlined above. Critically significant here is the statement made by Accused to LCpl E.H. when she became conscious and discovered Accused on top of her with his penis inside her vagina. The statement "don't worry, I used a condom," not only corroborates the finding a sexual act took place, but is also key in establishing the following pivotal facts:

(A) LCpl E.H. was not aware the sexual act was taking place when it began because she was unconscious due to her state of intoxication. Therefore, she was unable to consent to the act; and

(B) By attempting to 'comfort' her anticipated fears upon discovering he was performing sexual intercourse on her, Accused's statement, including the word "used" in the past tense, illustrates Accused was aware LCpl E.H. was not able to consent, and in fact did not consent, to the sexual act from its outset.

4. Conclusion.

THEREFORE, pursuant to R.C.M. 918(b), **THE COURT** hereby enters these Special Findings.

I.K. THORNHILL
CDR, JAGC, USN
Military Judge

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial)	2. SSN	3. RANK/RATE	4. PAY GRADE
LOPEZ, Darin, G.	[redacted]	IS2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Navy Expeditionary Intelligence Command, Virginia Beach, Virginia	5 Mar 2009	5 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,922.30	$0.00	$2,922.30	None	N/A

II. CHARGES AND SPECIFICATIONS

10.

CHARGE: VIOLATION OF THE UCMJ, ARTICLE 120

Specification: (*Sexual Assault*) In that Intelligence Specialist Second Class Darin G. Lopez, U.S. Navy, Navy Expeditionary Intelligence Command, on active duty, did, at or near Sierra Vista, Arizona, on or about 24 November 2012, commit a sexual act upon Private First Class Elizabeth [redacted] U.S. Marine Corps, to wit: penetration of her vulva with his penis, when the said Private First Class Elizabeth [redacted] was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by the said Intelligence Specialist Second Class Darin G. Lopez.

AND NO OTHERS

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial)	b. GRADE	c. ORGANIZATION OF ACCUSER
PIETTE, Alaric, A.	LTJG/O-2	Region Legal Service Office Mid-Atlantic

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[signature]	20140111

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 11th day of January, 2014, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

K. H. HARRELL
Typed Name of Officer

Region Legal Service Office Mid-Atlantic
Organization of Officer

Captain, U.S. Marine Corps
Grade

Judge Advocate
Official Capacity to Administer Oaths
(See R.C.M. 307(b)_must be commissioned officer)

[signature]
Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

Tab 4

From:	Arvis Owens
To:	WHS Pentagon EM Mailbox DACIPAD
Cc:	arvis owens
Subject:	[Non-DoD Source] Request to Speak on the Record at the 21 September DAC-IPAD Meeting on False Allegations
Date:	Monday, August 22, 2022 11:47:58 PM

Dear DAC-IPAD,

Mr. Darin Lopez referred me to your organization as he is slated to speak at your 21 September meeting regarding false allegations in the military. I would like to respectfully request to also speak at this event as I also have a case that I would like to speak about on the record and am aware of other cases too.

I live in [redacted] so I am already in the area. My cell phone is [redacted]

Thank you for your consideration.

Very respectfully,
Arvis Owens

DEPARTMENT OF THE NAVY
NAVAL DISTRICT WASHINGTON
1343 DAHLGREN AVE SE
WASHINGTON NAVY YARD, DC 20374-5161

26 Feb 15

GENERAL COURT-MARTIAL ORDER NO. 3-15

DNA processing required in accordance with 10 U.S.C. § 1565.

Before a general court-martial convened at Region Legal Service Office Naval District Washington, Washington Navy Yard, District of Columbia, pursuant to Commandant, Naval District Washington, General Court-Martial Convening Order 1-12 of 4 May 2012 as amended by General Court-Martial Amending Convening Order 1A-12 of 28 August 2013, Commander Arvis Owens, U.S. Navy, XXX-XX-8191, Defense Logistics Agency, was arraigned and tried on the following offenses, and the following findings or other dispositions were reached:

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 92.

PLEA: NOT GUILTY **FINDING: NOT GUILTY**[1]

Specification 1: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, on active duty, did, at or near Fort Belvoir, Virginia, on or about 4 October 2012, fail to obey a lawful general order, to wit: SECNAVINST 5350.16A, dated 18 December 2006, when he sexually harassed [redacted], by engaging in verbal conduct of a sexual nature, which had the effect of creating a hostile work environment, when he told Sara Doxey, while at work, that he "wanted to be bad because of the dress you're wearing," or words to that effect; and that "it is probably good that you leave so I won't be bad," or words to that effect.

PLEA: NOT GUILTY **FINDING: NOT GUILTY**

Specification 2: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, on active duty, did, at or near Fort Belvoir, Virginia, on or about 10 October 2012, fail to obey a lawful general order, to wit: SECNAVINST 5350.16A, dated 18 December 2006, when he sexually harassed [redacted], by engaging in verbal conduct of a sexual nature, which had the effect of creating a hostile work environment, when he told Sara Doxey,

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[1] The initial finding of "Guilty" is set aside by the 8 January 2015 opinion issued by the United States Navy-Marine Corps Court of Criminal Appeals, NMCCA 201300485.

while at work, "You know I'm going to fuck you, right?" or words to that effect; "Look at what you do to me," or words to that effect, referring to his erection; that he had "been good as long as I could," or words to that effect; that he was going to "do something bad," or words to that effect; that her "butt is nice," or words to that effect; that her "breasts are nice," or words to that effect; and that he "knew how to keep you quiet," or words to that effect.[2]

PLEA: NOT GUILTY **FINDING: DISMISSED WITH PREJUDICE**[3]

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 120.[4]

PLEA: NOT GUILTY **FINDING: GUILTY**

Specification 1: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, on active duty, did, at or near Fort Belvoir, Virginia, on or about the morning of 10 October 2012, commit sexual contact upon [redacted], by causing bodily harm to her, to wit: kissing her on the mouth, and placing his hands on her buttocks, without her consent.

PLEA: NOT GUILTY **FINDING: NOT GUILTY**

Specification 2: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, on active duty, did, at or near Fort Belvoir, Virginia, on or about 10 October 2012, commit sexual contact upon [redacted], by causing bodily harm to her, to wit: placing his hands on her breasts, without her consent.

PLEA: NOT GUILTY **FINDING: NOT GUILTY**

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[2] The original language ""that her breasts are nice," or words to that effect" was dismissed by the Military Judge pursuant to R.C.M. 917.

[3] Charge 1, Specification 2, was dismissed by the 8 January 2015 opinion issued by the United States Navy-Marine Corps Court of Criminal Appeals, NMCCA 201300485.

[4] Specifications 2, 5, and 6 of Charge II on the original charge sheet were dismissed and merged by order of the military judge on 30 July 2013. The underlying offenses alleged in original specifications 5 and 6 of Charge II were merged with original specification 4 of Charge II. All specifications under Charge II were then renumbered 1 through 4.

Specification 3: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, on active duty, did, at or near Fort Belvoir, Virginia, on or about the afternoon of 10 October 2012, commit sexual contact upon [redacted], by causing bodily harm to her, to wit: kissing her on the mouth and neck, touching her vaginal area with his hand over her underwear, and placing his mouth on her breasts, without her consent.

PLEA: NOT GUILTY **FINDING: NOT GUILTY**

Specification 4: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, on active duty, did, at or near Fort Belvoir, Virginia, on or about 10 October 2012, commit sexual contact upon [redacted], by causing bodily harm to her, to wit: causing her hand to touch his penis, without her consent.

PLEA: NOT GUILTY **FINDING: GUILTY**

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 128.

PLEA: NOT GUILTY **FINDING: NOT GUILTY**

Specification: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, on active duty, did, at or near Fort Belvoir, Virginia, on or about 10 October 2012, unlawfully grab [redacted] on the arm and pull her onto his lap with unlawful force.

PLEA: NOT GUILTY **FINDING: NOT GUILTY**

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 133.

PLEA: NOT GUILTY **FINDING: GUILTY**

Specification: In that Commander Arvis Owens, U.S. Navy, Defense Logistics Agency, a married man, on active duty, did, at or near Fort Belvoir, Virginia, between about 4 October 2012 and 10 October 2012, make sexual advances toward [redacted], a woman not his wife, which constituted conduct unbecoming an officer and a gentleman.

PLEA: NOT GUILTY **FINDING: GUILTY**

SENTENCE

Sentence adjudged: On 13 September 2013, the accused was sentenced to be dismissed from the United States Navy.

ACTION OF THE CONVENING AUTHORITY

In the case of Commander Arvis Owens, U.S. Navy, XXX-XX-8191, Defense Logistics Agency, the sentence is approved and, except for that portion of the sentence extending to a dismissal, will be executed, in accordance with the UCMJ, MCM, and applicable regulations.

Per the accused's request on the record, a copy of the Staff Judge Advocate's Recommendation was served on the accused's detailed defense counsel on 6 February 2015, in accordance with R.C.M. 1106(f), MCM 2012. The accused through detailed defense counsel submitted a petition for clemency on 16 January 2014, requesting that I set aside the guilty findings. The accused through detailed defense counsel submitted an additional petition for clemency on 18 February 2015, again requesting that I set aside the guilty findings, though in the alternative to set aside Charge II, Specification 4. Although I granted an extension to submit additional clemency, no further clemency was submitted. Having considered the request to set aside the guilty findings or to set aside Charge II, Specification 4, those requests are hereby denied. A copy of the Staff Judge Advocate's Recommendation Addendum was served on the accused's detailed defense counsel on 25 February 2015.

In taking this action, the record of trial, the results of trial, the 8 January 2015 opinion rendered by the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA), the Staff Judge Advocate's Recommendation and the addendum thereto, and the letter of clemency submitted by the accused through detailed defense counsel on 16 January 2014 as well as the letter of clemency submitted on 18 February 2015, were considered. I also considered the letter from Ms. [redacted], wife of the accused, dated 15 January 2014, the family photos submitted by the accused, the Affidavit of Mr. [redacted], civilian attorney for the accused, the email string related to exchanges between Mr. [redacted] and members of the court-martial, a letter from Commander Thomas May, U.S. Navy, a court-martial member dated 4 October 2013, a letter from Commander Miles Ervin, U.S. Navy, a court-martial member dated 10 February 2015, a letter from Commander George Robinson, U.S. Navy, a court-martial

member, dated 13 February 2015, an email from Commander Tim O'Hara, Medical Corps, U.S. Navy, a court-martial member, dated 13 February 2015, a letter from Commander Arvis Owens, U.S. Navy, the accused, dated 17 February 2015, an additional letter from Ms. [redacted]s, wife of the accused, dated 16 February 2015, a letter from Mr. [redacted], dated 8 February 2015, a letter from Commander [redacted], Supply Corps, U.S. Navy, dated 9 February 2015, a letter from Major [redacted], U.S. Marine Corps (Inactive) dated 10 February 2015, a letter from Commander Christy Cowan, U.S. Navy, dated 9 February 2015, a letter from Captain [redacted], Supply Corps, U.S. Navy, dated 11 February 2015, a letter from Captain [redacted], Supply Corps, U.S. Navy, dated 11 February 2015, a letter from Mr. [redacted], Jr., dated 12 February 2015, a letter from Captain [redacted], Supply Corps, U.S. Navy, dated 12 February 2015, a letter from Captain (retired) [redacted] Supply Corps, U.S. Navy, dated 11 February 2015, a letter from Commander [redacted], U.S. Navy, dated 11 February 2015, a letter from Commander [redacted], U.S. Navy, dated 9 February 2015, a letter from Commander [redacted], Supply Corps, U.S. Navy, dated 12 February 2015, a letter from Commander [redacted], U.S. Navy, dated 12 February 2015, a letter from Lieutenant Colonel (retired) [redacted], U.S. Air Force, dated 12 February 2015, a letter from Commander [redacted], Supply Corps, U.S. Navy, dated 12 February 2015, a letter from Ms. [redacted] dated 12 February 2015, a undated letter from Ms. [redacted], a letter from Lieutenant Colonel [redacted], U.S. Army, dated 13 February 2015, a letter from Commander [redacted], Supply Corps, U.S. Navy, dated 12 February 2015, a letter from Commander Nathan Begley, Supply Corps, U.S. Navy, dated 11 February 2015, a letter from Commander [redacted], Supply Corps, U.S. Navy, dated 13 February 2015, a letter from Commander [redacted], Supply Corps, U.S. Navy, dated 13 February 2015, a letter from Commander [redacted], Supply Corps, U.S. Navy, dated 13 February 2015, a letter from Mr. [redacted], dated 13 February 2015, a letter from Commander [redacted], U.S. Navy, dated 12 February 2015, a letter from Captain (retired) [redacted], Supply Corps, U.S. Navy, dated 12 February 2015, a letter from Mr. [redacted], dated 14 February 2015, a letter from Lieutenant Colonel (retired) [redacted], U.S. Marine Corps, dated 13 February 2015, and the Extraordinary Writ petition submitted to NMCCA by his counsel. All of these submissions were made by the accused through counsel.

Captain Patrick Owens, U.S. Navy, a court-martial member,

did not provide clemency material nor did any other court-martial members, other than Commander May, Commander Ervin, and Commander Robinson, who are referenced above. I previously considered Commander May's submission as it was referenced in the email chain submitted by defense during the initial clemency submission in 2014. Commander Ervin and Commander Robinson did not previously provide a submission. Each court-martial member who submitted a clemency recommendation essentially mirrored one another asking that I grant clemency in the form of setting aside the finding of guilty on Specification 4 of Charge II. I hereby decline to do so. I also note that Commander Robinson recommended that the dismissal be approved.

Commander George Robison, U.S. Navy, initially alerted the Deputy Staff Judge Advocate, Lieutenant Matthew Budow, Judge Advocate General's Corps, U.S. Navy, about being contacted by Mr. [redacted], but no response was provided to the contacted court-martial members other than the clarifying instructions provided by the military judge. I am separately aware that Commander Timothy O'Hara in an email communication with defense counsel on 13 February 2015 indicated that he wanted to speak with the senior member and/or local council (sic) regarding communicating with defense counsel. This communication was part of the reason I granted defense an extension to submit clemency matters. However, defense did not submit any further material from Commander O'Hara and I am not aware of any further communications from Commander O'Hara with a recommendation as to clemency.

Separately, I also considered the undated Impact Letter from Ms. [redacted], a letter from Ms. [redacted], dated 1 November 2013, a letter from Ms. [redacted], dated 31 December 2013, a undated letter from Mr. [redacted], a letter from Mr. [redacted], uncle to the victim, dated 1 January 2014, a letter from Ms. [redacted], aunt to the victim, dated 30 December 2013, an undated letter from Ms. [redacted], RN, BSN, cousin to the victim, a letter from Ms. [redacted], cousin to the victim, dated 1 January 2014, a letter from Ms. [redacted], aunt to the victim, dated 31 December 2013, a letter from Ms. [redacted] dated 29 December 2013, a letter from [redacted], uncle and aunt of the victim, dated 1 January 2014, an undated letter from Mr. [redacted], a letter from Ms. [redacted], dated 2 January 2014, an undated letter from [redacted] an undated letter from Ms. [redacted], a letter from Ms. [redacted], dated 2 January 2014, a letter from [redacted], cousin to the victim, dated

31 December 2013, a letter from Ms. [redacted], aunt to the victim, dated 2 January 2014, an undated letter from [redacted], an undated letter from Ms. Dianne Ryder, a letter from Ms. [redacted], dated 2 January 2014, an undated letter from Ms. [redacted], mother of the victim, an undated letter from Mr. [redacted], father of the victim, and a victim impact letter from Ms. [redacted], the victim, all of which were submitted by the victim, Ms. [redacted]. No further submissions were provided by the victim after the case was remanded. Prior to taking my action on this case, the foregoing material provided by the victim was referred to the accused for any rebuttal, explanation, or comment he might care to make on 6 January 2014. The accused did not provide any response aside from that contained in the clemency material submitted through detailed defense counsel on 16 January 2014 and 18 February 2015.

Because this action did not occur within 120 days from adjournment of the court-martial, I have reported this fact and the reasons for the delay in a separate memorandum to be attached to the record of trial and forwarded to the Office of the Judge Advocate General (Code 40).

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40), Office of the Judge Advocate General, 1254 Charles Morris Street SE, Suite B01, Washington Navy Yard, DC, 20374-5124, for review under Article 66, UCMJ.

The results of the foregoing case are hereby promulgated in accordance with R.C.M. 1114, MCM 2012.

M. K. RICH
Rear Admiral, U.S. Navy
Commandant
Naval District Washington

DISTRIBUTION
ORIGINAL - Original Record of Trial
DUPLICATE ORIGINALS - Service Record of Accused
Certified Copies - (Original ROT) (3)
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- Navy Clemency and Parole Board

- NAVAPLVACT WASHINGTON DC
- Defense Logistics Agency
- TRANSIENT PERSONNEL DETACHMENT, JBAB, WASHINGTON DC
- United States Army Criminal Investigation Laboratory (USACIL), Forrest Park, GA

Plain Copies
- RLSO NDW, Washington Navy Yard, DC
- Accused's Copy
- MJ
- TC
- File

13 FEB 15

From: CDR George Robinson, USN
To: Commandant, Naval District Washington
Via: LCDR Justin Pilling, Staff Judge Advocate, Naval District Washington

Subj: REQUEST FOR CLEMENCY ICO CDR ARVIS OWENS, USN

1. Based on the evidence presented at trial, I recommend clemency in the form of setting aside the finding of guilty on Specification 4 of Charge II be granted to the accused CDR Arvis D. Owens. I also recommend that the other charges be approved, and that his dismissal be approved.

G. ROBINSON

10 FEB 15

From: CDR Miles Ervin, USN
To: Commandant, Naval District Washington
Via: LCDR Justin Pilling, Staff Judge Advocate, Naval District Washington

Subj: REQUEST FOR CLEMENCY ICO CDR ARVIS OWENS, USN

1. Based upon the evidence presented at trial, I recommend clemency be granted to the accused, CDR Arvis D. Owens, in the form of setting aside the finding of guilty on Specification 4 of Charge II.

M. ERVIN

4 October 2013

From: CDR Thomas E. May, USN
To: Commandant Navy District Washington
Subj: CLEMENCY RECOMMENDATION ICO CDR ARVIS D. OWENS

1. Based on the evidence presented at trial, I recommend clemency in the form of setting aside the finding of guilty on Specification 4 of Charge II be granted to the accused CDR Arvis D. Owens.

T.E. May

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.R. MCFARLANE, M.C. HOLIFIELD, K.J. BRUBAKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ARVIS D. OWENS
COMMANDER (O-5), SUPPLY CORPS, U.S. NAVY

NMCCA 201300485
GENERAL COURT-MARTIAL

Sentence Adjudged: 5 November 2013.
Military Judge: CAPT Carrie Stephens, JAGC, USN.
Convening Authority: Commander, Naval District Washington, Washington, DC.
Staff Judge Advocate's Recommendation: LCDR J.D. Pilling, JAGC, USN.
For Appellant: William E. Cassara, Civilian Counsel; Capt David Peters, USMC.
For Appellee: LCDR Keith B. Lofland, JAGC, USN; Capt Matthew Harris, USMC.

23 December 2014

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

HOLIFIELD, Judge:

A panel of officers sitting as a general court-martial convicted the appellant, contrary to his pleas, of violating a lawful general order (sexual harassment), abusive sexual contact, and conduct unbecoming an officer, in violation of Articles 92, 120, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 933. The appellant was acquitted of an

additional specification involving sexual harassment, three specifications of abusive sexual contact, and one specification of assault consummated by battery. The members sentenced the appellant to be dismissed from the Service. The convening authority (CA) approved the sentence as adjudged.

The appellant raises eleven assignments of error (AOE):

(1) that the Government's failure to provide requested medical records of the victim denied him his 5th Amendment right to due process;

(2) that the Government's failure to provide evidence of the victim's learning disability denied him his right to discovery under Article 46, UCMJ;

(3) that the military judge denied the appellant's Sixth Amendment right to confrontation by precluding cross-examination of the victim regarding her learning disability;

(4) that the military judge erred in admitting the victim's prior consistent statements when they were not made prior to when a motive to fabricate arose;

(5) that the military judge improperly allowed the trial counsel to question the appellant regarding the veracity of a prosecution witness' testimony;

(6) that the failure to provide the members with the general order the appellant was accused of violating renders the evidence on that charge legally insufficient;

(7) that the Article 92 specifications fail to state offenses, as the general order in question is not punitive;

(8) that the military judge abused her discretion when she did not grant a mistrial when at least one member was no longer confident in the panel's verdict;

(9) that the evidence supporting the Article 120, UCMJ, charge was factually insufficient;

(10) that the military judge's post-trial order to the members denied the appellant an opportunity to submit clemency matters; and,

(11) that the promulgating order inaccurately reflects the specification language of which the appellant was found guilty.[1]

After careful consideration of the record of trial, the appellant's AOEs, and the written and oral submissions of the parties, we find the evidence introduced at trial insufficient to support a conviction for violation of a lawful general order and will take corrective action in our decretal paragraph. Our decision in this regard renders moot the appellant's seventh and eleventh assignments of error.

Background

While assigned to the Defense Logistics Agency (DLA) as the Strategic Management Branch Chief within the Order Management Division, the appellant, a married man, worked with SD, a GS-4 civilian employee in the same Division. SD had been hired through the Workforce Recruitment Program (WRP), which was designed, at least in part, to facilitate the hiring of persons with learning disabilities. The appellant and SD had frequent interaction, and, despite SD often sharing personal information during their meetings, their relationship was professional. During a 4 October 2012 meeting in the appellant's office, the appellant and SD shared two "friendly" hugs and the appellant commented favorably on her dress and appearance. Record at 626, 974. Six days later, the appellant called SD to his office. At this meeting the appellant kissed SD and made numerous comments of a sexual nature.[2] The parties disagree as to whether this conduct was consensual. Later that day, the appellant again asked SD to come to his office. Upon her arrival, the appellant kissed SD, rubbed her vagina through her underwear, touched and kissed her breasts, placed SD's hand on his erect penis, and made numerous sexual comments.[3] Again, the parties disagree as to whether this conduct was consensual. Throughout the encounter, SD did not try to leave or clearly articulate her lack of consent. Rather, she made statements that she "didn't

[1] We have considered AOEs 4, 5 and 8 and find no error. *United States v. Clifton*, 35 M.J. 79, 81 (C.M.A. 1992).

[2] The appellant was charged with violating a lawful general order by sexually harassing SD through these comments, but was acquitted of this specification.

[3] Based on these comments, the appellant was convicted of violating a lawful general order prohibiting sexual harassment. Although charged individually with each of the sexual contacts, the appellant was convicted only of causing SD's hand to touch his penis without her consent.

know how quiet [she] could be," and "couldn't wrap [her] head around this." *Id.* at 651-52.

SD did not immediately report the appellant's conduct and witnesses observed nothing unusual about her demeanor that day. She remained at the office until her normal departure time. SD did not return to the office for more than two weeks following this incident, giving her supervisor various excuses for why she could not come in to work. At trial, SD testified she feared going to the office, believing the appellant would rape her. Several days after the encounter with the appellant, SD contacted her personnel office seeking information on how to make a sexual harassment/assault complaint. Shortly thereafter, she was contacted by DLA's Office of the Inspector General. During SD's absence, the appellant repeatedly attempted to contact her and expressed concern for SD to SD's supervisor, two things he had not done during other periods when she was absent.

Other facts necessary to address the assigned errors will be provided below.

Discovery/Production

The first two AOEs involve alleged discovery and production violations. Prior to the Article 32, UCMJ, hearing in this case, the defense requested, *inter alia*, "any medical records which exist for [SD] for any medical treatment, received as a result of any complaints pertaining to this investigation," as well as "any psychiatric records which exist for [SD]" that either "may bear upon [SD's] mental capacity on 4 and/or 10 October 2012" or reflect "treatment as a result of any mental issues attributed to the alleged misconduct by [the appellant]." Appellate Exhibit LXXI. The defense subsequently requested "[a]ccess to all relevant personnel, medical and mental health records of all potential witnesses who may testify against the Accused at any stage of the case," as well as "any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired[.]" AE LXXII. While trial counsel makes a passing reference to a Government "response," there is nothing in the record to indicate how the Government answered these requests. Record at 1256.

Article 46, UCMJ, requires that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain . . . evidence[.]" RULE FOR COURT-MARTIAL 703(F)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) further requires that the Government produce any evidence, specifically

requested by the defense, upon a showing it is "relevant and necessary." We review claimed discovery and disclosure violations in two steps: "'first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial.'" *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)). Where the defense has made a general request, we test nondisclosure for harmless error, that is, "whether there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* at 186 (internal quotation marks and citation omitted). However, where the undisclosed matter was the subject of a specific request, we look to see whether the nondisclosure was harmless beyond a reasonable doubt. *Id.* at 187. This determination must be made in light of the entire record. *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1999).

Medical Records

The appellant argues the prosecution failed to provide SD's medical records despite a specific request, and that the military judge's remedy for the nondisclosure – to preclude the prosecution from mentioning any medical or psychological treatment during sentencing – was inadequate.

This issue first arose during trial when SD, responding to a question from civilian defense counsel (CDC) regarding a pending lawsuit, mentioned medical expenses. A subsequent question from a panel member sought the details of SD's medical treatment; CDC did not object. After closing arguments, CDC for the first time claimed a discovery violation concerning the requested medical records. While the military judge did not conclusively find that there was a violation, she stated she was "inclined to make [a] determination that there was some violation." Record at 1260. She then instructed the members to disregard any evidence on the merits regarding any medical or psychological treatment SD may have received, and granted CDC's proposed remedy to preclude mention of any medical or psychological treatment during sentencing.

After stating the "government's position was [the medical records were] not relevant" at the time when the prosecution responded to the production request, trial counsel admitted, "[t]o be perfectly honest, I don't know that they exist[.]" *Id.*

at 1254, 1256. Unfortunately, neither does the military judge or this court. We are left to consider a long list of "what if" questions based on what the records "may contain." Appellant's Brief of 23 May 2014 at 17. The time to answer these questions was at trial. CDC did not move to compel the production of the requested records, request a delay in the trial to allow for an *in camera* review by the military judge, or request a mistrial based on the production violation. By not doing so, we find the appellant waived the issue.

There is a "'reasonable presumption against waiver of fundamental constitutional rights. . . [and such a] waiver is effective only if it is knowingly and intelligently rendered.'" *United States v. Avery*, 52 M.J. 496, 498 (C.A.A.F. 2000) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Such a waiver requires affirmative action and not merely a failure to object. *Id.* (citation omitted). Not every discovery violation involves a constitutional right, as "Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional rights to due process." *Coleman*, 72 M.J. at 187 (citations omitted). However, we need not determine whether the present violation impacted a fundamental constitutional right; even applying the higher "knowingly and intelligently rendered" test, we still find waiver in this case.

Here, CDC was aware of and objected (if somewhat belatedly) to the alleged violation. Despite speculating on how the medical records may have assisted him in impeaching SD on the merits, CDC sought no remedy other than for sentencing. When asked by the military judge for a proposed remedy, CDC stated: "the remedy is that the witness not be allowed to testify about things that haven't been discovered on—on the defense." Record at 1257. When the military judge later indicated she would instruct the members to disregard any evidence regarding medical or psychological impact, CDC responded, "I'm fine with that." *Id.* at 1300. Had CDC insisted on the production of the medical records, as he did regarding the learning disability testing (addressed below), this court would be in a position to weigh the relevance and necessity of those records. In foregoing this remedy, despite being made aware of the records' existence and objecting to their nonproduction, CDC created the very situation that waiver is designed to address.

Learning Disability Testing

At the Article 32, UCMJ, hearing, SD testified she had a learning disability. Despite being on notice of this issue – now considered by the appellant to be critical to his case - the defense neither filed a supplemental discovery request nor questioned before trial the Government's failure to turn over any related documents in response to its general discovery request.

At trial, trial counsel mentioned SD's learning disability in his opening statement and sought to question SD on it during direct examination. CDC objected, arguing lack of discovery and lack of relevance to the offenses as charged.[4] The military judge found that the information "could be relevant" and allowed the questions, stating the defense could cross-examine SD on the matter and inquire whether SD had been tested for a learning disability. Record at 600, 603. The military judge also offered to give a limiting instruction if desired.

The trial counsel asked several questions on the subject, establishing that SD had a learning disability, was able to graduate from high school despite this, and was hired through "a program for people with disabilities." *Id.* at 608. CDC's cross-examination on the topic was significantly more substantial, eliciting testimony from SD that her condition affected her ability to read quickly and sometimes required people to explain things to her in more detail. SD also testified that she had "normal social skills" and no "cognitive disabilities." *Id.* at 689. SD stated she had been tested for a learning disability in high school, and that a report of this testing existed.

The military judge renewed her offer to provide a limiting instruction; both the prosecution and defense declined the offer, with CDC restating his request to see the learning disability-related records. *Id.* at 796. SD subsequently provided the report[5] to the prosecution, who, at the military judge's direction, shared it with the defense. In response to the CDC's objection to the late discovery of the report, the military judge ruled the prosecution could not use SD's learning

[4] The Government did not charge the appellant with any offenses based upon SD's lack of capacity.

[5] AE LXIX.

disability as "one of the bases for . . . any of the charges." *Id.* at 1101.

The Government later called SD as a rebuttal witness. During cross-examination, CDC sought to question SD on the learning disability report. In response to a relevance objection, CDC argued that he should be able to use the report to impeach SD's credibility. Specifically, he argued that, since the report did not substantiate a claim of a learning disability, SD's earlier testimony that she had such a disability was false. The military judge disagreed with CDC's interpretation of the report, stating that the report did not impeach SD's testimony. At that point, having had the benefit of hearing SD's testimony and seeing the report's contents, the military judge reversed her earlier ruling on the relevance of SD's learning disability and instructed the members to disregard all testimony they had heard regarding the subject. CDC did not object to this instruction.

It is not disputed that the report was not in the Government's possession prior to the trial. It is also clear that neither of the defense's discovery requests identified the report with the specificity required by R.C.M. 703(f)(3).[6] However, the record indicates that the Government was aware of SD's learning disability, and knew that a record of testing existed. Arguably, the Government should have known SD's learning disability might prove relevant when it decided to raise the issue in its opening statement and case-in-chief.

Whether these facts transform the defense's general request so as to meet the requirements of R.C.M. 703, or subject the nondisclosure to the stricter review normally applicable to a specific request, are not questions we need answer here, as the appellant has not demonstrated prejudice. Assuming, *arguendo,* that the defense made a specific request for the testing report, that the failure of the Government to obtain and provide the report in response to the defense's request was error, and that the military judge's instruction to the members was an insufficient remedy, we test whether the nondisclosure was harmless beyond a reasonable doubt. The sole basis for the report's relevance offered by the CDC was to impeach SD's claim of having a learning disability. Unlike SD's medical records, we *do* know the contents of her learning disability testing

[6] R.C.M. 703(f)(3) requires that "any defense request for the production of evidence shall list the item of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."

report, and a thorough reading reveals the report comports in all relevant aspects with her testimony. As we agree with the military judge's finding that the report in no way served to impeach SD, we find any error in not disclosing the report prior to trial was harmless beyond a reasonable doubt.

Confrontation

The appellant next claims the military judge's ruling that SD's learning disability was not relevant denied him the opportunity to cross-examine SD and thereby deprived him of his Sixth Amendment right to confrontation. We disagree.

"Where the Sixth Amendment's right to confrontation is allegedly violated by a military judge's evidentiary ruling, the ruling is reviewed for an abuse of discretion." *United States v. Moss,* 63 M.J. 233, 236 (C.A.A.F. 2006) (citation omitted). Where an abuse of discretion involving a constitutional right is found, we look to see whether the error was harmless beyond a reasonable doubt. *Id.* While the right of confrontation "necessarily includes the right to cross-examine," this right is not unlimited. *United States v. Ellerbrock,* 70 M.J. 314, 318 (C.A.A.F. 2011) (citations omitted). A military judge may limit interrogation that is "only marginally relevant." *Id.* (internal quotation marks and citations omitted).

As discussed above, the military judge initially ruled that evidence of SD's disability "could be relevant,"[7] only to later rule that it was "not relevant to these proceedings."[8] While the appellant seeks to make much of this reversal, it is easily explained. The initial ruling was made in the absence of any specific information regarding SD's learning disability. Her final ruling had the benefit of CDC's cross-examination of SD and a full review of the testing report. A military judge may, "upon any question of law other than a motion for a finding of not guilty, . . . change his ruling at any time during the trial." Art. 51(b), UCMJ.

CDC's stated purpose for cross-examining SD on her learning disability was to attack her credibility, saying: "she came in here and testified that she has a learning disability and, based on everything in this [report], it doesn't appear to me that she does." Record at 1155. As we agree with the military judge's finding that the report corroborates SD's testimony and does not

[7] Record at 600.

[8] *Id.* at 1154.

say that SD does not have a learning disability, we do not find that the military judge abused her discretion in barring the desired cross-examination.

Even were we to assume error, we find no prejudice. The appellant now argues on appeal that the learning disability was relevant to explain why SD responded to the appellant and investigators as she did. At trial, the defense specifically addressed and rejected this argument: "there's got to be a nexus between the learning disability and the lack of response." Record at 602. He then noted the lack of any evidence showing such a relationship other than SD's testimony that "she needs things explained to her at work or she has to read slower." *Id.* Given the absence of anything in the subsequently-produced testing report to establish the nexus CDC found missing, we find it very unlikely the defense would have changed its position and argued relevance on the basis now raised on appeal. Even if they had, we find beyond a reasonable doubt that it would have had no impact on the verdict. Accordingly, we find that precluding the line of questions sought by CDC, even assuming it was error, was harmless beyond a reasonable doubt.

Legal and Factual Sufficiency

The appellant claims, in his sixth and ninth AOEs, that the evidence was factually and legally insufficient to sustain convictions for violation of a lawful general order and abusive sexual contact, respectively. We agree on the former and disagree on the latter.

We review questions of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offenses, viewing the evidence in a light most favorable to the Government. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *Id.* at 325. However, reasonable doubt does not mean the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

Violation of a Lawful General Order

The two specifications under Charge I alleged violations of Secretary of the Navy Instruction 5350.16A, dated 18 December 2006. At trial, trial counsel marked a copy of the instruction as "Prosecution Exhibit 14 For Identification", and the military judge took judicial notice of the instruction's existence and applicability to the appellant. During an Article 39(a), UCMJ, session in which the parties discussed what portions of the instruction would be published to the members, the military judge stated, "the entire instruction is part of the evidence in this case." Record at 878. Trial counsel then responded by offering the entire instruction as "Prosecution Exhibit 14." *Id.* However, despite the agreement of both parties and the military judge that the instruction had been admitted into evidence, the words "For Identification" were never struck, and the exhibit was not provided to the members. Nevertheless, the members found the appellant guilty of violating the instruction.

The appellant was acquitted of the first specification under Charge I. Thus, we restrict our review to the facts as they apply to the second specification only. The military judge instructed the members on the elements of the second specification under Charge I as follows:

> In order to find the accused guilty of the offense, you must be convinced by legal and competent evidence beyond a reasonable doubt:
>
> One, that there was in existence a certain lawful general order in the following terms, SECNAV Instruction 5350.26ALPHA, dated 18 December 2006;
>
> Two, that the accused had a duty to obey such order; and,
>
> Three, that on or about 10 October 2012, the accused failed to obey this order--this lawful general order by sexually harassing [SD] by engaging in verbal conduct of a sexual nature, which had the effect of creating a hostile work environment when he told [SD] while at work "You know I am going to fuck you, right?" or words to that effect, "Look at me--look at what you do to me," or words to that effect, referring to his erection. Then he had--that he had been good as long as he could, or words to that effect, that he was going to do something bad, or words to that

> effect, that her butt is nice, or words to that effect, that her breasts were nice, or words to that effect, and that he knew how to keep her quiet, or words to that effect.
>
> For [this] specification[], the following is provided: As a matter of law the order in this case, as described in the specification, if, in fact, there was such an order, was a lawful order.

Record at 1185-86. She also instructed the members that she had "taken judicial notice that Secretary of the Navy, SECNAV, Instruction 5350.16A is a lawful general order, that it was in existence throughout October 2012, and that the accused had a duty to obey it during that period of time," and that the members were "permitted to recognize and consider those facts without further proof." *Id.* at 1194. There was no discussion of the instruction's language.

Thus, all the members knew of the instruction was that it was a lawful general order in existence and applicable to the appellant at the time of the alleged violation. Without having the actual text of the instruction against which to examine the appellant's conduct, they were left to fall back on facts outside the record. While these senior officers likely knew the basic proscriptions of the Navy's sexual harassment policy through many years of training, they were properly instructed that "[a]n accused may be convicted based only on evidence before the court[.]" *Id.* at 1195. Accordingly, we conclude that the appellant's conviction under Specification 2 of Charge I cannot withstand the test for legal sufficiency, and will set aside that finding of guilty and dismiss that specification.

Abusive Sexual Contact

The elements of abusive sexual contact under Article 120, UCMJ, are as follows: (1) That the appellant committed or caused sexual contact by SD; and, (2) that the touching was done by causing bodily harm to SD. The appellant and SD agree that SD touched the appellant's penis with her hand. But, while SD stated the appellant placed her hand there against her will, the appellant testified SD did so of her own volition.

SD testified that the appellant "grabbed [her] hand and started rubbing his erection with it." Record at 652. She also testified that, other than the initial two hugs, all contact

during the events in question was without her consent. Accordingly, we find the prosecution presented evidence on every element of the charged offense.

The next question is whether the evidence was factually sufficient. SD and the appellant, the sole occupants of the room where the touching occurred, painted very different pictures on the matter of consent. The issue, then, is whether reasonable doubt exists with respect to SD's testimony regarding lack of consent. As matters in support of reasonable doubt, the appellant offers two alleged motives to fabricate. First, the appellant argues that SD was seeking revenge for a statement by the appellant implying that she had no future with him. Second, the appellant claims SD was seeking money; she hired an attorney and filed suit against the Government for the sexual harassment she allegedly endured.

We give no weight to the first alleged motive. We simply find incredible the appellant's scenario: that a consensual sexual encounter that ended with the appellant responding "I don't know" to SD's asking "what does this mean?" triggered a desire for revenge so strong as to support a false allegation of sexual harassment and assault. Appellant's Brief at 81-82. As for the lawsuit, CDC questioned SD at length regarding the matter. We find nothing in SD's testimony to indicate a fraudulent intent. To the contrary, the evidence indicates she was simply exercising her right to seek compensation for a wrong she suffered.

The appellant also points to numerous inconsistencies between SD's various statements and in-court testimony. We find these to be minor, as her testimony comported in all key aspects with the appellant's description of events. On the one important issue where they diverge – consent – SD's earlier statements and testimony are consistent.

Accordingly, after carefully reviewing the record of trial and considering the evidence in the light most favorable to the Government, we are convinced that a reasonable trier of fact could have found all the essential elements of abusive sexual contact beyond a reasonable doubt. Furthermore, after weighing all the evidence in the record and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt to Charge II.

Post-Trial Matters

The appellant next claims that the military judge had post-trial communications with the members that had a chilling effect on his ability to obtain clemency recommendations. He also claims the staff judge advocate (SJA) withheld one or more clemency recommendations from the CA.

Post-Trial Order to Members

The military judge shall "[i]nstruct the members on questions of law and procedure which may arise." R.C.M. 801(a)(5). "'The question of whether a jury was properly instructed is a question of law, and thus, our review is *de novo*.'" *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (quoting *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)).

A military judge's "hearing and ruling upon any matter which may be ruled upon by the military judge . . . shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made part of the record." Art. 39(a) and (b), UCMJ. Other than when members are voting or deliberating, all proceedings "shall be made part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge." Art. 39(c), UCMJ.

During deliberations on sentencing, a member asked the military judge whether it would be possible for the panel to re-vote on the findings to Specification 4 of Charge II (abusive sexual contact). The military judge properly instructed the members that, once findings are announced in open court, reconsideration is not permitted. R.C.M. 924(a). The appellant was sentenced on 13 September 2013.

Eleven days after trial, CDC sent to the members an e-mail explaining the clemency process and seeking their input. Most notably, he requested statements from members regarding their desire to set aside the findings of guilty on Specification 4 of Charge I.[9] One of the members, Captain (CAPT) O, responded by

[9] The entire email read as follows:

> I am contacting you to follow up on the request you made during your sentencing deliberations in the U.S. v. CDR Arvis Owens trial. Some or all of you inquired about the procedure for

saying he preferred to send his response directly to the CA. The record does not indicate whether he actually sent anything to the CA. Three days later, the President of the court-martial, CAPT H, forwarded the CDC's e-mail to the military judge, seeking guidance. The judge responded by e-mail on 3 October 2013, directing CAPT H "to refrain from contacting any counsel that is not on the record in open court," and to "pass this order along to the other members." AE LXXXVII. She advised that "[f]urther order of the court will be forthcoming via the Trial Counsel." *Id.*

That same day, the military judge issued the following order to the members:

> 1. Prior to adjournment in this case, I instructed you as follows:
>
> To assist you in determining what you may discuss about this case now that it is over, the following guidance is provided. When you took your oath as members, you swore not to discover or disclose the vote or opinion of any particular member of this court, unless required to do so in due course of law. This means that you may not tell anyone about the way you or anyone else on the court voted or what opinion you or they had, unless I or another judge requires you to do so in court. You are each entitled to this privacy. Other than that limitation, you are free to talk about the case to anyone, including me, the

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reconsideration of your vote regarding Specification 4 of Charge II. The judge stated that you may not do so after findings. The Manual for Courts-Martial is silent on whether members may reconsider after findings. Nonetheless, the final decision on all courts-martial convictions is the convening authority. The convening Authority may approve, set aside, or approve some and set aside others of the charges. He may also grant clemency. I intend to request that the convening authority set aside the finding of guilty on Specification 4 of Charge II based on your request to reconsider.

My request to the convening authority will receive more favorable consideration if I can demonstrate that my request is based on the wishes of at least 3 of the 7 members. I, therefore, request that you email me a brief email stating that [sic] your desire to set aside the finding of guilty on Specification 4 of Charge II. This is not a request for your vote, nor are you required to disclose your vote. It is only a request for you to individually – if you did – restate the request you made during the trial regarding that Specification." AE LXXXVII.

> attorneys or anyone else. You can also decline to participate in such a discussion if that is your choice.
>
> Your deliberations are carried out in the secrecy of the deliberation room to permit the utmost freedom of debate and so that each of you can express your views without fear of being subjected to public scorn or criticism by the accused, the convening authority, or anyone else. In deciding whether to answer questions about this case, and if so, what to disclose, you should have in mind your own interests and the interests of the other members of the court.

AE LXXXVII. This was a verbatim restatement of the instructions she provided the members at the trial's end. After quoting CDC's e-mail to the members, the military judge went on to correct CDC's incorrect statement of the law regarding R.C.M. 924(a). She further instructed the members:

> 3. Pursuant to R.C.M. 1105(b)(2)(D), it is permissible for the Defense to seek from you and for you to provide a clemency recommendation to the convening authority.
>
> 4. However, pursuant to R.C.M. 923, R.C.M. 1008, Military Rule of Evidence (M.R.E.) 606(b) and the Discussion to R.C.M. 1105 (b)(2)(D), a clemency petition from a member should not disclose the vote or opinion of any member expressed in deliberations. This prohibition extends to any member's vote or opinion on the following: findings, any request to reconsider findings, and sentence.

Id.

On 4 October, another member, Commander M, informed the CDC that he had e-mailed his recommendation to the SJA. The record does not indicate what, if anything, the SJA received from the member, although the SJA stated in his recommendation to the CA that "[t]here is no clemency recommendation by the sentencing authority made in conjunction with the announced sentence."[10]

[10] Staff Judge Advocate's Recommendation of 31 Dec 2013 at 1.

The defense filed a written objection to the military judge's order on 9 October 2013, and requested a post-trial Article 39(a), UCMJ, session. The defense also filed a motion for a mistrial based on newly discovered evidence. At that session the defense indicated it had ceased attempts to contact the members, thinking it safer to request the post-trial hearing. The defense's objection, in part, was that in applying an impeachment-of-the-findings standard to the defense's request, the military judge mischaracterized the request. The military judge explained that her ruling did not characterize the defense's e-mail request in any way. However, she said the request "tetered [sic] on asking for a vote[.]" Record at 1416.

The military judge ruled that the order would stay in effect, and denied the defense's motion for a mistrial. In her ruling, the military judge found that CDC's e-mail to the members was "asking for their votes and thoughts behind their decisions," and "[a]sking members who desired a revote to restate their request to the Convening Authority effectively asked members to reveal their vote in this regard." AE XCIII at 5. She clarified, however, that her order "does not forbid or otherwise prohibit any member from contacting the Convening Authority to discuss matters permitted by the M.C.M.," nor does it "limit[] the ability of defense counsel to seek clemency petitions from the members or provide clemency materials to the Convening Authority." *Id*. at 6.

With this extensive background, we address the appellant's claim of error. First, the military judge's e-mail to CAPT H violated the requirements of Article 39(b) and (c), UCMJ. However, while "violation of Article 39(b) creates a 'rebuttable presumption of prejudice,'" *United States v. Thompson*, 47 M.J. 378, 379 (C.A.A.F. 1997) (quoting *United States v. Allbee*, 18 C.M.R. 72, 76 (C.M.A. 1955)), we are not left speculating as to the content of the military judge's communications with the members.[11] The record contains the sum of these communications, both in her e-mail to the CAPT H and her supplemental order. Accordingly, we are able to review the case for prejudice. We find none.

Second, we find that any error the military judge may have committed by issuing her e-mail order without giving the parties an opportunity to be heard was cured by the subsequent Article 39(a), UCMJ, session. The military judge gave both parties a

[11] We note that both *Allbee* and *Thompson* involved the legal officer/military judge communicating with the members during deliberations. That is not the case here.

chance to state their positions and persuade her to alter her order. Had the defense been able to show how the order was in any way a misstatement of the law, the military judge could have revised or rescinded the order.

Third, in her order the military judge discussed the extent to which the defense could seek clemency recommendations from the members. Despite any trepidation the defense may have had before the hearing, once the military judge reaffirmed and clarified her order the defense was free to revisit the matter with the members. There is nothing in the record to indicate the defense did so. Even assuming the military judge erred in the procedural handling of this matter – and further assuming the defense's failure to reengage with the members does not constitute forfeiture of the issue - we cannot say the appellant has demonstrated any prejudice.

Finally, we find no error in the language of the order itself. The military judge simply restated her earlier instructions, corrected CDC's misstatement of the law, advised the members that it was permissible for the defense to request (and for the members to provide) a clemency recommendation, and reminded the members of their duty not to disclose the vote or opinion of any member expressed in deliberations. This order was a full, clear, and accurate statement of the law. The appellant's unsupported examples of possible misunderstanding do not persuade us otherwise.

Clemency Matters

Errors in post-trial processing are reviewed *de novo*. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). The Court of Appeals for the Armed Forces has identified three requirements for "resolving claims of error connected with the convening authority's posttrial review. First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Furthermore, "there is material prejudice to the substantial rights of an appellant if there is an error and the appellant makes some colorable showing of possible prejudice." *Id.* at 289 (internal quotation marks and citation omitted).

Citing to the e-mails of CAPT O and CDR M, the appellant claims the SJA withheld clemency recommendations from the CA.

While neither the SJA's recommendation (SJAR) nor the addendum thereto mentions any such recommendations, the CA, in taking his action, states he considered "the email string indicating what appears to be messages from members of the court-martial[.]" Convening Authority's Action of 16 Jan 2014 at 4. It appears the CA is referencing the emails of CAPT O and CDR M, enclosed in the defense's clemency request. There is no mention in the CA's action of any specific recommendation from CAPT O or CDR M.

We don't know whether any members submitted clemency recommendations. Due to the statements of CAPT O and CDR M that they preferred not to submit their recommendations through CDC or had already sent a recommendation directly to the SJA, compounded by the SJA's limited comment that there was "no clemency recommendation by the sentencing authority made *in conjunction with the announced sentence*,"[12] the defense had no way to know the CA had not seen or considered the purported recommendations from CAPT O and CDR M. Since the SJA and CA were aware of the e-mails in which the two members indicated that they would or had submitted such recommendations, and there being no evidence in the record to indicate the SJA or CA took steps to contact either member and resolve the apparent discrepancy, under the specific facts presented, we find it was error to leave the question answered.

Given the members' role in the proceedings, any clemency recommendation from them would likely carry particular weight with the CA. The record here indicates two senior officer members either intended to or did provide such a recommendation. Accordingly, we find the appellant has met the very low threshold of "some colorable showing of possible prejudice." We will provide relief in our decretal paragraph.

Sentence Reassessment

As we are setting aside part of the conviction, we will reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). We find no "'dramatic change in the penalty landscape' [which] gravitates away from the ability to reassess" the sentence in this case. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). For the offenses of which the appellant was

[12] SJAR at 1 (emphasis added).

convicted, the maximum punishment included ten years' confinement, total forfeiture of pay and allowances, and a dismissal. Removing Charge I from the calculation only reduces the maximum authorized confinement to eight years. The sentence awarded by the court-martial was limited to a dismissal, a sentence far removed from the potential maximum.

Additionally, the facts underlying the affirmed charges and specifications provide ample justification for the sentence the members awarded. The appellant, a senior naval officer, misused his rank and position to sexually abuse a junior civil servant in the workplace. Accordingly, we are confident that the members would have imposed the previously adjudged sentence of a dismissal.

Conclusion

The findings as to Specification 2 of Charge I and Charge I are set aside and that charge and specification are dismissed. The remaining findings are affirmed. The CA's action dated 16 January 2014 is set aside and the record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate CA for a new post-trial recommendation and action.[13] Thereafter the record will be returned to the Court for completion of appellate review. *Boudreaux v. U.S. Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989).

Senior Judge MCFARLANE and Judge BRUBAKER concur.

For the Court

R.H. TROIDL
Clerk of Court

[13] The CA's Action of 16 January 14 is incorrect in that it fails to reflect the merger of various specifications under Charge II, as reflected in AE LXXXII (the cleansed charge sheet). While the error is mooted by our decree, we point this out so that any future order will not repeat the mistake.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Keith E. Barry Senior Chief Special Warfare Operator (E-8) United States Navy, Appellant	**DECLARATION OF RADM PATRICK J. LORGE, USN (RET.)** Crim.App. Dkt. No. 201500064 USCA Dkt. No. 17-0162/NA

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

I, Patrick J. Lorge, USN (ret), do hereby swear and attest that the following is true and accurate to the best of my knowledge:

1. I am a retired Rear Admiral in the United States Navy.

2. In 2015, I was the General Court-Martial Convening Authority in the matter of *United States v. Barry*.

3. In that capacity I reviewed the trial in the post-trial clemency phase.

4. Upon review of the record, I had serious misgivings about the evidence supporting this conviction. Specifically, I did not believe the evidence supported the alleged victim's account of events. I was inclined to disapprove the findings.

5. My Staff Judge Advocate was CDR Dominic Jones and my Deputy Staff

Judge Advocate was LCDR Jon Dowling. They advised me on my legal options regarding this case, and tried to convince me to approve the findings in the case.

6. As I considered whether to disapprove the findings, I was also concerned about the impact to the Navy if I were to disapprove the findings. At the time, the political climate regarding sexual assault in the military was such that a decision to disapprove findings, regardless of merit, would bring hate and discontent on the Navy from the President, as well as senators including Senator Kirsten Gillibrand. I was also aware of cases from other services that became high profile and received extreme negative attention because the convening authorities upset guilty findings in sexual assault cases.

7. I perceived that if I were to disapprove the findings in the case, it would adversely affect the Navy. Everyone from the President down the chain and Congress would fail to look at its merits, and only view it through the prism of opinion. Even though I was convinced then, and am convinced now, that I should have disapproved the findings, my consideration of the Navy's interest in avoiding the perception that military leaders were sweeping sexual assaults under the rug outweighed that conviction at the time.

8. Prior to my action in this case, VADM Nanette DeRenzi, the then-Judge Advocate General of the Navy, expressed a similar concern to me about the reputation of the Navy in a conference in my office, although she did not address

this specific case. This was a personal conversation, not part of an instruction or informational course. She conveyed the importance that convening authorities held and how tenuous the ability of an operational commander to act as a convening authority had become, especially in findings or sentences in sexual assault cases due to the intense pressure on the military at the time. She mentioned that every three or four months military commanders were making court-martial decisions that got questioned by Congress and other political and military leaders including the President. This conversation reinforced my perception of the political pressures the Navy faced at the time.

9. In addition to the advice from my staff judge advocates, I also discussed the case with then- RADM Crawford, who is now the Judge Advocate General of the Navy.

10. I have known VADM Crawford since 2001. LT McMahon's questions about my action in this case led me to recall—vaguely—conversations I had with VADM Crawford, in my office and on the telephone, about my action.

11. Upon my review of the record of trial from this case, I did not find that the Government proved the allegation against Senior Chief Barry beyond a reasonable doubt. Absent the pressures described above, I would have disapproved the findings in this case.

12. On a personal note, I would ask you to forgive my failure in leadership and right the wrong that I committed in this case against Senior Chief Barry; ensure justice prevails and when doubt exists, allow a man to remain innocent.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

Date: 5 MAY '17

Signed: _____
Patrick J. Lorge

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 2 6 2016

The Honorable Kirsten Gillibrand
United States Senate
Washington, DC 20510

Dear Senator Gillibrand:

I write on behalf of the President in response to your April 19, 2016, letter regarding sexual assault cases prosecuted by the military and in response to your April 27, 2016, letter to me. The Department takes allegations of sexual assault seriously, and we are committed to ensuring that Service members who commit sexual assault are held accountable. I believe that there is a clear message emanating from the Department: We, from the most junior enlisted Service member to the most senior commander, do not, and will not, tolerate such behavior. It is unacceptable to the individuals who selflessly serve our country and a detriment to our military readiness. I deeply appreciate your leadership in this vital matter and your continued commitment to eliminating this scourge.

As I stated in my testimony before the Senate Armed Services Committee (SASC) on April 28, 2016, I asked my staff to review the issues raised by the Protect Our Defenders report and the Associated Press article about the sexual assault cases discussed by Admiral Winnefeld in his testimony before the SASC on July 18, 2013 and a July 23, 2013 letter. I know Admiral Winnefeld personally, and he is a man of the highest integrity. He served his country admirably and would never intend to mislead Congress. I also know he cared deeply about ensuring that sexual assault in the military was addressed.

The review that was conducted pursuant to your concerns, which I have enclosed, shows that the central issues raised in the report and article are based on certain misunderstandings of how the military justice system works, lack of access to information contained in the full case files, or a disagreement on what "counts" as a sexual assault case. The Department is prepared to provide briefings on the review upon request.[1]

Over the past several years, the Department has made significant advances in addressing sexual assault. Since 2012, Secretary Panetta, Secretary Hagel, and I have directed a total of 54 initiatives to address different aspects of the sexual assault prevention and response system. These initiatives have fundamentally changed the way the Department confronts sexual assault.

In 2015 alone, the Department issued three separate policy documents[2] implementing more than seventy sections of law contained in National Defense Authorization Acts (NDAA)

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[1] Because the underlying case files include sensitive personal identifying information, particularly about victims of sexual assault, the Department is able to discuss information in case files with Committee members and cleared staff only upon a request of a Chairman of a Committee with jurisdiction over this matter.

[2] DoDD 6495.01, "Sexual Assault Prevention and Response (SAPR) Program", Change 2 (20 January 2015); DoDI 6495.02, "Sexual Assault Prevention and Response (SAPR) Program Procedures", Change 2 (7 July 2015); and DoDI 6495.03, "Defense Sexual Assault Advocate Certification Program (D-SAACP)" (10 September 2015).

since Fiscal Year 2012. Many of the Fiscal Year 2013 NDAA provisions were featured in Secretary Panetta's legislative proposal to Congress, the Leadership, Education, Accountability and Discipline on Sexual Assault Prevention Act of 2012, known as the LEAD Act. The most far-reaching LEAD Act reform required the establishment of a Special Victims Investigation and Prosecution Capability by each Service, with a force of specially-trained military investigators, prosecutors, and other legal personnel to work adult sexual assault, child abuse, and domestic violence cases. In addition to these legislative changes, the Department is working to implement nearly 200 recommendations from other bodies, including the Government Accountability Office, Defense Task Forces, and the Response Systems to Adult Sexual Assault Crimes Panel.

The Department has enhanced our response system to provide more effective support to sexual assault survivors. We established the Victim Assistance Leadership Council to implement uniform victim assistance policies and procedures throughout the Department. We have implemented a tailored campaign to address male victimization and provide gender-specific treatments. Our 24/7 global operation of the Safe Helpline continues to provide confidential and immediate support for all Service Members in crisis.

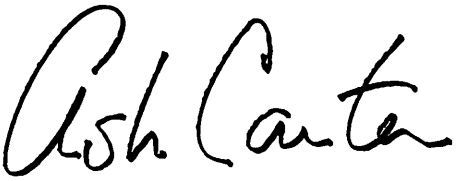
The Services conduct regular command climate surveys and performance evaluations that include ratings on sexual assault prevention and response. We are taking steps to assess more effectively and combat retaliation against victims and others who report sexual assault, or any other misconduct. For example, the Safe Helpline now gives victims an option to anonymously report retaliation over the phone or through a secure web form at safehelpline.org. We are also leveraging the monthly meetings held by each installation commander to ask about retaliation experienced by victims and first responders.

Finally, we are improving our data collection and reporting to give us the clearest possible picture of the issues we face and our progress. For example, Defense Digital Services is partnering with SAPRO to ensure more streamlined, timely, and accurate reporting. One aspect of this collaboration includes synchronizing SAPR and Family Advocacy Program data to portray sexual assault cases more holistically.

As always, the Department stands ready to work with Congress on this and other issues to ensure that our Service members are fully supported. Thank you for your continued support of our uniformed men and women.

A copy of this letter has also been sent to Senators Grassley, Shaheen, Heinrich, Boxer, Blumenthal, Paul, Heller, and Hirono.

Sincerely,



Enclosure:
As stated

Review of Issues Raised by the Protect Our Defenders Report and Associated Press Article Regarding Military Sexual Assault Cases

On April 18, 2016, Protect Our Defenders, a non-governmental organization, released a report entitled, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice*,[1] which sought to analyze data provided by the Services relating to sexual assault cases prosecuted in the military justice system but not by civilian authorities. The same day, the Associated Press published an article that described the report and added anecdotes and quotations about specific cases.[2] Both the report and the article claim the Department of Defense misled Congress in 2013 by overstating the number of sexual assault cases brought by the military following declination of those cases by civilian authorities, overstating the sexual assault conviction rate in such cases, and conflating cases declined by civilian law enforcement authorities with cases declined by civilian prosecutorial authorities.

Both the report and the article claim that misrepresentations of sexual assault case data occurred in testimony by and a letter from ADM James A. Winnefeld. On July 18, 2013, ADM Winnefeld testified before the Senate Armed Services Committee (SASC) regarding his reconfirmation as Vice Chairman of the Joint Chiefs of Staff. During this testimony, SASC members asked questions about military convening authorities' exercise of jurisdiction over sexual assault cases that civilian authorities had declined to pursue. In a follow up letter to Chairman Levin on July 23, 2013 ("July 23rd letter"), ADM Winnefeld provided more information.

Although it was not the primary topic of his reconfirmation hearing, sexual assault prosecutions by the military were the subject of intense debate within Congress at the time and in the four months prior to ADM Winnefeld's hearing, the Senate Armed Services Committee had held two hearings on the matter on March 13, 2013, and June 4, 2013. After those hearings, Congress passed Title XVII of the National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66 (2013), which legislated major reforms to the Uniform Code of Military Justice for sexual assault allegations. The legislation included 16 substantive revisions of the military justice system, including enhancing victims' rights and constraining convening authorities' power and discretion.

A review of the material provided to Protect Our Defenders as well as the case files underlying that material reflects that many of the issues raised in the report and the article are based on a misunderstanding of certain statements or how prosecutions are conducted under the Uniform Code of Military Justice or a disagreement on what constitutes a nonconsensual sexual act. Additionally, the data utilized by Protect our Defenders and the Associated Press resulted in

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[1] Protect Our Defenders, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice* (April 18, 2016), available at http://www.protectourdefenders.com/debunked/ (hereinafter, "Debunked").

[2] Richard Lardner, Associated Press, *Pentagon misled lawmakers on military sexual assault cases* (April 18, 2016), available at http://bigstory.ap.org/article/23aed8a571f64a9d9c81271f0c6ae2fa/pentagon-misled-lawmakers-military-sexual-assault-cases (hereinafter, the "AP article").

an incomplete picture of many of the cases which may have had an effect on the conclusions drawn by both organizations.[3]

This white paper reviews five key issues raised in the report and the article.

Analysis

Issue #1: "Deferred" Versus "Declined" Cases

Protect Our Defenders takes issue with the term "declination" to describe those cases in which military and not civilian authorities ultimately pursued a prosecution of a sexual assault case. While Protect Our Defenders' attempt to make a distinction between a "declination" and a "deferral" may have some utility, it is not a distinction that is recognized in the military justice system and would be difficult to determine consistently, as discussed below.

In many instances, both civilian and military authorities have jurisdiction over offenses committed by uniformed military members. When an alleged offense occurs in an area subject to the jurisdiction of a State, military and State officials generally must negotiate which authority will exercise jurisdiction over the allegation, and the exact nature of how this negotiation plays out is dependent upon the individuals involved.

In its report, Protect Our Defenders attempted to distinguish between cases where civilian authorities *would not* ("declined") bring a case in a civilian court, and cases where civilian authorities *voluntarily allowed* ("deferred") the case to be brought in a military court, even if the civilian authorities may have believed they would have been able to bring a case. The military has not historically kept records attempting to distinguish cases that are "declined" or "deferred" in this manner, and based on the data available, it would be difficult to make those assessments retroactively. Rather, in the military, when a civilian authority does not take a case, it is commonly referred to as a "declination" or "civilian declination," although on occasion, the phrase "deferred" and "declined" are used interchangeably.[4] This terminology is used regardless

[3] Protect Our Defenders submitted FOIA requests seeking documents pertaining to the testimony of ADM Winnefeld. In response, the Army provided all of the documents that had been provided to the Office of the Vice Chairman of the Joint Chiefs of Staff in preparation for the testimony. The documents included narrative summaries of the cases upon which the data relied and associated court-martial documents reflecting the charges, findings, and sentence in all completed cases, but did not provide full case files. The Marine Corps also provided summaries of the cases upon which their data had relied, but did not interpret the FOIA request to request full case files, and therefore did not provide full case files. The Air Force and Navy did not provide documents responsive to the FOIA requests. According to those Services, the Air Force did not respond to the FOIA request because of how Protect Our Defenders addressed the request, and it was never received by an office with FOIA or military justice roles and responsibilities. The Navy's response was due to the absence of a system of records responsive to the request.

[4] For example, the Manual of the Judge Advocate General of the Navy states: "When, following referral of a case to a civilian Federal investigative agency for investigation, the cognizant U.S. Attorney declines prosecution, the investigation normally will be resumed by NCIS and the command may then commence court-martial proceedings as soon as the circumstances warrant." JAGINST 5800.7F, at ¶ 0125.c(2) (June 26, 2012). Similarly, the Air Force's Administration of Military Justice regulation states: "If civilian or foreign authorities decline or waive the right to exercise jurisdiction, the Air Force may proceed with military justice action, whether court-martial or nonjudicial punishment." AFI 51-201, at ¶ 2.6.2 (July 30, 2015).

of the underlying reason for civilian authorities' decision not to pursue a case, whether for lack of evidence, a determination that one venue has a preferable punishment, the availability of charges, resource constraints, or other reasons.

Furthermore, making an accurate distinction between "deferred" and "declined" cases would be difficult even with perfect data. This is due to the various factors considered by military and civilian authorities in their negotiations as well as the stage in an investigation or prosecution at which decisions are made. For example, a civilian authority may *voluntarily* allow the military to take a case in an early stage of an investigation, but had the civilian authorities pursued the case, they may at a later stage in the prosecution have decided *not to pursue* the case because of evidentiary or other issues that arise during an investigation and trial.

The underlying case files also contain information inconsistent with the AP's reporting. For example, the AP article quotes a civilian prosecutor who stated that his office would not have declined to prosecute the case at issue. The case file includes a letter from an assistant district attorney in that prosecutor's office stating that the charge in that case "was declined by our office [a]s a Felony offense." An investigation report concerning the case states that civilian prosecutorial authorities declined the case after the alleged offender passed an independent third-party polygraph examination. An Army convening authority subsequently referred that case for trial by court-martial, at which the accused was convicted of the Article 120 offense of abusive sexual contact with a child and sentenced to confinement for 30 days and a dismissal.

In another example, the AP article stated that there was insufficient information to verify whether a particular case had been declined by civilian authorities. The article stated that four civilian prosecutors' offices were contacted in the area of the military installation, and none had a record of the case. The underlying case files include the name of the prosecutor who declined prosecution and the date on which that information was orally conveyed to a military Special Victim Prosecutor. Following the civilian declination, an Army convening authority referred that case for trial by court-martial, resulting in a conviction for rape of a child and sodomy with a child under the age of 12 and a sentence that included confinement for 35 years and a dishonorable discharge.

Issue #2: What Constitutes a Sexual Assault Case

The Protect Our Defenders report adopts a different approach for determining what constitutes a "sexual assault case" than do the Services. This approach seems to have led Protect Our Defenders to interpret the same underlying data differently than do the Services.

Protect Our Defenders notes that some of the sexual assault cases summarized by the Services and cited in testimony and the letter "were not prosecuted for sexual assault."[5] However, this assessment misses important context of the cases and is not reflective of how sexual assault data is collected or how sexual assault cases are tried. The Department officially tracks cases involving allegations of sexual assault as "sexual assault cases" even when the

[5] "Debunked" at 9; see also *id*. at 10.

charges filed may be for an alternate or collateral offense, as noted most recently the *Department of Defense Fiscal Year 2015 Annual Report on Sexual Assault in the Military.*[6] Because in both the civilian and military justice system, a determination must be made on a case-by-case basis as to which charges are supported by sufficient evidence, it is possible in both systems to bring an array of charges and not solely charges for sexual assault. In certain cases, the availability of non-sexual assault offenses in the military justice system (such as conduct unbecoming of an officer) led to convictions that would not have been possible in the civilian criminal justice system.[7]

Protect Our Defenders notes that some of the charges were for "indecent acts or possession of child pornography—offenses that, while often reprehensible, are not nonconsensual sexual acts." This description is not an accurate characterization of those types of cases, and disregards important charges and tools for military prosecutors.

For example, in one case involving child pornography provided to Protect Our Defenders,[8] the accused service member had a sexual relationship with a minor under the age of 16, but in the jurisdiction where he resided, the sexual relationship was not considered to be statutory rape. The individual was found guilty of an attempt to possess child pornography, indecent conduct for sending a photo of his genitalia to a child under the age of 16, and possession of child pornography. While a charge alleging nonconsensual sexual abuse was not brought, the underlying sexual acts raise questions about the consensual nature of the sexual relationship, given the age of the victim and the ability of a minor to consent to sex or to being a participant in pornography.

Similarly, prior to changes to the UCMJ in 2012, indecent acts charges provided an option for the government to pursue a sexual assault charge where consent of the victim would not have been a defense. That is, a charge for indecent acts does not indicate that the nature of the act was consensual or non-consensual; instead, it could be used to charge a case where proving lack of consent would have been difficult.

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[6] See *Department of Defense Fiscal Year 2015 Annual Report on Sexual Assault in the Military* (2016), available at http://sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf, at 49 (noting that "accountability actions [were] taken against the 2,013 subjects receiving command action this year involved sexual assault offenses" but that while "1,437 subjects received action for a sexual assault offense . . .[t]he remaining 576 subjects received action on a non-sexual assault offense, such as a false official statement, adultery, or assault.")

[7] As an example of a sexual assault case that did not ultimately result in sexual assault convictions for all of the defendants involved, the July 23rd letter described one case where two soldiers engaged in sexual intercourse with a victim who was substantially incapacitated by alcohol. The letter noted that after civilian investigators found that there were victim credibility issues, "military investigators … discovered evidence indicating that the soldiers had conspired to obstruct justice." While one individual was ultimately convicted by court-martial for abusive sexual conduct as well as collateral misconduct, the other was convicted only for conspiracy to obstruct justice, making a false statement, and absence without leave. Although one of the individuals was not convicted of sexual assault, the July 23rd letter appropriately used this as an example of a "sexual assault case."

[8] "Debunked" at page B35 (discussing U.S. v. PFC Uribe).

With respect to cases relied on in the July 23rd letter, each of the 32 completed cases referred to court-martial identified by the Army involved underlying allegations of sexual assault in which the accused was charged with one or more sexual assault charges, meaning a case involving a charge under Article 120, 120b, 125 for forcible sodomy, or Article 80 for an attempt to commit such an offense. In the Marine Corps cases, 27 of the 28 cases involved a prosecution or investigation for one or more sexual assault offenses or allegations of nonconsensual sexual conduct.[9] The final case, which was charged under Article 120 as a case of sexual misconduct, included an indecent exposure charge involving a Marine who was engaging in public masturbation. Although not examined in the Protect Our Defenders report, four of the six Navy cases involved prosecutions at courts-martial for sexual assault offenses. Sexual assault charges were dismissed in the two remaining Navy cases after the Article 32 investigating officers recommended against referral. As discussed below, because the attorney who selected the 10 Air Force cases has died, the Air Force has been unable to determine with certainty to which cases the letter refers and cannot provide an assessment of them.

Additionally, in both civilian and military judicial systems, defendants are often tried for "collateral misconduct" charges, such as lying to an investigator, in addition to an underlying crime. In both the military and civilian systems, it is sometimes difficult to obtain a conviction for sexual assault.[10] It is a common practice for prosecutors to attempt to obtain convictions for collateral charges as well, which provide additional methods of holding an individual responsible for his or her acts in the event of an acquittal for the charge of sexual assault.

The military justice system has additional collateral misconduct charges that would not be available in a civilian criminal justice setting, such as conduct unbecoming an officer, adultery, and orders violations. The military also has a range of disciplinary and other tools available that have no civilian counterpart, such as non-judicial punishment and administrative discharges. Accordingly, in sexual assault cases, it is common that charges other than, or in addition to, a charge specifically for sexual assault may be pursued as a means of increasing the likelihood that the accused is ultimately held accountable. [11]

Issue #3: Conviction Rates for Sexual Assault Cases

Protect Our Defenders applies different criteria to determine which cases to consider in assessing conviction rates than do the Services, which resulted in different calculations of conviction rates associated with sexual assault cases brought by the military. Following are the key differences.

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[9] One of the cases involved an allegation that a Marine attempted to engage in online sexual conversations with, and sent pornographic imagery to, an individual he believed to be a fourteen year old. The other 26 involved a prosecution or investigation for one or more sexual assault offenses.

[10] See, e.g., Rape, Abuse & Incest National Network, *Reporting Rates*, available at https://www.rainn.org/get-information/statistics/reporting-rates (last accessed May 19, 2016).

[11] The "Debunked" report also states, "In contrast to claims in Adm. Winnefeld's testimony, two cases did not involve a prosecution but, instead, discharge in lieu of court-martial." "Debunked" at 12 n.7. ADM Winnefeld's July 23rd letter expressly stated that two of the accused in Army cases "were administratively discharged in lieu of trial by court-martial under other than honorable conditions."

First, Protect Our Defenders includes in its calculation those cases declined by prosecutors *but not* those cases declined by other law enforcement officials.[12] Because it did not count cases declined by other law enforcement officials, the report did not account for at least three Marine Corps cases and eight Army cases declined by law enforcement. Second, Protect Our Defenders did not count an additional nine Army cases because the organization could not determine whether the declination was by a prosecutor or law enforcement. In contrast, the Services, as reflected in the July 23rd letter, specifically included both types of declinations.[13] Third, Protect Our Defenders counts only cases where the actual conviction fell within a narrow definition of "sexual assault offenses" whereas, as discussed above, the Services included all sexual assault cases – that is, all cases involving sexual assault allegations even if the charge brought was for other violations, such as indecent conduct (which, as explained above, is an important tool for the government to hold individuals accountable for nonconsensual sexual conduct). Finally, Protect Our Defenders excluded cases it determined were "deferred" instead of declined, which as discussed above, is a difficult determination to make and the organization's assessments in this matter may have been incorrect, based on other information contained in the files.

The underlying case files support the calculations set forth in the July 23rd letter. The July 23rd letter stated that there were 32 civilian declination cases in the Army referred to court-martial resulting in 26 convictions for an 81% conviction rate.[14] The case files support the 81% conviction rate stated in that letter when using the standards that the Department generally uses. The letter also stated that the Marine Corps had tried 28 civilian declination cases resulting in 16 convictions for a 57% conviction rate. At the time, the case files contained information that showed that 17 cases had resulted in a conviction; in addition, one of the 28 case was pending court-martial, and subsequently resulted in findings of guilt to non-sexual assault offenses. Thus the conviction rate among the cases at that time was 17/27, or 63%, higher than what the letter stated. The Navy statistics referred to in the July 23rd letter were correct. One out of three cases that were referred to court-martial had resulted in a conviction at the time of the letter.

Finally, the July 23rd letter also discussed 10 Air Force cases over a two-year period. Because the attorney who selected those cases died, the Department has been unable to determine with certainty to which Air Force cases the letter refers.[15] Similar to this data,

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[12] Protect Our Defenders also criticizes ADM Winnefeld's testimony for his failure to distinguish between cases declined by civilian prosecutors rather than by civilian law enforcement officials. His July 23rd letter accurately stated that "the military services have investigated and prosecuted a number of sexual assault cases after civilian authorities either did not pursue a full investigation or formally declined to prosecute."

[13] One of these cases did not involve a "declination." In that case, a civilian prosecution for an alleged sexual assault offense resulted in an acquittal. After the acquittal, an Army court-martial was brought for that same sexual assault offense, resulting in a conviction. (The Army court-martial also involved a second alleged sexual assault that resulted in an acquittal.)

[14] The report also notes several duplicates from the Army. It is unclear why the FOIA included duplicates, but the cases, as provided to the Joint Staff from the Army, did not include those duplicates and it did not affect the accuracy of the July 23rd letter.

[15] Responding to a request from Senator Gillibrand in the same time period, the Air Force provided a non-exhaustive sampling of 10 cases in which civilian authorities waived jurisdiction to the Air Force and the cases were

however, is a statement made by Col Don Christensen,[16] then-Chief of the Air Force Government Trial and Appellate Counsel Division, about the Air Force's prosecution of 15 sexual assault cases that civilian authorities declined to prosecute. As *Stars and Stripes* reported on January 9, 2013, "the Air Force prosecuted 96 sexual assault cases last year, including 15 cases in which civilian jurisdictions where the off-base assaults occurred declined the cases as unwinnable. Of those 15, 'so far, we have eight convictions,' Christensen said. 'We don't shy away from a tough case.'"[17]

Issue #4: Role of Commanders and Staff Judge Advocates in Prosecutions

Protect Our Defenders criticizes the Department for failing "to provide a single example of a commander 'insisting' a case be prosecuted," noting that, "[c]rucially, the military did not identify a single case where a commander sent a case to trial after a military prosecutor refused to prosecute."[18] These statements misunderstand the process.

The commander has the statutory authority and responsibility to make the ultimate decision regarding referral of a case to trial, but he or she does not make that decision in a vacuum. In the military justice system, a convening authority—the commander—may refer a charge for trial by a general court-martial *only if* the staff judge advocate concludes that (1) the specification alleges an offense, (2) the specification is warranted by the evidence, and (3) a court-martial would have jurisdiction over the offense. This conclusion is made in an Article 34 advice letter. The staff judge advocate's conclusions as to those matters are binding on the convening authority, and a military commander would not be able to overrule such a decision. Because it is not possible for a convening authority to overrule a staff judge advocate's determination that there is not, for example, sufficient evidence or jurisdiction, Protect Our Defenders' conclusion that there was no instance of a convening authority overruling a military lawyer who opposed bringing charges is misleading.

Of note, in the Article 34 advice letter, a staff judge advocate is also required to make a non-binding recommendation as to disposition, such as whether the charges *should not* be referred for trial by court-martial, even if the evidence is sufficient. The documents Protect Our Defenders reviewed did not include these letters.

Since the National Defense Authorization Act for Fiscal Year 2014 enacted review procedures for certain non-referral decisions there has not been a single instance in which a

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referred to trial by court-martial. In those 10 cases, eight of the accused were convicted of sexual assault offenses; one was convicted of non-sexual assault offenses; and one was acquitted, for a 90% conviction rate overall and an 80% conviction rate for sexual assault offenses.

[16] Col Christensen is currently President of Protect our Defenders as well as the lead author of the "Debunked" report.

[17] Nancy Montgomery, Stars and Stripes, *Air Force Strengthens Sex Assault Prosecutions with New Measures* (January 9, 2013), *available at* http://www.stripes.com/news/air-force-strengthens-sex-assault-prosecutions-with-new-measures-1.203291.

[18] "Debunked" at 2.

general court-martial convening authority has declined to refer a sexual assault case, as defined in Article 120(b) (as well as rape cases charged under Article 120(a) and forcible sodomy cases charged under Article 125 and attempts to commit any of those offenses charged under Article 80), for trial by court-martial where the staff judge advocate's article 34 advice letter recommended such referral. On the other hand, in some rare instances, general court-martial convening authorities have referred cases for trial contrary to the article 34 advice letter's recommendation against such referral.

Issue #5: Sentencing

The Protect Our Defenders report states that "[s]entencing decisions were arbitrary and unpredictable, potentially undermining the deterrence effect of the military justice system."[19] Disparity in sentencing is an issue in both the civilian and military justice systems. The Department has acknowledged that there have been cases of sentencing disparity in the court-martial system and has offered a detailed legislative proposal to address those concerns.

On December 28, 2015, the Assistant Secretary of Defense for Legislative Affairs transmitted to both the President of the Senate and the Speaker of the House the report of the Military Justice Review Group (MJRG)[20] along with the proposed Military Justice Act of 2016, which would enact the MJRG's recommendations. One of the major reform proposals in the bill was the adoption of judge-alone sentencing informed by sentencing parameters and criteria, which would provide sentencing guidance to military judges. While the parameters would not be binding, a military judge must explain a departure above or below the relevant parameter and such departures would be subject to appellate review. Unlike the current military justice system—in which court-martial members (the equivalent of jurors) also adjudge the sentence if they decide guilt or innocence—the Military Justice Act of 2016 would vest sentencing authority in the military judge in all non-capital cases.

The MJRG explained that these proposals were designed to "limit inappropriate disparity" in court-martial sentences while "maintain[ing] individualized sentencing and judicial discretion in sentencing."[21] Section 801 of the Military Justice Act of 2016 as proposed by DoD would accomplish this goal.

[19] "Debunked" at 4.

[20] Military Justice Review Group, *Report of the Military Justice Review Group* (December 22, 2015), available at http://www.dod.gov/dodgc/images/report_part1.pdf (hereinafter "MJRG Report").

[21] MJRG Report at 32.

THE VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

23 July 2013

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

As General Dempsey and I stated during our reconfirmation hearing, the military services have investigated and prosecuted a number of sexual assault cases after civilian authorities either did not pursue a full investigation or formally declined to prosecute. The Army and Marine Corps statistics we cited are below, as well as additional statistics from the Navy and Air Force. The statistics cover the last two years.

U.S. Army. Commanders exercised jurisdiction in 49 sexual assault cases that local civilian authorities declined to pursue.

- 32 of these cases were tried by court-martial, resulting in 26 convictions—an 81% conviction rate
  - 25 of the 26 (96%) convicted were sentenced to confinement and a punitive discharge or dismissal from the military
  - Six accused were acquitted of sexual assault charges
- Two of the accused were administratively discharged in lieu of trial by court-martial under other than honorable conditions
- 15 cases are still in the pre-trial phase of the military justice system

U.S. Marine Corps. Commanders exercised jurisdiction in 28 sexual assault cases that local civilian authorities declined to pursue.

- All 28 cases were tried by court-martial
- 16 cases resulted in convictions—a 57% conviction rate

U.S. Navy. Commanders exercised jurisdiction in six sexual assault cases that local civilian authorities declined to pursue.

- Three cases were tried by court-martial, resulting in one conviction—a 33% conviction rate
- Three cases are still in the pre-trial phase of the military justice system

U.S. Air Force. Commanders exercised jurisdiction in ten sexual assault cases that local civilian authorities declined to pursue.

- All ten cases were tried by court-martial, resulting in nine convictions—a 90% conviction rate

- Seven of the nine (78%) convicted were sentenced to confinement and/or a punitive discharge or dismissal from the military

I believe these statistics demonstrate the personal ownership commanders take in the discipline of their units—even in the face of often challenging circumstances.

In one case, for example, two soldiers engaged in sexual intercourse with a victim who was substantially incapacitated by alcohol. When questioned, both soldiers lied to civilian law enforcement. A civilian investigator accused the victim of lying, and concluded as much in the official report. After local authorities declined to prosecute, military investigators opened a case, located additional victims, and discovered evidence indicating that the soldiers had conspired to obstruct justice. Both soldiers were convicted by a court-martial, sentenced to confinement, and punitively discharged.

Another case involved a soldier's rape and forcible sodomy of his 10-year-old autistic step-daughter. Lacking physical evidence and a statement from the accused, civilian authorities declined to prosecute. Military investigators opened a case and located a key piece of evidence that corroborated the victim's allegations against the soldier. A court-martial convicted the soldier, sentencing him to 35 years confinement and a dishonorable discharge.

In cases like these and others, which independent authorities declined to pursue, commanders recognized the need to hold service members accountable for their crimes both for the sake of justice, and to preserve good order and discipline.

You also asked whether, conversely, civilian authorities have prosecuted cases that the military services did not pursue. The services currently do not track that information. However, after querying the field, the Army, Navy, and Air Force have responded that they have no recollection of cases in which commanders declined to prosecute, or a court-martial ended in an acquittal, and civilian authorities subsequently prosecuted. From time to time, civilian authorities prosecute cases that the military could prosecute, but that is the result of informal discussions regarding which system is better suited to handle the case rather than a result of a service formally declining prosecution.

I appreciate your energetic support for our determined efforts to eliminate the insider threat of sexual assault, and your continued concern for and support of our men and women in uniform.

Sincerely,

JAMES A. WINNEFELD, JR.
Admiral, U.S. Navy