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

Appellate Review Study

March 2023

Defense Advisory Committee

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

Appellate Review Study

March 2023

THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

March 30, 2023

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United States Senate
Washington, DC 20510

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United States Senate
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The Honorable Adam Smith
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Washington, DC 20515

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with the *Appellate Review Study* prepared by the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces [DAC-IPAD]. This stand-alone report is the first in a series that will culminate with a comprehensive report on the results of a multi-year study of recurring issues in appellate decisions in military sexual assault cases.

This report was prepared in response to a request from the General Counsel of the Department of Defense for the DAC-IPAD to study and report on appellate decisions in military sexual assault cases, focusing on recurring issues that arise in such cases and recommending reforms. The report provides an overview of the Committee's work to date in reviewing and assessing all military sexual assault cases decided in fiscal year (FY) 2021 with published military appellate court decisions, including comprehensive data, depicted in numerous charts, for the cases and appellate decisions.

For the FY 2021 appellate decisions studied for this report, the five specific issues recurring with the highest frequency included: (1) factual sufficiency; (2) post-trial processing and delay; (3) evidentiary issues; (4) prosecutorial misconduct or ineffective assistance of counsel; and (5) panel member selection. The report details the Committee's findings with respect to each.

In 2023, the Committee will continue its extensive study of appellate decisions, expanding to FY 2022 cases, with a focus on factual sufficiency and sentence appropriateness.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

Respectfully submitted,

Karla N. Smith, Chair

Marcia M. Anderson

Martha S. Bashford

William S. Cassara

Margaret A. Garvin

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I. APPELLATE REVIEW STUDY

In January 2022, the DoD GC requested that the DAC-IPAD study and report on appellate decisions in military sexual assault cases, focusing on "recurring" issues that arise in such cases and recommending reforms.[1] The DoD GC asked the Committee to consider the efficacy of the military appellate system's handling of those cases; to make recommendations for improving the training and education of military justice practitioners; and to examine the effects of recent legislative changes to the standards of appellate review of factual sufficiency and sentence appropriateness.[2]

In October 2022, the Case Review Subcommittee (CRSC), composed of four DAC-IPAD members,[3] was formed, and the Appellate Review Study was assigned to the CRSC. On December 7, 2022, following the DAC-IPAD's 25th Public Meeting, and on January 26, 2023, the CRSC held strategic planning sessions to discuss the Appellate Review Study and other projects.

This report provides an overview of the Appellate Review Study as briefed to the DAC-IPAD in June and September 2022; a summary of recurring appellate issues in the military sexual assault cases; and an outline of the next steps in the Appellate Review Study.

1 *See* Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, Request to Study Appellate Decisions in Military Sexual Assault Cases (Jan. 28, 2022) [Appellate Review Memo], available at Appendix A. At the time, the DAC-IPAD was suspended as the result of a zero-based review of all DoD advisory committees directed by the Secretary of Defense on January 30, 2021. On July 6, 2021, the Secretary authorized the DAC-IPAD to resume operations once its new members were duly appointed. In January 2022, the Secretary of Defense appointed 17 new members.

2 Only the factual sufficiency standard will be addressed in this report. Sentence appropriateness will be further analyzed when the new standard takes effect in cases in which all finding of guilty are for offenses that occurred after December 27, 2023.

3 The CRSC members are Ms. Martha Bashford (Chair), Ms. Meg Garvin, Ms. Jennifer Gentile Long, and Brigadier General James Schwenk, USMC (Ret.).

II. METHODOLOGY

In June 2022, the DAC-IPAD directed the review of military sexual assault (MSA) appellate cases decided in fiscal year 2021 (FY21) to establish a baseline for assessing the effect of the substantial changes ushered in by the Military Justice Act of 2016 ("MJA16"), including changes to the appellate standards of review of factual sufficiency and sentence appropriateness.[4]

To identify the relevant FY21 appellate decisions, the staff reviewed all decisions posted on the websites of the Courts of Criminal Appeals for each Military Department (CCAs) and the Court of Appeals for the Armed Forces (CAAF) published between October 1, 2020, and September 30, 2021, including rulings on writs and substantive motions. The staff identified 775 appellate decisions published during this time and the associated Entry of Judgment from trial to determine whether the case involved a conviction on a qualifying MSA offense. Qualified cases, including both contested trials and guilty pleas, were selected for further review.

For this study, the DAC-IPAD defined "qualifying military sexual assault offenses" as those involving nonconsensual penetration or sexual contact, including child victims, under Articles 120 and 120b, 92, 93, 133, and 134 of the UCMJ, and any attempt, conspiracy, or solicitation to commit any of the designated offenses.[5] While Article 120 and 120b offenses constitute the majority of penetrative and contact sexual assault offenses, the additional UCMJ articles were included to capture cases involving inappropriate sexual acts with members of a junior rank or military-specific crimes such as maltreatment of a subordinate or conduct unbecoming an officer.[6] Based on this selection criteria, 212 cases were selected for further analysis.

The staff reviewed all 212 appellate opinions from the CCAs and CAAF,[7] with some cases associated with more than one appellate opinion. For example, a case may have involved a writ petition, thus generating more than one appellate decision, or a case may have returned to the appellate court for a second review after a partial reversal. Some cases had two opinions: one published by the CCA and then a subsequent CAAF opinion. Accordingly, although the study involved 212 cases, the staff reviewed all 262 appellate opinions issued in those 212 cases.[8] The overall data points collected on each case can be found in Appendix B.

4 Changes include jurisdiction, punitive articles, referral, and the trial process. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Division E, 130 State. 2000 (2016) [Military Justice Act of 2016].

5 *See Transcript of DAC-IPAD Public Meeting* 31 (June 21, 2022; *Transcript of DAC-IPAD Public Meeting* 153 (June 22, 2022).

6 Examples within the UCMJ include: violation of lawful general regulation by recruiter or trainer engaging in inappropriate sexual relationship with trainee or prospective applicant (Article 92); maltreatment consisting of sexual act or sexual contact (Article 92); inappropriate intimate relationship between officer and warrant officer Article 133; and assimilated offenses, like sex trafficking in violation of 18 U.S.C. § 1590 (Article 134).

7 DAC-IPAD members also read a subset of the appellate opinions for this study, focusing on opinions addressing court-martial panel composition and member selection, factual sufficiency, evidentiary issues (specifically, Military Rules of Evidence [MRE] 412 and 513), and ineffective assistance of counsel.

8 Because of the nature of appellate review of the 212 cases, the 262 opinions published in those cases often spanned a longer time frame than just FY21.

TABLE 1. FY21 CASES WITH QUALIFYING MILITARY SEXUAL ASSAULT (MSA)

Service	Cases Reviewed	Identified as MSA cases	%
Army	289	99	34%
Navy	109	31	28%
Marine Corps	182	25	14%
Air Force	192	55	29%
Coast Guard	3	2	67%
Total	775	212	27%

TABLE 2. APPELLATE OPINIONS IN FY21 MSA CASES

Military Service	MSA Cases	Appellate Opinions in MSA Cases	Cases With More Than One CCA Opinion
Army	99	112	11
Navy	31	41	10
Marine Corps	25	29	3
Air Force	55	76	19
Coast Guard	2	4	2
Total	212	262	45

III. DESCRIPTIVE DATA FROM FY2021 APPELLATE REVIEW

This section describes characteristics from the 212 cases with a MSA conviction, and the 262 appellate decisions associated with those 212 cases.

A. Descriptive Data for the 212 MSA Cases

TABLE 3. MSA CASES WITH AND WITHOUT GUILTY PLEAS

Military Service	Guilty Plea	%	Contested	%	Mixed Plea	%
Army (N=99)	34	34%	61	62%	4	4%
Navy (N=31)	10	32%	20	65%	1	3%
Marine Corps (N=25)	15	60%	10	40%	0	0%
Air Force (N=55)	10	18%	43	78%	2	4%
Coast Guard (N=2)	0	0%	2	100%	0	0%
Total (N=212)	69	33%	136	64%	7	3%

For the 212 MSA cases, the reviewer recorded whether the accused pled guilty or contested the MSA offense or offenses, as shown in the final entry of plea. The majority of cases (64%) resulted in a contested trial rather than a guilty plea (33%). In 3% of the cases, the plea was mixed—that is, that the accused pled guilty to some but not all offenses at trial; however, all cases involving mixed pleas included at least one contested MSA.

TABLE 4. CONTESTED MSA CASES WITH CONVICTIONS BY A PANEL OF MEMBERS OR BY JUDGE ALONE

Military Service	Military Judge	%	Panel of Members	%
Army (N=60)*	21	35%	39	65%
Navy (N=20)	2	10%	18	90%
Marine Corps (N=10)	2	20%	8	80%
Air Force (N=43)	14	33%	29	67%
Coast Guard (N=2)	1	50%	1	50%
Total (N=135)	40	30%	95	70%

*In 1 Army case information was not available and is not represented

Of the 135 contested cases with convictions for a MSA offense, the majority (70%) were tried before a panel of members. Only 40 of those cases (30%) were tried by a military judge alone.

TABLE 5. MSA CASES WITH ADULT OR CHILD VICTIMS

Military Service	Adult Victim	%	Child Victim	%	Both	%
Army (N=99)	67	68%	31	31%	1	1%
Navy (N=31)	16	52%	14	45%	1	3%
Marine Corps (N=25)	13	52%	12	48%	0	0%
Air Force (N=55)	35	64%	18	33%	2	4%
Coast Guard (N=2)	2	100%	0	0%	0	0%
Total (N=212)	133	63%	75	35%	4	2%

The UCMJ defines a child as any person who has not attained the age of 16,[9] with the child's specific age determining the severity of the offense.[10] For example, any sexual act upon a child who has not attained the age of 12 is considered rape. The majority of the 212 cases (63%) involved adult victims; 35% of the cases involved a child victim. Four cases (2%) involved both child and adult victims.

TABLE 6. GUILTY PLEAS IN MSA ADULT VICTIM CASES

Military Service	Guilty Plea	%
Army (N=67)	20	30%
Navy (N=16)	6	38%
Marine Corps (N=13)	5	38%
Air Force (N=35)	3	9%
Coast Guard (N=2)	0	0%
Total (N=133)	34	26%

TABLE 7. GUILTY PLEAS IN MSA CHILD VICTIM CASES

Military Service	Guilty Plea	%
Army (N=31)	14	45%
Navy (N=14)	4	29%
Marine Corps (N=12)	10	83%
Air Force (N=18)	7	39%
Coast Guard (N=0)	0	0%
Total (N=75)	35	47%

9 10 U.S.C. § 920b (Article 120b(h)(4), UCMJ) (2019)

10 *See generally* 10 U.S.C. § 920b (Article 120b, UCMJ) (2019)

Table 3 shows that the accused pled guilty in 69 cases (33%) in this study, with an even split between adult victim cases (34 – Table 6) and child victim cases (35 – Table 7); however, the accused pled guilty at a significantly higher rate in child victim case (47% - Table 7) compared to adult victim cases (26% - Table 6). The accused pled not guilty in all four cases with both a child and adult victim.

B. Descriptive data from the 262 Appellate Court Opinions

The appellate information described in this section is drawn from 262 appellate court opinions,[11] including: the type of opinion issued, the appellate authority, the disposition of the appellate opinion, and recurring substantive issues (with "recurring" as those issues discussed most frequently by the appellate courts in their written decisions).

TABLE 8. FORM OF CCA DECISIONS

Military Service	Published	%	Summary Affirmance (unpublished)	%	Other Unpublished	%	Order	%
Army (N=112)	3	3%	45	40%	62	55%	2	2%
Navy (N=41)	12	29%	5	12%	22	54%	2	5%
Marine Corps (N=29)	6	21%	14	48%	9	31%	0	0%
Air Force (N=76)	2	3%	1	1%	69	91%	4	5%
Coast Guard (N=4)	3	75%	0	0%	1	25%	0	0%
Total (N=262)	26	10%	65	25%	163	62%	8	3%

This study reviewed four types of appellate court decisions: published opinions, unpublished opinions, summary affirmances, and orders.[12] A court's determination whether to publish an opinion is governed by the CCAs' Rules of Appellate Procedure.[13] Published opinions serve as precedent, while unpublished opinions are considered persuasive authority.[14] Both published and unpublished opinions provide an overview of the facts and legal reasoning within the appellate decision. Summary affirmances do not describe the issues that were raised in briefs or on the record, and do not present the court's analysis. Although summary affirmances are a subset of unpublished opinions, they are discussed separately in this report.

The majority of the 262 court decisions (62%) are unpublished. The Services differ widely in their use of summary affirmances: Air Force (one total for the cases reviewed in this study); Army (issued a summary affirmance in 40% of its cases); Navy (12%); and Marine Corps (48%) (even though the Navy and Marine Corps share a Service CCA).

11 Most of these appellate opinions were decided in 2021 but some were published before or later based on the inclusion of all the lower court opinions in cases with a CAAF or CCA decision from FY21.

12 An order is a directive issued by a court. Orders may direct the parties to act in a certain manner, for example sending a record of trial back to the military judge or directing a resentencing.

13 The Rules of Appellate Procedure for each CCA describe published opinions as "[t] hose that call attention to a rule of law or procedure that appears to be currently overlooked, misinterpreted, or which constitutes a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities." Each CCA's appellate procedures can be located on the individual CCA websites.

14 *Id.*

TABLE 9. STATUTORY AUTHORITY FOR CCA REVIEW

Military Service	Article 62	%	Article 66	%	Writs Act/Other	%
Army (N=112)	1	1%	110	98%	1	1%
Navy (N=41)	1	2%	35	85%	5	12%
Marine Corps (N=29)	0	0%	27	93%	2	7%
Air Force (N=76)	2	3%	71	93%	3	4%
Coast Guard (N=4)	0	0%	4	100%	0	0%
Total (N=262)	4	2%	247	94%	11	4%

The majority of the 262 decisions were reviewed at the CCAs pursuant to Article 66(b), UCMJ. Article 66(b) provides an automatic review by the CCA if the accused receives a punitive discharge, a confinement sentence of two years or more (including when the accused pled guilty), or the sentence includes death.[15] In addition to automatic appeals, the CCA may, on appeal by the accused, review: (1) cases in which the sentence extended to more than six months' confinement; and (2) cases in which the government previously filed an interlocutory appeal on a specific issue,[16] and may consider the government's appeal of a court-martial sentence on the grounds that it violated the law or was "plainly unreasonable."[17]

The government filed an Article 62 appeal[18] in four cases (2% - Table 9) for the following issues:

- Whether the military judge abused their discretion in denying the government's motion to admit the accused's testimony from his prior court-martial.[19]
- Whether the military judge erred in declaring a mistrial owing to cumulative error, including a determination by the military judge that a panel member was selected despite implied bias.[20]
- Whether the military judge erred in suppressing DNA evidence that resulted from a search and seizure.[21]
- Whether the military judge erred in granting the appellant's motion to dismiss for a violation of the right to a speedy trial.[22]

In all but one interlocutory appeal, the government prevailed at the CCA and at CAAF.[23]

15 Article 66(b)(3), UCMJ (2019); *See Transcript of DAC-IPAD* 108 (Sept. 21, 2022) (testimony that the vast majority of appeals are automatic reviews and that the accused does not need to file a notice of appeal for review).

16 Article 66(b)(1), UCMJ (2021).

17 Article 56(d)(1), UCMJ (2021).

18 Article 62, UCMJ (2021) (permits the government to appeal an order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding).

19 *United States v. Pyron,* No. 201900296R, 2022 WL 2764366, at *5 (N-M. Ct. Crim. App. Jul. 15, 2022) (holding that previous trial testimony should have been admitted and that the military judge's conclusions of law were erroneous).

20 *United States v. Badders*, Army MISC 20200735, 2021 WL 4498674, at *16 (A. Ct. Crim. App. Sept. 30, 2021) (holding that military judge abused discretion in post-trial finding of implied bias and in declaring mistrial based on cumulative error).

21 *United States v. Garcia*, 80 M.J. 379, 389 (C.A.A.F. 2020) (holding that military judge abused discretion in suppressing evidence from search).

22 *United States v. Harrington*, 81 M.J. 184, 191 (C.A.A.F 2021) (dismissing charge and specification with prejudice where service member's Sixth Amendment right to speedy trial was violated).

23 *Id.*

TABLE 10. DISPOSITIONS AT CCAS AND CAAF

Military Service	Affirmed	%	Findings and Sentence Set Aside	%	Findings Set Aside in part, Sentence Set Aside or Reassessed	%	Findings Affirmed, Sentence Set Aside or Reassessed	%	Other	%
Army (N=112)	83	74%	7	6%	13	12%	6	5%	3	3%
Navy (N=41)	26	63%	4	10%	5	12%	0	0%	6	15%
Marine Corps (N=29)	21	72%	4	14%	2	7%	0	0%	2	7%
Air Force (N=76)	43	57%	3	4%	11	14%	4	5%	15	20%
Coast Guard (N=4)	2	50%	2	50%	0	0%	0	0%	0	0%
Total (N=262)	175	67%	20	8%	31	12%	10	4%	26	10%

The court affirmed the findings and sentence in 175 (67%) of the 262 appellate decisions reviewed. In 20 cases (8%), the appellate court set aside the findings and the sentence.[24] In 31 cases (12%), the findings were set aside in part, and the sentence was set aside or reassessed. In 10 cases (4%), the appellate court adjusted the sentence but not the findings.[25] The final category of dispositions, "other," includes 26 cases (10%) with decisions that did not alter the findings or sentence but affected the case in some other way, including dismissals owing to a lack of jurisdiction, new trial orders, remands, and cases in which the Record of Trial was returned to the military judge or convening authority for correction.

24 The findings set aside were not limited to sexual assault offenses but included all offenses in the MSA cases.

25 In the majority of these cases, the sentence was adjusted to remedy post-trial processing delay.

IV. ASSESSMENT OF FY21 APPELLATE ISSUES

For this study, the DoD GC specifically requested that the DAC-IPAD "focus on recurring appellate issues."[26] For the 262 appellate decisions reviewed, the following five specific issues recurred with the highest frequency: (1) factual sufficiency; (2) post-trial processing and delay; (3) evidentiary issues; (4) prosecutorial misconduct or ineffective assistance of counsel; and (5) panel member selection.[27] The following section describes these errors, including a review of significant cases and data on the frequency with which error was found and relief was granted.

A. Factual Sufficiency

In FY21, one of the top recurring appellate issues at the CCAs was factual sufficiency.[28] Factual sufficiency review will be impacted by a recent legislative change affecting the appellate courts.

The "Old" Article 66 Factual Sufficiency Standard of Review

Before the FY21 NDAA amendments to Article 66, UCMJ, CCAs were required to review every case for the factual sufficiency of every conviction.[29] CCAs had plenary statutory authority to conduct a de novo review of the court-martial record, pursuant to Article 66, which provided that the CCAs

> may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[30]

For decades, the CCAs' broad power of factual sufficiency review was reaffirmed through case law at CAAF and its predecessor, the Court of Military Appeals.[31] Under this "old" Article 66 standard of review, the CCA determined, after weighing all of the evidence in the record of trial and making allowances for not having personally heard or seen the witnesses, that it was convinced of the accused's guilt beyond a reasonable doubt.[32]

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26 The memorandum did not define the term "recurring issues." There may be "recurring" appellate issues that are briefed by the parties but not reported here, if the courts chose not to discuss those specific issues, decided the appeal by summary affirmance, or denied a petition for discretionary review. Finally, there were no appellate decisions on writ petitions filed by victims' counsel in the FY21 cases, and none of the opinions indicated that they considered arguments made by victims' counsel on appeal.

27 The professional staff identified every issue discussed by the CCA and CAAF in their opinions, regardless whether relief was granted. After reviewing all 262 appellate decisions, the staff identified 33 appellate issues. The five issues most often discussed were factual and legal insufficiency (58); post-trial processing errors, including post-trial delay (70); ineffective assistance of counsel (33); and problems with various Military Rules of Evidence (50). Other frequently recurring appellate issues included instructional error, sentence inappropriateness, panel member selection, and prosecutorial misconduct. Among the CAAF decisions, the recurring issues differed slightly. While ineffective assistance of counsel, prosecutorial misconduct, and problems with Military Rules of Evidence also were addressed at CAAF, other recurring issues included whether issues not raised at trial were waived (6); guilty pleas and pretrial agreements (6); and jurisdiction (5).

28 *See supra* p. 8.

29 Report of the Military Justice Review Group, Part I: UCMJ Recommendations, Military Justice Review Group 610 (Dec. 22, 2015) [MJRG Report].

30 Excerpt from 10 U.S.C. § 866(d)(1) as in effect for findings of guilt entered before January 1, 2021.

31 Walter B. Huffman, Richard D. Rosen, Military Law: Criminal Justice & Administrative Process § 11:14, 1675 (2018-19 ed.).

32 CPT Christian L. Reismeier, Commentary: Awesome, Plenary, and De Novo: Appellate Review of Courts-Martial 27 Fed. Sent. R. 143 (Feb 2015).

The "New" Article 66 Factual Sufficiency Standard of Review

In the FY21 NDAA, Congress amended Article 66 to modify the scope of the CCA's power to review the factual sufficiency of a court-martial.[33] For findings of guilt entered on or after January 1, 2021, the language of Article 66 now provides, in relevant part, that the CCA may consider

> whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency of proof. After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> If, as a result of the review . . . , the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.[34]

The Military Justice Review Group (MRJG) proposed these changes to Article 66 in its December 2015 Report[35] recommending that instead of requiring the CCA to review every conviction for factual sufficiency, the burden should be on the accused to raise the issue of factual sufficiency and to make a specific showing of deficiencies in proof.[36] Upon such a showing, the CCA would be authorized to set aside a finding if the court was clearly convinced that the finding was against the weight of the evidence. Under the MJRG proposal, the CCA would weigh the evidence and determine controverted questions of fact, but it would be required to give deference to the fact that the trial court saw and heard the witnesses and other evidence.[37]

Although Congress did not change the factual sufficiency review standard when it passed the Military Justice Act of 2016, it did so five years later in the FY21 NDAA, essentially adopting the MJRG proposal.

Assessment of FY21 Appellate Opinions Discussing Factual Sufficiency

This study identified 58 cases in which the CCA discussed the factual sufficiency of a finding of guilty in its written opinion. In these 58 cases, the CCA applied the old Article 66 standard as the findings of guilt were entered before the new standard took effect on January 1, 2021. Thus, the CCA had plenary authority to affirm only such findings of guilty as it found correct in law and fact and as it determined, on the basis of the entire record, should be approved.[38] Under the old Article 66 standard, the CCAs were required to review every case for the factual sufficiency of every conviction; however, not every CCA written opinion discussed a factual sufficiency review.

33 Pub. L. 116-283, div. A, title V, § 542(b) Jan. 1, 2021 amended subsec. (d)(1) generally.

34 10 U.S.C. § 866(d)(1).

35 *Supra* note X, [MJRG Report] at 605-620.

36 *Id.* at 610.

37 *Id.*

38 *Supra* note X.

TABLE 11. FACTUAL SUFFICIENCY REVIEW, FY21

Military Service	Identified as MSA Cases	Factual Sufficiency Discussed on Appeal*
Army	99	9
Navy	31	16
Marine Corps	25	2
Air Force	55	30
Coast Guard	2	1
Total	212	58

*Cases in which the CCA discussed factual sufficiency in its written opinion.

TABLE 12. MSA FACTUAL SUFFICIENCY CASES WITH ALL FINDINGS OF GUILTY AFFIRMED

Military Service	Factual Sufficiency Discussed on Appeal	Finding of Guilty Affirmed	%
Army	9	5	56%
Navy	16	12	75%
Marine Corps	2	1	50%
Air Force	30	24	80%
Coast Guard	1	1	100%
Total	58	43	74%

Of the 58 cases in which the CCA discussed factual sufficiency, the CCA affirmed all findings of guilty in the vast majority of cases (43 of the 58 cases - 74%).

TABLE 13. MSA FACTUAL SUFFICIENCY CASES WITH AT LEAST ONE FINDING OF GUILTY REVERSED

Military Service	Factual Sufficiency Discussed on Appeal	Finding of Guilty Reversed	%
Army	9	4	44%
Navy	16	4	25%
Marine Corps	2	1	50%
Air Force	30	6	20%
Coast Guard	1	0	0%
Total	58	15	26%

Of the 58 cases in which the CCA discussed factual sufficiency, the CCA reversed one or more findings of guilty in 15 opinions. In 13 of those 15 opinions, the CCA affirmed at least one other conviction—and often multiple other findings of guilty—or affirmed a lesser-included offense, resulting in the CCA's reassessment of the sentence or a decision to remand the case for a rehearing on the sentence for the remaining convictions.

For example, in one Army case, the CCA reversed the conviction for production of child pornography as factually insufficient but affirmed multiple other findings of guilty for aggravated sexual assault of a child, indecent liberties with child, indecent acts with a child, and sodomy of a child.[39] The Army CCA set aside the conviction for production of child pornography because the appellate judges were not convinced beyond a reasonable doubt that the appellant actually took the alleged photo at issue. At trial, the government failed to introduce evidence of a photo, and no witness testified that they ever saw a photo; the victim testified only that she "saw a flash." In that case, the CCA affirmed the remaining convictions and reassessed the sentence to affirm a dishonorable discharge and confinement for 43 years.

In the two cases in which the CCA set aside and dismissed with prejudice all findings of guilty, the convictions were all sexual offenses. In those two cases, the court provided a detailed explanation of why the government's evidence failed to convince it beyond a reasonable doubt that the appellant was guilty.[40] As the Navy-Marine Corps CCA explained in one opinion: "There is simply too much reasonable doubt associated with the evidence in this case. We are not charged with deciding 'who to believe,' but simply whether the Government proved its case beyond a reasonable doubt. It did not."[41]

TABLE 14. FACTUAL SUFFICIENCY CASES WITH FINDING OF GUILTY REVERSED, MSA VS. NON-MSA

Military Service	MSA Reversed	%	Non-MSA Reversed	%
Army (N=4)	2	50%	2	50%
Navy (N=4)	3	75%	1	25%
Marine Corps (N=1)	1	100%	0	0%
Air Force (N=6)	3	50%	3	50%
Coast Guard (N=0)	0	0%	0	0%
Total (N=15)	9	60%	6	40%

Although all 58 cases involved a conviction for a military sexual assault, the CCA sometimes affirmed the MSA conviction(s) but reversed a non-MSA conviction (such as drug use) as factually insufficient. Of the 15 opinions in which the CCA reversed one or more findings of guilty, 9 involved reversal of a MSA conviction and 6 involved reversal of a non-MSA conviction.

39 *United States v. Adams*, ARMY 20130693, 2020 WL 4001871 (A. Ct. Crim. App. Jul. 13, 2020), *rev'd in part on other grounds*, 81 M.J. 475 (C.A.A.F. 2021).

40 *United States v. Gilpin*, No. 201900033, 2019 WL 7480783 (N-M. Ct. Crim. App. Dec. 30, 2019); *United States v. Lewis*, No. 201900049, 2020 WL 3047524 (N-M. Ct. Crim. App. June 8, 2020).

41 *Gilpin*, 2019 WL 7480783, at *15.

TABLE 15. MSA FACTUAL SUFFICIENCY CASES, ADULT VS. CHILD VICTIMS

Military Service	Adult Victim	%	Child Victim	%	Both	%
Army (N=9)	6	67%	3	33%	0	0%
Navy (N=16)	10	63%	4	25%	2	13%
Marine Corps (N=2)	2	100%	0	0%	0	0%
Air Force (N=30)	22	73%	6	20%	2	7%
Coast Guard (N=1)	1	100%	0	0%	0	0%
Total (N=58)	41	71%	13	22%	4	7%

Of the 58 cases in which the CCA discussed factual sufficiency, 41 cases involved an adult victim of military sexual assault, 13 cases involved a child victim of military sexual assault, and 4 cases involved both adult and child victims.

TABLE 16. MSA FACTUAL SUFFICIENCY CASES WITH FINDING OF GUILTY REVERSED, ADULT VS. CHILD VICTIMS

Military Service	Adult Victim	%	Child Victim	%	Both	%
Army (N=4)	2	50%	2	50%	0	0%
Navy (N=4)	4	100%	0	0%	0	0%
Marine Corps (N=1)	1	100%	0	0%	0	0%
Air Force (N=6)	5	83%	1	17%	0	0%
Coast Guard (N=0)	0	0%	0	0%	0	0%
Total (N=15)	12	80%	3	20%	0	0%

Of the 15 opinions in which the CCA reversed one or more findings of guilty, 12 cases involved an adult victim, and 3 cases involved a child victim.

B. Post-trial Processing and Delay

Post-trial processing errors were among the most frequently recurring issues discussed by the appellate courts. Many of the discussions grappled with recent legislative changes aimed at streamlining the process for memorializing the results of the trial and transferring the record of trial to the appellate courts.[42] These changes, introduced by the Military Justice Act of 2016 (MJA16), took effect on January 1, 2019, and apply to cases in which all offenses were committed on or after that date.[43]

42 Report of the Military Justice Review Group, 558 (2015), available at https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf.

43 Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016), implemented in the 2019 Rules for Courts-Martial [R.C.M.] by Executive Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018) [EO 13825].

Under the old procedural rules, the convening authority's action was the final step before a record of trial was forwarded to the CCA and the case was docketed. In *United States v. Moreno*, CAAF established a presumption of facially unreasonable delay where: the convening authority did not take action within 120 days of sentencing (*Moreno I*); the case was not docketed with the CCA within 30 days of the convening authority's action (*Moreno II*); or the CCA did not render a decision within 18 months of docketing (*Moreno III*).[44] In the years since *Moreno* was decided, the Services have reported a significant decrease in post-trial processing delays.[45]

The MJA16 changed the role of the convening authority in post-trial processing, eliminating the requirement that the convening authority take action on the sentence prior to entry of judgment. In fact, such action is now prohibited, except in limited circumstances.[46] Under the new procedural rules, the convening authority's action is not required in cases where all offenses were committed on or after January 1, 2019. Although CAAF has not yet addressed the issue,[47] the CCAs have adopted a new timeline in response to the changes, concluding that a presumptively unreasonable delay occurs where more than 150 days elapse between sentencing and docketing.[48]

TABLE 17. NUMBER OF CCA OPINIONS DISCUSSING POST-TRIAL PROCESSING ISSUES

Service	Post-Trial Delay	%	Other Post-Trial Processing Errors	%	Both	%
Army (N=22)	8	36%	13	59%	1	5%
Navy (N=5)	1	20%	4	80%	0	0%
Marine Corps (N=4)	0	0%	4	100%	0	0%
Air Force (N=37)	16	43%	11	30%	10	27%
Coast Guard (N=2)	1	50%	0	0%	1	50%
Total (N=70)	26	37%	32	46%	12	17%

This study identified 70 opinions discussing post-trial processing issues, including 26 opinions discussing post-trial delay; 32 opinions discussing other post-trial processing errors; and 12 opinions discussing both post-trial delay and other post-trial processing issues. Most of these decisions were issued by the Air Force Court of Criminal Appeals, which in many cases considered these issues *sua sponte*.

44 63 M.J. 129, 142 (C.A.A.F. 2006).

45 *See* Reports to Congress from the Services for FY18, FY19, FY20, and FY21, available at Joint Service Committee on Military Justice website: https:/jsc.defense.gov/Annual-Reports/. *See also United States v. Rivera*, 81 M.J. 741, 744 (N-M. Ct. Crim. App. 2021) (noting that "[s]ince [*Moreno*], this Court has virtually eliminated *Moreno III* violations and the Navy and Marine Corps have done likewise with *Moreno I and II* violations"); *Transcript of DAC-IPAD Public Meeting* 206-08 (Sept. 21, 2022) (explaining that backlog of cases was cleared after CAAF issued *Moreno* decision).

46 10 U.S.C. § 860a (2018).

47 *See United States v. Anderson*, 82 M.J. 82, 86 n.2 (C.A.A.F. 2022) (acknowledging that "the amendments to the 2017 National Defense Authorization Act and R.C.M. 1109-1112 of the 2019 Rules for Courts-Martial call into question the continued validity of the *Moreno* timelines," but concluding resolution of the issue was not necessary to resolve appeal where charges were referred prior to effective dates of amendments).

48 *United States v. Rivera*, 81 M.J. 741, 745-46 (N-M. Ct. Crim. App. 2021); *United States v. Brown*, 81 M.J. 507, 510 (A. Ct. Crim. App. 2021); *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020); *United States v. Tucker*, 82 M.J. 553, 570 (C.G. Ct. Crim. App. 2022).

TABLE 18. NUMBER OF CCA OPINIONS DISCUSSING AND GRANTING RELIEF FOR POST-TRIAL DELAY

Military Service	Post-Trial Delay	Relief Granted	%
Army	9	5	56%
Navy	1	0	0%
Marine Corps	0	0	0%
Air Force	26	3	12%
Coast Guard	2	1	50%
Total	38	9	24%

The CCAs granted relief for post-trial delay in nine cases, remedying the delay in most cases with modest reductions to the sentence to confinement ranging from ten days to seven months.[49] In only one case did the CCA grant more substantial relief, setting aside the findings and sentence to remedy both post-trial delay amounting to a due process violation and the military judge's failure to conduct sufficient inquiry into alleged unlawful command influence.[50]

Most of the opinions discussing other post-trial processing issues addressed errors in the convening authority's action on the sentence in cases where all offenses were committed before January 1, 2019, but charges were referred after that date. The CCAs reached different conclusions as to whether, in those circumstances, a convening authority was required to explicitly state whether the sentence was approved, and in case of error in the action, whether the CCA had jurisdiction and was required to analyze for prejudice before remanding for corrective action.[51]

In *United States v. Brubaker-Escobar*,[52] CAAF resolved these issues when it held that a convening authority errs by failing to take action to approve, disapprove, commute or suspend a sentence in whole or in part if the accused is found guilty of at least one offense committed before January 1, 2019. CAAF concluded the error is procedural rather than jurisdictional, at least where charges were referred after January 1, 2019, and the accused is not entitled to relief absent material prejudice to a substantial right of the accused.[53]

Post-trial processing errors are unique in that the error is often plain, and the only issue the appellate court must decide is the appropriate remedy. In 24 cases, the CCAs granted relief for post-trial processing errors other than delay, including errors in the convening authority's action. In 16 of these cases, the relief granted did not affect the findings or sentence: the CCAs corrected scrivener's errors in post-trial documents, ordered the government to produce missing portions of the transcript of trial; or ordered a new post-trial processing or remanded the case to resolve an ambiguity in the convening authority's action. In most of the remaining cases, the CCAs disapproved a portion of the sentence due to ambiguity or errors in the convening authority's action on those portions of the sentence. The CCA set aside the findings and sentence in just one case, due to the absence of a substantially verbatim transcript of trial.

49 All but two of the post-trial delay cases were subject to the *Moreno* standards.

50 *United States v. Leal*, 81 M.J. 613, 624 (C.G. Ct. Crim. App. 2021).

51 *Compare United States v. Brown*, No. ACM 39854, 2021 WL 3701691, at *3 (A.F. Ct. Crim. App. Aug. 19, 2021) (holding that Service Court must remand for corrective action where convening authority's failure to take action on sentence fails to satisfy requirement of applicable Article 60, UCMJ), *with United States v. Hale*, ARMY 20190614, 2021 WL 2005916, at *1 n.2 (A. Ct. Crim. App. May 19, 2021) (concluding that convening authority's error in failing to take action was neither jurisdictional nor prejudicial to substantial right of the accused).

52 81 M.J. 471, 474 (C.A.A.F. 2021).

53 *Id.* at 475.

TABLE 19. NUMBER OF CCA OPINIONS DISCUSSING AND GRANTING RELIEF FOR OTHER POST-TRIAL PROCESSING ERRORS

Military Service	Other Post-Trial Processing Errors	Relief Granted	%
Army	14	6	43%
Navy	4	3	75%
Marine Corps	4	2	50%
Air Force	21	12	57%
Coast Guard	1	1	100%
Total	44	24	55%

C. Conduct of Counsel: Prosecutorial Misconduct and Ineffective Assistance of Counsel

Prosecutorial Misconduct

Prosecutors, military or civilian, occupy a special role as the government's representative in the courtroom, and their actions can affect the fairness of the criminal justice process at any stage, whether during the investigative, charging, or adjudicative phases of a case.[54] Courts exercise some oversight over the prosecution function by remedying errors caused by prosecutorial misconduct—defined broadly as action or inaction by a prosecutor in violation of some legal norm or standard, such as a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.[55]

A prosecutor's arguments at trial amount to prosecutorial misconduct when the comments "overstep the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[56] In general, counsel may argue facts in evidence and reasonable inferences drawn from the evidence. However, when a prosecutor deliberately misstates the evidence in comments to the factfinder, attacks other parties to the case, or appeals overtly to the passions or prejudices of the factfinder, courts may identify and remedy the error. Reversal of the findings, or setting aside the sentence, may occur when the error negatively influences the appellant's rights under Article 59, UCMJ.[57] In the context of an improper argument, courts will reverse a finding only when "the trial counsel's comments taken as a whole, were so damaging that the court cannot be confident that the appellant was convicted or sentenced on the basis of the evidence alone."[58]

Overview of decisions reviewed

In most FY21 decisions reviewed, the prosecutorial misconduct claimed by appellant involved allegations of improper argument. In all but one instance, the CCA either did not find error, or found the errors, considered in conjunction with curative measures taken by the military judge, were not so significant as to warrant reversal.

54 *United States v. Hillman*, 621 F.3d 929, 1465 (10th Cir. 2011); *United States v. Carter*, 236 F.3d 777, 792-3v (6th Cir. 2001).

55 *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996).

56 *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005).

57 *Id.* at 179; 10 U.S.C. § 859.

58 *United States v. Andrews*, 77 M.J. 393, 401-02 (C.A.A.F. 2018); *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

Decisions finding error

In *U.S. v. Norwood*, CAAF found counsel improperly vouched for the victim's veracity during argument, but when balanced against the weight of the evidence and the military judge's instructions, appellant was not prejudiced.[59] CAAF found that trial counsel's sentencing argument was inappropriate and prejudicial because it invited the panel members to adjudge a sentence based on how they might be judged in society for the sentence they assess in a sexual offense case, rather than on the evidence presented.[60] In setting aside the sentence and ordering a new sentence hearing, the Court explained, "an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument that we have repeatedly, and quite recently, condemned," and likely contributed to a higher sentence than appellant might otherwise have received.[61]

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel.[62] This right applies to Service Members facing courts-martial.[63] Attorneys representing criminal defendants incur responsibilities to thoroughly investigate the facts and law; uphold a duty of loyalty to the client; and provide competent advice to a defendant in furtherance of the exercise of their rights. Effective advocacy is essential to the reliability of and public confidence in the criminal justice process. On appeal, military courts evaluate defense counsel's performance using the standard articulated by the U.S. Supreme Court in in *Strickland v. Washington*.[64] In general, counsel are presumed competent.[65] However, if an appellant can demonstrate both that counsel's performance was deficient in a specific way, and that deficiency renders unreliable the trial outcome, the conviction and/or sentence may be set aside.

Overview of decisions reviewed

Ineffective assistance of counsel was one of the most frequently raised issues in the decisions reviewed for this study, including a wide variety of conduct by counsel in preparing and litigating a case. The appellate courts scrutinized the substantive conduct of counsel for the potential deficiency—e.g.., whether there was in fact a basis to file a particular motion, and the likelihood that such a motion would have been successful—and then separately analyze whether, had the error occurred, it would have affected the outcome of the trial. In none of these recently issued decisions was relief granted for deficient performance by defense counsel. Examples of the types of issues discussed include:

- Failure to object to evidence;
- Failure to request a specific jury instruction;
- Failure to challenge a panel member for bias;
- Failure to seek certain evidence, interview witnesses, or file specific motions;
- Inadequate preparation of a presentencing case;
- Improper advice as to the meaning and effect of a guilty plea or the terms of a pretrial agreement; and
- Improper advice regarding the accused's right to testify.

59 *United States v. Norwood*, 81 M.J. 12, 20-21 (C.A.A.F. 2021)

60 *Id*.

61 *Id*.

62 U.S. Const. Amend. VI; *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

63 *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011); *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)

64 *Strickland*, 466 U.S. at 694.

65 *United States v. Cronic*, 466 U.S. 648, 658 (1984).

No single issue was raised repeatedly so as to highlight a potentially systemic issue regarding the competence or training of military and civilian defense counsel. Given the importance of the right to counsel, and the broad spectrum of issues that may arise in the course of representing a criminal defendant at trial, it is expected that allegations of ineffective assistance will recur with some frequency. Military justice practitioners must monitor these discussions in appellate cases for recurring trends and take note of instances in which a deficiency is found.

Decision finding error

In *United States v. Westcott*,[66] the Air Force Court of Criminal Appeals found civilian and military defense counsel's performance deficient for failing to ensure the findings instructions defined "consent" as it related to a sexual contact offense of which appellant was convicted. Counsel had reviewed the proposed instructions before the military judge read them to the panel, listened as the military judge instructed the panel, and at no point objected to the missing instruction. The Court concluded that counsel's failure to object was an oversight, as opposed to a strategic or tactical choice, for which there was no reasonable explanation;[67] however, the Court found appellant was not due any relief because the defense counsel error did not contribute to appellant's conviction. Moreover, the instructions provided did permit the panel to consider related issues, such as mistake of fact as to consent, in line with the defense's theory of the case.

D. Evidentiary Issues

Rules of Evidence, in any court, are a collection of rules that govern admissibility of evidence at trial; their purpose includes the fair administration of justice as well as "ascertaining the truth and securing a just determination."[68] The Military Rules of Evidence (MREs) are almost identical to the Federal Rules of Evidence. In any trial, what evidence can or should be shared with the factfinder will be contested. Evidentiary issues were one of the recurring issues frequently discussed by the CCAs. In this study, there were 50 CCA opinions with discussion of MREs, most often pertaining to hearsay, search and seizure, confessions and admissions, and MREs 513 and 412. The appellate court opinions discussing MRE 513 and MRE 412 appear below.

Military Rule of Evidence 513: psychotherapist-patient privilege

In total, eight decisions involving MRE 513 were reviewed in this study—3 decisions issued by CAAF, and an additional 5 decisions from the CCAs. This section provides an overview of MRE 513 and the decisions in which this rule of privilege was discussed.

The military's psychotherapist–patient privilege was codified into the Military Rules of Evidence more than 20 years ago.[69] MRE 513 protects a patient from having to disclose and prevents others from disclosing a "confidential communication made between the patient and the psychotherapist or an assistant to the psychotherapist . . . [when] such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[70] Although there is no equivalent privilege delineated in the Federal Rules of Evidence, the Supreme Court has recognized a psychotherapist–patient privilege in federal common law, noting its importance because therapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears."[71]

66 No. ACM 39936, 2022 WL 807944 (A.F. Ct. Crim. App. Mar. 17, 2022).

67 *Id*. at *19 ("Trial defense counsel had the obligation to carefully review the draft instructions and propose their own instructions based upon the facts of Appellant's case and the state of the law.").

68 Fed. R. Evid. 102, Purpose.

69 *See* Exec. Order No. 13, 140, 64 Fed. Reg. 55, 115 (Oct. 12, 1999); Mil. R. Evid. 513(a).

70 Mil. R. Evid. 513(a).

71 *Jaffee v. Redmond,* 518 U.S. 1, 2 (1996).

Beyond the rule itself, MRE 513 contains several parts: definitions, a description of who may claim the privilege, and seven enumerated exceptions to the rule,[72] as well as a lengthy description of the procedure to determine admissibility of patient records or communications.[73] Despite the rule's complexity, in 2006, CAAF began a long stretch during which it issued no decisions interpretation MRE 513. That changed in 2021, when CAAF took up three cases pertaining to MRE 513, each addressing a different issue: the scope of the rule itself; the in camera review process; and enumerated exceptions to the privilege.

In July 2022, CAAF decided *U.S. v. Mellette,* addressing whether the scope of communications between a patient and psychotherapist under MRE 513 extends to diagnoses and treatments.[74] Before *Mellette*, the CCAs were split on how broadly to interpret privileged "communications" between a psychotherapist and patient.[75]

At trial, the military judge denied a defense motion for in camera review and disclosure of the victim's mental health records, finding that the records were privileged and that diagnoses and treatment were not "segregable" from any privileged communications.[76] The Navy-Marine Court of Criminal Appeals (NMCAA) affirmed, concluding that privileged communications between a patient and psychotherapist for the purposes of facilitating diagnosis and treatment include the actual "diagnosis and treatment plan."[77]

CAAF disagreed with the lower court's broad interpretation of communications. Relying on the Supreme Court's statutory interpretation of evidentiary privileges, it concluded they are to be "narrowly construed."[78] CAAF looked to the text of MRE 513(a) and framed the ultimate question as follows: whether the word "communications" should be "interpreted broadly to include all evidence that in some way reflects, or is derived from, confidential communications."[79] In a 3-2 decision, CAAF found that the privilege was limited to "communications" between the patient and psychotherapist. In making this decision, the Court stated that the judges' opinion was based not on their "views on the proper scope" but only on their interpretation of the text itself, reasoning if the President intended for the rule to govern information outside of the "communications" he would have so specified.

72 Mil. R. Evid. 513(d)(1)-(7). Exceptions include: when the patient is dead, the communication is evidence of child abuse or neglect, when a law imposes a duty to report, when the psychotherapist believes that the patient is a danger to a person, if the communication clearly contemplated a future crime, disclosure is necessary to ensure the safety and security of military personnel, when an accused offers statements or other evidence concerning his mental condition in defense.

73 Mil. R. Evid. 513(e)

74 *United States v. Mellette,* 82 M.J. 374 (C.A.A.F. 2021).

75 *United States v. Rodriguez*, No ARMY 20180138, 2019 WL 4858233, (A. Ct. Crim. App. Oct. 1, 2019) (holding that neither the diagnosed disorder nor the medications prescribed to treat the disorder are "confidential communications" under the privilege; *H.V. v. Kitchen*, 75 MJ 717, 719-721 (USCG Ct. Crim App. 2016) (holding both the diagnosis as well any prescribed medications are covered by the privilege).

76 *United States v. Mellette*, 81 M.J. 681, 691 (N-M. Ct. Crim App. 2021).

77 *Id.*

78 *United States v. Mellette,* 82 M.J. 374, 379 (C.A.A.F. 2021).

79 *Id*. at 378.

Duty to Report Exception under MRE 513

In *United States v. Beauge*, CAAF explored the contours of the enumerated "duty to report" exception to the psychotherapist-patient privilege.[80] Under MRE 513, a psychotherapist must disclose to the authorities "when federal law, state law, or service regulation imposes a duty to report information contained in a communication."[81] Generally, these mandated disclosures involve the potential for self-harm or certain types of abuse—for example, a child's report of sexual abuse. In *Beauge*, CAAF granted review on the issue of whether the lower court created an "unreasonably broad scope of the psychotherapist-patient privilege" by denying the defense access to the child victim's mental health records after her therapist reported the child's sexual abuse to state authorities.[82] The defense was provided the audio recording and investigative summary of the report in discovery, but was denied the remaining records of the communications between the therapist and the victim. The appellant argued, on the basis of the plain language of the rule, that the privilege was pierced to all communications once a mandated report was made.

As in *Mellette*, CAAF looked to principles of statutory construction.[83] Here, the Court clarified that the privilege applies not only to communications between a therapist and patient but also to "legally required reports to state authorities."[84] CAAF went on to find that the underlying communications should not be viewed as a "unitary whole" with the mandated state reporting requirements, because to do so would violate MRE 513(e)(4), which states that disclosure should be narrowly tailored.[85]

In-camera Review and the Constitutional Exception

Before ordering the production or disclosure of records under MRE 513, a military judge may conduct an in camera review to determine the admissibility of protected records or communications if the moving party establishes four factors:

- a specific, credible factual basis demonstrates a reasonable likelihood that the records would contain information admissible under an exception to the privilege;
- the requested information meets an enumerated exception;
- the information is not merely cumulative; and
- the party made reasonable efforts to obtain the same or substantially similar information from non-privileged sources.[86]

The second factor for in-camera review is that the requested information must meet an enumerated exception to pierce the MRE 513 privilege. The CCAs have split on whether to recognize a constitutional exception that was enumerated as MRE 513(d)(8) until 2015, when it was removed from the enumerated exceptions. [87]

80 *United States v. Beauge*, 81 M.J. 157 (C.A.A.F. 2021).

81 Mil. R. Evid. 513(d)(3), UCMJ.

82 *United States v. Beauge,* 81 M.J. 301 (C.A.A.F. 2021) (order granting review).

83 *Beauge*, 81 M.J. at 162.

84 *Id.* at 163.

85 *Id.* at 165.

86 Mil. R. Evid. 513(e)(3)(A)-(D), UCMJ.

87 *See* National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014). This legislation removed the "constitutionally required" exception under Mil. R. Evid 513(d)(8).

In a published decision in *United States v. Tinsley*, the Army Court of Criminal Appeal (ACCA) rejected the appellant's argument that in camera review of a victim's mental health records was constitutionally required, concluding "that the military courts do not have the authority to either read back the constitutional exception in Military Rule of Evidence 513, or otherwise conclude that the exception still survives notwithstanding its explicit deletion."[88] In *Mellette*, discussed above, the NMCAA reached the opposite conclusion, finding that in camera review of the victim's mental health records was constitutionally required, based on an accused's "weighty interests of due process and confrontation," because the victim's inability to remember key dates went to credibility.[89] CAAF denied a petition for review of *Tinsley* and decided *Mellette* on other grounds, leaving unresolved the question of whether a constitutional exception can be considered as part of the authorization process for in-camera review.[90]

The disagreement between the CCAs over whether to recognize a constitutional exception to the psychotherapist-patient privilege in determining whether to conduct in-camera review will likely result in further litigation, especially as it relates to the discovery of documents related to MRE 513. Specifically, the issue of whether military courts, for purposes of an in-camera inspection, can read into the Rule a constitutional exception will most likely center on rights to discovery in conjunction with the Sixth Amendment right to confront witnesses.[91]

Military Rule of Evidence 412

MRE 412, commonly referred to as the rape shield rule, prohibits the introduction of any evidence offered to prove that an alleged sexual assault victim engaged in other sexual behavior or evidence offered to prove an alleged victim's sexual predisposition.[92] This rule is "intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions."[93] The rule itself, like MRE 513, contains a definition section, three exceptions, and a relevancy test for admissibility, as well as procedures for conducting hearings on the issue. This study reviewed eight appellate opinions discussing the application of MRE 412, including four AFCCA decisions, two ACCA decisions, and two NMCCA decisions.

In the majority of decisions reviewed for this study, the CCA found or assumed error involving the admission or exclusion of MRE 412 evidence. Two cases resulted in findings being set aside on the sexual assault charge; in three cases the court determined that the error or assumed error was harmless.

88 *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021), *petition denied*, 82 M.J. 372 (C.A.A.F. 2022).

89 *Mellette*, 81 M.J. at 694. The NMCCA did not find that the error materially prejudiced Appellant's substantial rights.

90 *See also United States v. McClure*, 82 M.J. 194 (C.A.A.F. 2022) (granting review of issue "Whether the Military Judge abused his discretion when he denied defense's motion for access to JS's mental health records under M.R.E. 510 and 513 and refused to review the mental health records in camera to assess whether a constitutional basis justified the release of the records to the defense"), *aff'd by summ. disp.*, __ M.J. __ (affirming in light of *Mellette*, assuming error but finding no prejudice).

91 *See Beauge*, 82 M.J. at 167 (noting that "the debate on the confrontation issue is limited by the Supreme Court's decision in *Pennsylvania v. Ritchie*, in which a plurality of the Court opined that the Sixth Amendment right 'to question adverse witnesses…does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony'").

92 Mil. R. Evid. 412(a), UCMJ.

93 *United States v. Carpenter*, 77 M.J. 285 (C.A.A.F 2018).

Both cases setting aside findings related to the military judge's ruling excluding evidence. In the first case, the appellant filed a motion to introduce evidence of the victim's behavior before the sexual assault under two MRE 412 exceptions: behavior of the victim to prove consent and the appellant's constitutional right to confrontation. The Air Force CCA found the military judge's reasoning flawed and concluded he abused his discretion by excluding evidence that the victim and appellant were playing a "sexually provocative game" of Jenga in the lead-up to the sexual assault.[94] Specifically, the court found that the evidence went directly to the defense's theory of consensual sex while the appellant was blacked out and that the behavior between the appellant and the victim during the sexually suggestive drinking game had "some tendency to lead the court members to find she may have also consented to the engage in sexual intercourse."[95] Further, the court found that the evidence was relevant to a mistake of fact defense.

In the second decision that set aside findings, the issue on appeal also invoked the appellant's constitutional right to confrontation. At a motions hearing, the defense sought to introduce evidence of the victim's diagnosis of chlamydia, and a doctor testified that this particular STD could have caused intercourse to be painful. The defense moved to have the evidence introduced to rebut the victim's testimony that the intercourse was painful. In his ruling, the judge made a factual finding that the victim's pain did not derive from a chlamydia infection but was instead caused by her intercourse with the appellant. The Army CCA found that the appellant was denied his constitutional right to confront the victim. The court also found that the military judge's finding of fact that the chlamydia could not have caused pain, despite testimony from a medical doctor, invaded the "province of the panel."[96]

In the additional three cases that found or assumed error, the CCA concluded:

- The military judge erred by admitting evidence of the victim's virginity as evidence of sexual predisposition, but the prejudicial effect was minimal in light of the totality of the evidence adduced at trial;[97]
- Assuming without deciding that the military judge erred by precluding the defense from cross examining the victim about alleged consensual sexual behavior with the accused immediately prior to the charged offense, the error was harmless beyond a reasonable doubt, where the evidence supporting conviction was not overwhelming but the victim's testimony on cross examination would not have changed the members' perception of her credibility;[98]
- The military judge abused his discretion by precluding the defense from cross examining the victim about a sexually explicit video recording to prove consent, where he failed to consider admissibility of the evidence to impeach the victim's character for truthfulness, but the error was harmless beyond a reasonable doubt where her testimony was not the only evidence and cross examination regarding the recordings would not have meaningfully undermined her credibility.[99]

94 *United States v. Harrington*, No. ACM 39223, 2018 WL 4621100, at *4 (A.F. Ct. Crim. App. Sept. 25, 2018).

95 *Id.* at *5.

96 *United States v. Cuevas-Ibarra*, ARMY 20200146, 2021 WL 2035139, at *5 (A. Ct. Crim. App. May 21, 2021).

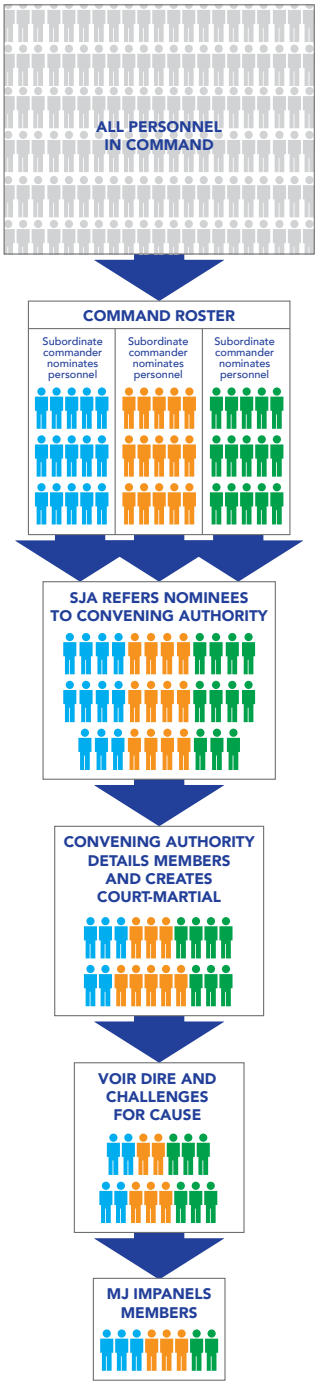
97 *United States v. Olson*, ARMY 20190267, 2021 WL 1235923, at *6 (A. Ct. Crim. App. Apr. 1, 2021). The Army court noted that other Services have reached the opposite conclusion, holding that a victim's virginity is not evidence of sexual predisposition under M.R.E. 412 and is therefore admissible. *Id.* (citing *United States v. Price*, 2014 WL 2038422 (A.F. Ct. Crim. App. Apr. 22, 2014) and *United States v. White*, 62 M.J. 639 (N-M. Ct. Crim. App. 2006)).

98 *United States v. Horne,* ACM 39717, 2021 WL 2181169, at *37 (A.F. Ct. Crim. App. May 27, 2021), *aff'd on other grounds*, 82 M.J. 283 (C.A.A.F. 2022).

99 *United States v. Martinez,* ACM 39903 (f rev), 2022 WL 1831083, at *44 (A.F. Ct. Crim. App. May 31, 2022).

E. FY21 ppellate Opinions Addressing Court-Martial Panels

In December 2022, the DAC-IPAD heard testimony from senior judge advocates who described how a court-martial panel is convened.[100] In January 2023, the CRSC also heard from civilian defense attorneys who described their experiences with court-martial panel selection processes.[101] Despite some differences between the Services and between different convening authorities within each Service, they all described a process by which the pool of prospective panelists is gradually narrowed to a venire from which the members are selected for specific courts-martial.



Typically, subordinate commanders under the convening authority's jurisdiction nominate a certain number of officers and enlisted personnel who are "best qualified" according to the criteria of Article 25, UCMJ,[102] and provide the SJA with a member questionnaire and/or Enlisted or Officer Record Brief[103] (ERB/ORB) from each nominee. After collecting nominations from the subordinate commands, the SJA screens the nominees for eligibility and availability and compiles a package for the convening authority to consider, consisting of the member questionnaires and/or ERB/ORBs as well as a roster of every eligible Service member under that command. The convening authority is not limited to nominated personnel or even to the command roster, but may borrow personnel from other commands. After the convening authority selects the members, the SJA drafts a Court-Martial Convening Order (CMCO). The CMCO creates the court-martial and details members to the court-martial panel. All of the Services typically use standing panels that are available to any court-martial convened within a specified time period, but the convening authority may also detail panelists to a specific court-martial.

Once the panel members are sworn and the court-martial is assembled, the military judge and counsel may whittle down the panel even more through the voir dire process. Military judges uphold the accused's right to an impartial panel by applying R.C.M. 912(f)(1)(M), which requires that a member be excused for actual bias when they have "formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged," and R.C.M. 912(f)(1)(N), which requires that a member be excused for implied bias when they "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." While issues of actual and implied bias often arise during pretrial voir dire, "A party may challenge a member for cause 'during trial when it becomes apparent that a ground for challenge may exist.'"[104]

100 *Transcript of DAC-IPAD Public Meeting* 9-94 (Dec. 6, 2022).

101 *Transcript of CRSC Meeting* 31-126 (Jan. 23, 2023).

102 Article 25(e)(2), UCMJ, provides that the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament." *See also* RCM 503(a)(1)(A) (providing that the convening authority shall detail qualified persons as members for courts-martial); RCM 502(a)(1) (requiring that the "members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament").

103 These documents provide a one-page summary of a person's military career as well as demographic information.

104 *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015) (quoting R.C.M. 912(f)(2)(B)).

Assessment of FY21 Appellate Opinions Discussing Court-Martial Panel Issues

This study identified 14 appellate opinions addressing the selection of court-martial panel members.[105] In two of the opinions, the CCA reviewed the convening authority's selection of the court-martial panel. In 11 of the opinions, the CCA reviewed the military judge's rulings on challenges for cause during the voir dire process and other panel issues that arose during trial. In one case, the CCA reviewed challenges to both the convening authority's panel selection process and the voir dire process.

TABLE 20. APPELLATE REVIEW OF COURT-MARTIAL PANEL SELECTION ISSUES

Military Service	Identified as MSA Cases	Court-Martial Panel Discussed on Appeal*	Panel Composition Discussed on Appeal	Member Selection Dicussed on Appeal	Panel and Member Discussed on Appeal	CCA Relief Granted	%
Army	99	7	0	7	0	3	43%
Navy	31	3	2	1	0	1	33%
Marine Corps	25	0	0	0	0	0	0%
Air Force	55	4	0	3	1	0	0%
Coast Guard	2	0	0	0	0	0	0%
Total	212	14	2	11	1	4	29%

*Cases in which the CCA discussed panel composition and/or member selection in its written opinion

Reversals in Member Selection Cases

The appellate courts reversed the military judge's ruling in four cases involving member selection at trial. One of the reversals was an Article 62 appeal by the government in response to a mistrial the military judge granted after imputing bias to a member as a result of the member's conduct during an evening recess (conduct unrelated to the court-martial). The appellate court set aside the ruling, concluding that the military judge abused her discretion in imputing implied bias to the member.[106]

In the three other cases in which a CCA granted relief because of error in member selection, the findings and sentence were set aside owing to the military judge's abuse of discretion in denying a defense challenge for cause. In all three cases, the appellate courts noted that voir dire was inadequate to rehabilitate the challenged panel member, and the military judge did not put their reasoning on the record or consider the liberal grant mandate.[107] Two of the reversals were based on implied bias revealed during pretrial voir dire. In one case, the panel member could not be certain he would not think of his own two daughters, who were close in age to the victims.[108] In the other, the member failed to disclose in group voir dire that her daughter was a victim of sexual assault.[109] The third reversal arose from a mid-trial challenge for cause, resulting from a panel member's questions referring to "sexual predators."[110]

105 All but three of the decisions involved contested cases; in the three in which the accused pled guilty, he was sentenced by a panel.

106 *United States v. Badders*, ARMY Misc. 20200735, 2021 WL 4498674, at *16 (A. Ct. Crim. App. Sept. 30, 2021), *aff'd*, 82 M.J. 299 (C.A.A.F. 2022).

107 *United States v. Peters*, 74 M.J. 31 (C.A.A.F. 2015)(the military judge is mandated to err on the side of granting a challenge of a court member; this is what is meant by the liberal grant mandate).

108 *United States v. Pyron*, 81 M.J. 637, 640 (N-M. Ct. Crim. App. 2021).

109 *United States v. Leathorn*, ARMY 20190037, 2020 WL 7343018, at *4 (A. Ct. Crim. App. Dec. 11, 2020).

110 *United States v. Hollenbeck*, ARMY 20170237, 2019 WL 2949367, at *2 (A. Ct. Crim. App. June 27, 2019).

Affirmances in Member Selection Cases

The appellate courts denied relief in eight member selection cases, including one in which appellate review was precluded by the appellant's exercise of his peremptory strike against the challenged member,[111] and one that addressed limits on the questions the accused was allowed to ask during voir dire.[112] In one case, the court affirmed the military judge's ruling excusing a member, over defense objection, for medical reasons.[113] In the remaining cases, which included two guilty pleas with member sentencing, the court affirmed the denial of a challenge for cause, finding no implied bias under the following circumstances:

- a member who made improper comments about favoring the prosecutor was excused for cause, but the military judge declined to *sua sponte* excuse another member who overheard the comment or to grant a mistrial on the grounds the entire panel was tainted by the comment;[114]
- a member reacted to the reading of the charges with disappointment that criminal activity was occurring in the military community;[115]
- a member had served as a sexual assault response coordinator and unit victim advocate;[116]
- a member's wife was a victim of child sexual assault;[117] and
- a member said he was on board with the command's policy of zero tolerance for sexual misconduct.[118]

Appellate Review of Race, Ethnicity, and Gender in Panel Composition

In *United States v. Crawford*, the Court of Military Appeals—the predecessor to CAAF—held that the deliberate inclusion of a black Service member as a panel member when the accused was black did not violate equal protection.[119] Since then, courts have cited *Crawford* for the proposition that a convening authority may depart from the factors present in Article 25, UCMJ, when seeking in good faith to make the panel more representative of the accused's race or gender.[120] However, "[t]he government is prohibited from assigning members to, or excluding members from, a court-martial panel in order to 'achieve a particular result[.]'"[121]

111 *United States v. VanValkenburgh*, ACM 39571, 2020 WL 2516482, at *3 (A.F. Ct. Crim. App. May 13, 2020), *aff'd*, 80 M.J. 395 (C.A.A.F. 2020).

112 *United States v. Long*, ARMY 20190257, 2021 WL 6062948, at *2 (A. Ct. Crim. App. Dec. 17, 2021).

113 *United States v. Lizana*, ACM 39280, 2018 WL 3630154, at *5 (A.F. Ct. Crim. App. July 13, 2018).

114 *United States v. Guyton*, ARMY 20180103, 2020 WL 7384950, at *3-4 (A. Ct. Crim, App. Dec. 16, 2020), *aff'd in part on other grounds*, 82 M.J. 146 (C.A.A.F. 2022).

115 *United States v. Barnaby*, ACM 39866, 2021 WL 4887771, at *4 (A.F. Ct. Crim. App. Oct. 19, 2021).

116 *United States v. Whiteeyes*, ARMY 20190221, 2020 WL 7384949, at *7 (A. Ct. Crim. App. Dec. 15, 2020), *aff'd on other grounds*, 82 M.J. 168 (C.A.A.F. 2022).

117 *United States v. Allen*, ARMY 20200039, 2021 WL 3038540, at *4 (A. Ct. Crim. App. July 19, 2021).

118 *United States v. Newt*, ACM 39629, 2020 WL 7391563, at *5 (A.F. Ct. Crim. App. Dec. 11, 2020).

119 35 C.M.R. 3, 13, 15 C.M.A. 31, 41 (1964).

120 *E.g.*, *United States v. Smith*, 27 M.J. 242, 250 (C.M.A. 1988) (recognizing that "a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population," but rejecting the intentional selection of women panel members to achieve a particular result in that case, involving the female victim of a sex offense by a male defendant).

121 *United States v. Riesbeck*, 77 M.J. 154, 165 (C.A.A.F. 2018) (internal quotation marks and citation omitted).

This study identified three cases in which the accused challenged the convening authority's composition of their court-martial panel, alleging systematic and purposeful exclusion of women, African Americans, and medical personnel. In those cases, the CCAs did not grant relief on any of the claims. However, CAAF granted review in *United States v. Jeter*, a case involving a black Navy officer convicted by an all-white panel of sexual assault and other offenses, to consider one issue: Did the convening authority violate the appellant's equal protection rights when, over defense objection, he convened an all-white panel using a racially nonneutral member selection process and provided no explanation for the monochromatic result beyond a naked affirmation of good faith?[122]

In *Jeter*, the appellant argued that the total absence of minorities from his panel, combined with a racially nonneutral selection process—in this case, a questionnaire that asked prospective panel members to identify their race—established a prima facie violation of his equal protection rights, as well as a prima facie case of purposeful discrimination under *Batson v. Kentucky*.[123] He argued that in both instances, the convening authority's naked affirmations of good faith were insufficient to rebut the prima facie case. He also argued that the evidence established a pattern of racial discrimination in which, in the span of one year, the same convening authority detailed all-white panels in the courts-martial of three other minority Service members.

After oral argument, the Court ordered supplemental briefing on whether *Crawford* should be overturned. A decision in the case is pending.

F. Additional ssues Regarding Appellate Practice in the Military

As part of the appellate review project, the DAC-IPAD received public testimony from the Government and Defense Appellate Divisions from each Military Department. Army, Navy and Air Force representatives reported that factual sufficiency and instructional errors are recurring issues.[124] Navy and Air Force representatives also reported seeing appellate courts consider whether errors at trial were waived, often linked to defense counsel's failure to raise instructional error or other issues giving rise to claims of ineffective assistance of counsel.[125] Other recurring issues included prosecutorial misconduct,[126] MREs 412 and 513, search and seizure, member selection, issues with expert witnesses or consultants, and sentence severity.[127] Representatives of the Government Appellate Divisions described recurring issues in post-trial processing of cases, including delays and errors in the convening authority's action on the sentence, as well as litigation over the contents of the appellate record.[128]

122 *United States v. Jeter*, 82 M.J. 355 (C.A.A.F. 2022).

123 476 U.S. 79 (1986).

124 *Transcript of DAC-IPAD Meeting* 208, 265-67 (Sept. 21, 2022).

125 *Id.* at 266-67, 271-74.

126 *See Transcript of DAC-IPAD Meeting* 265 (Sept. 21, 2022)

127 *Id.* at 266, 278-79.

128 *Id.* at 206-10.

These appellate practitioners described some of the practical challenges they face. The dominant theme that emerged from their testimony was the absence of a shared database of searchable court records, including trial transcripts and pleadings as well as appellate briefs and other filings. Updating knowledge management systems to make these records readily available and searchable would improve efficiency and enhance coordination within and between the Services, especially with respect to recurring issues.[129] Other challenges they described included: personnel shortages during the PCS cycle, which forced appellate counsel to seek extensions of time; inexperienced appellate defense counsel; inability of clients–especially those in confinement–to access records of trial; inability of defense counsel to access digital evidence in the record; the lack of clear guidance as to what matters may be added to the appellate record and considered by the appellate courts in acting on findings or sentence; and the rapid rate of legislative changes outpacing guidance as to how to implement those changes.[130]

At the January 26, 2023 CRSC meeting, civilian defense counsel discussed the challenges of litigating issues that arise in the court-martial panel selection process.[131] They described a lack of transparency in the process, where the SJA's advice to the convening authority is often a bare-bones recitation of the Article 25 criteria, and other communications between the SJA and convening authority concerning panel selection are not reduced to writing, rendering any irregularities undiscoverable.[132] They recommended that defense counsel be permitted to attend those discussions; justification for the selection should be memorialized in writing and appended to the record; defense counsel and prospective panelists should be notified 30 days in advance of the start of trial; and member questionnaires should be standardized.[133] Civilian defense counsel suggested that these changes would ensure visibility into the process and permit the parties to raise issues in advance of trial, avoiding situations like that faced in *Jeter*, where the SJA and convening authority provided affidavits to the appellate court three years after the panel was selected, when they could no longer recall pertinent details.

The Chief of Appellate and Outreach for the Air Force Victims' Counsel Program also spoke to the CRSC in January, and described the most significant recurring issues for appellate victims' counsel as access to victims' medical records and victims' right to notice of production of their records in the government's possession.[134] With respect to these and other issues, she noted that victim interlocutory appeals had seen a significant increase in recent months, even though there is no rule effectuating victim rights under Article 6(b), UCMJ. Specific issues that have not been clearly settled by the appellate courts but would lend themselves to resolution by rule or statute include victim standing to enforce Article 6(b) rights, definition of the record on an interlocutory victim writ, and whether filing of a writ stays the ruling or order at issue.

129 *Id.* at 189-92, 197-201, 306-07.

130 *See generally id.* at 190-313.

131 *See generally Transcript of CRSC Meeting* 32-126 (Jan. 26, 2023).

132 *Id.* at 40.

133 *Id.* at 52-63, 71-80.

134 *See generally id.* at 127-76.

V. THE WAY AHEAD

In the upcoming year, the Appellate Review Study will expand to include FY22 appellate decisions in military sexual assault cases, focusing on the two areas identified by DoD OGC: factual sufficiency and sentence appropriateness review. The FY21 and FY22 opinions will be analyzed with a view toward comparing the effect of legislative changes to the appellate standards of review of these issues. A comprehensive report will be issued in a subsequent year, once cases subject to the new standards reach the appellate courts.

APPENDIX A. GENERAL COUNSEL MEMORANDUM

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

28 JAN 2022

GENERAL COUNSEL

MEMORANDUM FOR STAFF DIRECTOR, DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD)

SUBJECT: Request to Study Appellate Decisions in Military Sexual Assault Cases

I request that the DAC-IPAD conduct a comprehensive study of appellate decisions in military sexual assault cases, focusing on recurring appellate issues that arise in such cases, and provide a report of the results of that study. Your report should include an analysis of the most commonly recurring issues and any recommendations for reforms. Please also consider the efficacy of the military appellate system's handling of those cases. Finally, please identify any recommended training and education improvements for military justice practitioners suggested by the study.

The DAC-IPAD's members and the experts on its support staff are best suited to determine the optimal study design to analyze the issues set out above. In developing a study design, please note two recent changes to the law that affect the Courts of Criminal Appeals' reviews of findings and sentences. First, section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388, 3461 (2021), modified the factual sufficiency standard of review that the Courts of Criminal Appeals apply when reviewing findings of guilty entered on or after January 1, 2021. Second, in conjunction with the enactment of sentencing reform to move largely to parameter-based sentencing in non-capital courts-martial, section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021), modified the Court of Criminal Appeals' sentence appropriateness review standard to be applied in cases where all offenses resulting in a finding of guilty occurred on or after December 27, 2023.

If you have any questions concerning this request, please contact Dwight Sullivan of my office, the DAC-IPAD's Designated Federal Officer. You can reach him by email at dwight.h.sullivan.civ@mail.mil.

The Department continues to benefit from the DAC-IPAD's reports, which were instrumental in the work of the Independent Review Commission on Sexual Assault in the Military. I am grateful to you and your staff for your indispensable role supporting the DAC-IPAD.

Caroline Krass
General Counsel

APPENDIX B. COURT-MARTIAL APPELLATE REVIEW DATA

	Data	Description
1.	Case Name	U.S. v. Doe, Jane
2.	Service Court of Criminal Appeals Case Number	
3.	Appellant's Branch of Service	USA; USN; USMC; USAF; USCG
4.	Appellant's Pay Grade at Time of Offense(s)	O-1 – O-10; W-1 – W5; E-1 – E-9; Cadet/Midshipman
5.	Qualifying UCMJ Offense(s)	A nonconsensual penetrative or sexual contact offense under Articles 120, 120b, 92, 93, 133 and 134
6.	Conspiracy / Solicitation of Offense(s)	Yes or No
7.	Date of Sentence	MM-DD-YYYY
8.	Victim	Child, Adult, or Both
9.	Pleas on Qualifying UCMJ Offense(s)	Guilty or Not Guilty
10.	Pre-Trial Agreement	Yes, No or Mixed
11.	Other UCMJ Offense(s) Convictions	
12.	Findings Forum	Military Judge or Panel Members
13.	Sentencing Forum	Military Judge or Panel Members
14.	Adjudged Sentence	
15.	Type of Sentence	Unified or Segmented
16.	Service Court of Criminal Appeals Decision Date	MM-DD-YYYY
17.	Type of Decision	Published; Summary Affirmance without Discussion of Issues; Unpublished; Order
18.	Appellate Authority	Article 62; Article 66; Article 69; Article 73; All Writs Act; Other Authority
19.	Issues Raised in Brief	Issue or Not Available
20.	Issues Discussed in Service Court of Criminal Appeals Opinion	
21.	Service Court of Criminal Appeals Finding(s) on Qualifying Offenses	Affirm; Dismiss; Findings Set Aside (In Part); Sentence Set Aside (In Part); Findings and Sentence Set Aside; Other
22.	Court-Martial Findings Changed by Service Court of Criminal Appeals	Yes or No; Identify Findings Affected
23.	Court-Martial Sentence Reduced by Service Court of Criminal Appeals	Yes or No; Identify Sentence Affected
24.	Service Court of Criminal Appeals with Separate Opinions	Yes or No; Concur and/or Dissent
25.	Proceedings on Reconsideration	Yes or No; Disposition
26.	Service Court of Criminal Appeals Additional Procedural History	Case Citation(s)
27.	U.S. Court of Appeals for the Armed Forces Petition for Review or Certificate	Yes or No
28.	U.S. Court of Appeals for the Armed Forces Case Number	

	Data	Description
29.	U.S. Court of Appeals for the Armed Forces Petition Date	MM-DD-YYYY
30.	U.S. Court of Appeals for the Armed Forces Petition Disposition	Grant; Deny; Dismiss
31.	U.S. Court of Appeals for the Armed Forces Decision Date	MM-DD-YYYY
32.	U.S. Court of Appeals for the Armed Forces Issues Decided	
33.	U.S. Court of Appeals for the Armed Forces Case Disposition	Affirmed; Reversed; Findings and/or Sentence Set Aside; Remand
34.	Findings Changed by U.S. Court of Appeals for the Armed Forces	Yes or No; Identify Findings Affected
35.	Sentence Changed by U.S. Court of Appeals for the Armed Forces	Yes or No; Identify Sentence Affected
36.	U.S. Court of Appeals for the Armed Forces with Separate Opinions	Yes or No; Concur and/or Dissent
37.	Proceedings on Reconsideration	Yes or No; Disposition
38.	Court of Criminal Appeals for the Armed Forces Additional Procedural History	Case Citation(s)
39.	U.S. Supreme Court Petition	Yes or No
40.	U.S. Supreme Court Petition Date	MM-DD-YYYY
41.	U.S. Supreme Court Petition Disposition	Grant; Deny; Dismiss
42.	U.S. Supreme Court Issues Granted	
43.	U.S. Supreme Court Citation and Disposition	Affirmed; Reversed; Findings and/or Sentence Set Aside; Remand; Additional Proceedings