

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee

v.

RAFAEL AYUSO
Master Sergeant (E-8)
United States Army,
Appellant

SUPPLEMENT TO THE
PETITION FOR GRANT OF
REVIEW

Crim. App. Dkt. No. ARMY
20240332

USCA Dkt. No. _____/AR

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

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Issue Presented

I. Whether the Army Court of Criminal Appeals erred when it denied appellant's Article 73, UCMJ, petition for a new trial without a factfinding hearing and without discussion.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction under Article 67(c)(3), UCMJ, 10 U.S.C. § 867(c)(3).

Statement of the Case

On June 26, 2024, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of simple assault with an unloaded firearm, one specification of solicitation to distribute a controlled substance, and two specifications of extramarital sexual conduct in violation of Articles 128, 82, and 134, UCMJ. (Statement of Trial Results; R. at 675). Appellant was acquitted of other minor specifications. (Statement of Trial Results; R. at 675). The next day, the military judge sentenced appellant to reduction to E-5. (R. at 790). On July 30, 2024, the convening authority took no action on the findings or sentence. (Action). On August 26, 2025, appellant submitted a petition for a new trial which was incorporated into his appeal to the Army Court pursuant to Article 73, UCMJ, 10 U.S.C. § 873, and R.C.M. 1210(f). On July 24, 2026, the Army Court affirmed the findings and the sentence. (Appendix A).

Statement of Facts

1. Trial Evidence

The Specification of Charge I (the only specification appellant challenges before this Court) alleged appellant had pointed a gun at his former wife, SFC NA in 2018. (Charge Sheet). SFC NA testified that they were both drinking then “started play-fighting.” (R. at 427). She slapped appellant in the face. (R. at 427). After she slapped him, appellant drug her into another room and pointed a shotgun at her. (R. at 427). She grabbed the barrel of the shotgun and, presumably jokingly, told appellant to “do it” – and called appellant “you a little bitch.” (R. at 427). Thereafter, appellant returned to the couch and SFC NA went into the bathroom. (R. at 427). SFC NA acknowledged on cross examination that she doubted the shotgun was loaded. (R. at 444). SFC NA declined an SVC and said it simply was not a traumatic event. (R. at 447).

SFC NA’s testimony was notably matter-of-fact and brief – with her entire direct-examination only lasting six pages. (R. at 425-31). SFC NA confirmed on cross-examination that she was not an enthusiastic participant in the court-martial and, indeed, had tried to decline participation at least three times. (R. at 433-44). In fact, when CID contacted SFC NA, she sent appellant an email asking what was going on, why CID would be contacting her, and whether appellant was okay. (R. at 434). SFC NA only participated in the court martial after pressured by a senior

judge advocate (one of the prosecutors) who personally flew to Hawaii to get SFC NA (an active-duty subordinate) to participate. (R. ag 443-44).

The testimony as to when exactly this incident happened was placed it extremely close to the cut off for the 5-year statute of limitations. (R. at 430-31).¹ When the prosecutor asked first SFC NA if she knew about when the charged incident happened, she responded “No, I do not.” (R. at 430-31). In response to prosecutorial coaxing, SFC NA stated that it had happened after they were married in August (R. at 431) and then, seemingly by reference to a Facebook Photo, that her “estimated best guess [was] the weekend after the Facebook photo was posted.” (R. at 431). This would put it on “the 25th or 28th of August.” (R. at 431).

SFC NA, who testified *for the defense* at sentencing, attempted to recant her testimony about the date. (R. at 707-08). Defense counsel asked SFC NA: “is it likely that the incident occurred at the beginning of August or the end of July in 2018?” (R. at 707). SFC NA replied:

It’s possible. The only definitive thing I know is that it happened after we got married. So whatever that courthouse date, I know it happened

¹ Charges were preferred and received by the Summary Court-Martial Convening Authority on August 23, 2023. (Charge Sheet). As such, if the charged conduct occurred prior to August 24, 2018, the statute of limitations was expired, constituting a defense. Post-preferral, the government modified the charge sheet and alleged this event occurred “between 24 August 2018 and on or about 15 September 2018.” (Charge Sheet).

at that time. My best estimate is the date that I gave the – government attorneys.

(R. at 707-08). Defense counsel then attempted to ask if it was possible the conduct occurred before August 23, 2018, but the military judge cut off the line of questioning. (R. at 708-09).

2. Post-Trial Evidence

During the course of appellate review, appellate defense counsel learned that SFC NA texted appellant about the charged conduct on August 17, 2018, stating, “You held a whole gun to my head” and “But you held a gun to my head”. (Def. App. Ex. A). The referenced conduct obviously occurred on or before the date of these text messages, placing it squarely outside the statute of limitations. As such, if the text messages are authentic, SFC NA’s testimony at trial that the charged conduct occurred on “the 25th or 28th of August” was clearly false. (R. at 431).

On appeal, however, the government questioned the authenticity of the text messages. (Gov. Army Court Br. at n.5) (“T]he text messages have been fabricated.”). The government noted that the authenticity of the text messages could be resolved at a hearing held pursuant to *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411, 413 (C.M.A. 1967) (per curiam). (Gov. Army Court Br. at n.5). In his reply brief, appellant agreed that a *DuBay* hearing was appropriate to resolve this and other factual questions. (Appellant’s Army Court Reply Br. at 8).

The Army Court, however, affirmed without ordering any fact-finding and

without any discussion whatsoever of the petition for a new trial. (Appendix A).

Reasons to Grant Review

This case presents the unusual circumstance where post-trial evidence, if authentic, both shows that the complaining witness' trial testimony was false as to the critical question of when the conduct occurred and establishes conclusively that the charged conduct occurred outside the statute of limitations.

At trial, the government's evidence barely placed the charged assault within the statute of limitations. (R. at 430-31). After trial, appellant produced a dated text message in which the alleged victim referred to the charged conduct approximately one week before the limitations cutoff. (Def. App. Ex. A).

This post-trial evidence was not the first indication that SFC NA's trial chronology was wrong. During sentencing, the alleged victim herself tried to amend her testimony on this very point. (R. at 707-08). SFC NA's contemporaneous attempt to retract her merits testimony suggests not just that her testimony was inaccurate – but that she knew it was inaccurate at the time (fraud upon the court).

The specter of impropriety is enhanced by the fact that SFC NA was clearly pressured to testify by the prosecution, against her will, after at least three unequivocal attempts at declination. (R. at 433-34). Even her merits testimony on the point in question (the chronology) was initially hesitant and only coaxed

through suggestive, apparently pre-discussed, questions by the prosecutor. (R. at 430-31).

On appeal, the government disputed factual questions such as the authenticity of the text messages and whether any inaccurate trial testimony was intentionally false. The government itself recognized that a *DuBay* hearing could resolve outstanding factual questions. (Gov. Army Court Br. at 21, n.5). The Army Court nevertheless denied appellant's Article 73 petition without such a hearing, without conducting any factfinding, and without any discussion whatsoever. (Appendix A). Appellant thereafter requested factfinding and offered his phone and cloud data for forensic examination. Remarkably, the Government itself recognized that a DuBay hearing could resolve the validity of the messages.

Review is warranted because the Army Court's procedure violates this Court's precedent governing material post-trial factual disputes. *See United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005). In *Meghdadi*, the appellant's petition for a new trial was denied without affording him the benefit of a factfinding hearing to resolve disputed questions of fact. *Id.* at 444. This Court held that "the failure to afford Appellant a forum in which to make his case was error that materially prejudiced Appellant's substantial trial rights." *Id.* Similarly, in the present case, material factual disputes are clear from the brief but, rather than resolve these disputes, the Army Court simply denied the petition without

discussion or analysis. (Appendix A).²

Argument

I. Whether the Army Court of Criminal Appeals erred when it denied appellant’s Article 73, UCMJ, petition for a new trial without a factfinding hearing and without discussion.

Standard of Review

This Court reviews rulings on a petition for a new trial for abuse of that discretion. *Meghdadi*, 60 M.J. at 441 (citing *United States v. Humpherys*, 57 M.J. 83, 96 (C.A.A.F.2002)). An abuse of discretion, in this context, occurs ““if the findings of fact upon which [the lower court] predicates [its] ruling are not supported by evidence of record; if incorrect legal principles were used by [the lower court] in deciding this motion; or if [the lower court’s] application of the correct legal principles to the facts of a particular case is clearly unreasonable.”” *United States v. Williams*, 37 M.J. 352, 356 (C.M.A.1993).³

Law and Analysis

² See *Meghdadi*, 60 M.J. at 441 (criticizing the lower court’s lack of analysis).

³ *Meghdadi* pierced the service court’s denial of the appellant’s petition for a new trial because the lower court had, in turn, largely or entirely deferred to a military judge who had denied the petition at a post-trial Article 39(a) hearing prior to appellate docketing. *Id.* But this procedural twist did not change the ultimate standard of review. See, e.g., *United States v. Gray*, 51 M.J. 1, 12 (C.A.A.F. 1999) (reviewing a service court’s denial of a petition for a new trial for abuse of discretion).

Appellant's petition for a new trial should have been granted based on fraud upon the court because the text message evidence showed that the charged conduct took place on or before August 17, 2018, and thus outside the statute of limitations. This evidence further proves that the evidence at trial placing the conduct within the statute of limitations was objectively false. SFC NA's own hesitation on this exact point on the merits (R. at 430-31) and attempt to recant her testimony on this very point at sentencing (R. at 707-08) further evinces that she knew at the time of trial that her testimony was false.

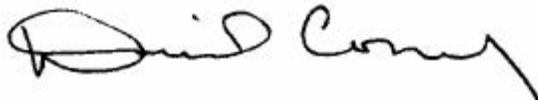
The discussion to R.C.M. 1210(f)(3) states: "Examples of fraud on a court-martial which may warrant granting a new trial are: *confessed or proved perjury in testimony* or forgery of documentary evidence which clearly had a substantial contributing effect on a finding of guilty and without which there probably would not have been a finding of guilty of the offense[.]" (emphasis added). The present case falls squarely within this category. The objective evidence proves the testimony at trial placing the Specification of Charge I within the statute of limitations was false. This false testimony "clearly had a substantial contributing effect on a finding of guilty" in that, but for this false testimony, the charged conduct would not have been actionable because it fell outside the statute of limitations.

Given the current procedural posture, however, this court need not determine

whether appellant is ultimately entitled to a new trial. It need only hold, as it did in *Meghdadi*, that appellant was entitled to a forum in which to establish his factual claims. 60 M.J. at 444; *see also United States v. Leipart*, No. ACM 39711, 2023 CCA LEXIS 39, at *3 (A.F. Ct. Crim. App. 26 Jan. 2023) (describing how the Air Force Court ordered a *DuBay* hearing to answer questions about appellant's petition for a new trial based on alleged fraud upon the Court.).

Conclusion

WHEREFORE, Appellant respectfully requests this Court grant review.



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Appendix A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOPER, WILLIAMS, and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Master Sergeant RAFAEL AYUSO
United States Army, Appellant

ARMY 20240332

Headquarters, I Corps
Jessica Conn, Military Judge (arraignment & motions)
Pamela L. Jones, Military Judge (trial)
Lieutenant Colonel Matthew E. Dyson, Acting Staff Judge Advocate

For Appellant: Captain Jessica A. Adler, JA; Daniel Conway, Esquire (on brief, reply brief, and petition for new trial).

For Appellee: Colonel Richard E. Gorini, JA; Major Stephen L. Harmel, JA; Captain Clare M. Murphy, JA (on brief).

24 July 2026

SUMMARY DISPOSITION AND ACTION
ON PETITION FOR NEW TRIAL

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

SCHLACK, Judge:

Appellant and Staff Sergeant (SSG) BD engaged in an adulterous relationship, ultimately resulting in appellant being found guilty of extramarital sexual conduct, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [UCMJ].¹ During presentencing proceedings, the military judge allowed SSG BD to provide an unsworn victim impact statement as a “victim” of appellant’s extramarital sexual conduct. The military judge did so without any evidence to show SSG BD suffered “direct physical, emotional, or pecuniary harm as a result of” her

¹ Appellant was also found guilty of soliciting the distribution of a controlled substance and one specification of assault with an unloaded firearm, in violation of Articles 82 and 128, UCMJ, neither of which pertained to SSG BD. Appellant was subsequently sentenced to a reprimand and to be reduced to the grade of E-5.

extramarital sexual conduct with appellant. *See* Rule for Courts-Martial [R.C.M.] 1001(c)(2)(A) (defining “victim”).

Appellant argues, *inter alia*, the military judge abused her discretion by permitting SSG BD to give an unsworn statement to the court-martial as a “crime victim” under Article 6b, UCMJ, and R.C.M. 1001(c). Although we agree the military judge erred, we conclude the error did not materially prejudice appellant’s substantial rights. Accordingly, we affirm.²

BACKGROUND

During the charged time frame, appellant served as the first sergeant of a company assigned to Joint Base Lewis-McChord, Washington. Staff Sergeant BD served in the same company as a platoon sergeant.

Over the course of approximately five months, appellant and SSG BD engaged in a consensual extramarital sexual relationship. The majority of their encounters occurred at appellant’s residence, though one sexual encounter occurred in appellant’s office after duty hours. Appellant knew SSG BD was married to another person when he had sex with her.

After findings were announced, SSG BD, through her Special Victims’ Counsel (SVC), requested to provide an unsworn victim impact statement. Defense counsel objected, arguing SSG BD did not qualify as a “crime victim” within the meaning of Article 6b, UCMJ, and R.C.M. 1001(c).³ Defense counsel emphasized appellant had been acquitted of a maltreatment charge that pertained to SSG BD and argued the relevant Article 134 conviction involved consensual misconduct in which SSG BD was a voluntary participant. In response, SSG BD’s SVC posited, “given the facts of this matter,” he believed SSG BD to be “a victim entitled to make an unsworn statement.” The military judge did not require the SVC to provide a proffer of SSG BD’s unsworn statement to the court or to identify *how* SSG BD was

² We have given full and fair consideration to the other assignments of error raised by appellant as well as to those matters personally submitted by him pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they warrant neither discussion nor relief.

³ Article 6b, UCMJ, affords a victim the right “to be reasonably heard” at “[a] sentencing hearing relating to the offense.” As noted *supra*, R.C.M. 1001(c) defines who constitutes a “victim” for a given offense.

harmed.⁴ Instead, the military judge overruled the defense objection and allowed SSG BD to make a statement as a “victim”.

In her statement, SSG BD described the emotional and professional consequences she attributed to her illicit relationship with appellant. Staff Sergeant BD explained how she felt “stuck” with appellant, as she “had taken this mistake so far that [she] felt like [she] could never return from it,” and referenced potential harm to her husband, career, family, and friends. She explained that, following the relationship, she “spiraled downward,” questioning her integrity as a noncommissioned officer, believing she had failed to live according to the Army Values and the Noncommissioned Officer Creed and ultimately concluded that she should leave military service.

Appellant now argues the military judge abused her discretion by determining that SSG BD qualified as a crime victim under Article 6b, UCMJ, and R.C.M. 1001(c).

LAW

We review a military judge’s decision to admit a victim impact statement over defense objection for an abuse of discretion. *United States v. Edwards*, 82 M.J. 239, 242-43 (C.A.A.F. 2022) (citation omitted). “Military judges abuse their discretion (1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if they use incorrect legal principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable.” *United States v. Green-Watson*, 85 M.J. 340, 345 (C.A.A.F. 2025) (quoting *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024)).

Article 6b(a)(4)(B), UCMJ, affords crime victims the right to be reasonably heard during presentencing proceedings. *See also* R.C.M. 1001(c)(1) (implementing UCMJ art. 6b(a)(4)(B)). Before an individual may exercise this right, a military judge must determine the individual meets the statutory definition of a “victim,” as only one who has “suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense” of which the accused was found guilty may make such a statement. UCMJ art. 6b(b); R.C.M. 1001(c)(2)(A). Whether an individual satisfies this definition is a fact-intensive inquiry that requires an individualized assessment of the record.

⁴ A copy of SSG BD’s unsworn statement was not marked as an appellate exhibit (i.e., received by the court-martial) until shortly before the SVC read the statement into the record, and following another Article 39(a) session regarding the contents of the unsworn statement.

When interpreting the language and scope of Article 6b, UCMJ, and R.C.M. 1001(c), we “begin by simply reading the plain language of the rule giving effect to every clause and word,” applying the “common and approved usage” of the operative word or words. *United States v. Fetrow*, 76 M.J. 181, 186 (C.A.A.F. 2017) (citations omitted).

Applying these principles to appellant’s case, the operative statutory limitation is the word “direct.” To be considered a victim the individual must suffer physical, emotional, or pecuniary harm directly linked to the offense of conviction. UCMJ art. 6b(a)(4)(B); R.C.M. 1001(c)(2)(A)-(B). As this court recently clarified in *United States v. Goins*, 85 M.J. 643 (Army Ct. Crim. App. 2025), pet. denied, 2025 CAAF LEXIS 1023 (C.A.A.F. 16 Dec. 2025), “[a]pplying the plain language of the rule, the test of whether a harm is direct under R.C.M. 1001(c) is whether the harm is logically and causally related to the offense of which the accused is convicted,” without an “intervening cause.” *Id.* at 649. Accordingly, harm that is indirect or caused by another source is legally insufficient to establish standing under the rule. *Cf. id.* at 648 (noting “direct” is defined as “proceeding from one point to another in time or space without deviation or interruption” and as “stemming immediately from a source” (citations omitted)).

DISCUSSION

We need not decide whether SSG BD experienced emotional harm, nor are we well-positioned to do so. Rather, our decision in this case turns on whether the military judge abused her discretion when she determined SSG BD was a crime victim. We find that she did so in two separate respects: first, by failing to predicate her ruling on the evidence of record; and second, by applying “the correct legal principles to the facts” in a manner that “is clearly unreasonable.” *Green-Watson*, 85 M.J. at 345.

A. The Article 6b Ruling

1. Lack of an Evidentiary Record

The military judge determined SSG BD was a “victim” based on SSG BD’s SVC’s bald assertion that she was one and without placing independent findings of fact on the record. In addition to our owing minimal deference to a ruling made in a factual vacuum, *e.g.*, *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation omitted), the military judge’s *legal* determination that SSG BD was a victim, unsupported by the record, represents an abuse of discretion.

Without review of the proffered harm and its nexus to the criminal act, a military judge is not well-situated to decide whether the harm suffered was “direct.”

By deciding this threshold issue solely on the bare legal assertion of counsel, the military judge's ruling was arbitrary, unsupported by the record, and represents an abuse of discretion.

2. *Erroneous Application of Law to Facts*

Assuming *arguendo* the military judge considered SSG BD's unsworn statement prior to determining she qualified as a "victim," the military judge failed to address intervening causes of harm established on the record and therefore abused her discretion. Specifically, nothing in the record shows the military judge accounted for several key factors: SSG BD's voluntary participation in crime, her subsequent regret for her informed participation, and the effects of her disclosure. The harm she described feeling after participating in the crime is not attributable to appellant's criminal conduct, but to her own conduct under the facts of this case. *See Goins*, 85 M.J. at 649 (noting direct harm is limited to the "direct result of appellant's crimes rather than the result of someone else's actions or other intervening circumstance."). While this record demonstrates that her remorse may have been genuine, the military judge's ruling overlooked that this remorse derived from her own autonomous choices rather than a direct injury resulting from appellant's participation in the affair.

Likewise, the military judge erred in treating the professional consequences SSG BD described as direct harm. Under the *Goins* framework, these consequences occurred only after she disclosed her extramarital relationship with appellant and an administrative separation followed. The military judge failed to recognize that the post-discovery fallout under these facts was not a direct injury flowing from appellant's commission of the offense itself. Consequently, the military judge's threshold determination that appellant's offense directly caused her career or emotional harm in the manner contemplated by R.C.M. 1001(c) was unsupported by the record.

Accordingly, the record does not establish that SSG BD suffered direct physical, emotional, or pecuniary harm within the meaning of Article 6b, UCMJ, and R.C.M. 1001(c).⁵ The military judge abused her discretion by seemingly adopting an overly broad interpretation of the rule that exceeds the plain language of the text, erroneously allowing SSG BD to exercise crime-victim rights during sentencing. We emphasize the narrowness of our holding. We need not decide whether a consenting participant in extramarital sexual conduct could ever qualify as a crime victim under

⁵ Staff Sergeant BD's testimony on the merits included evidence of both the extramarital sexual relationship and the alleged maltreatment. None of her merits-testimony included evidence of direct harm attributable to the crime for which appellant was convicted.

Article 6b, UCMJ. We hold only that, on this record, SSG BD did not establish the direct harm required by the rule.

B. Prejudice

Having found error, we must determine whether it substantially influenced the adjudged sentence. *E.g.*, *Goins*, 85 M.J. at 648 (citing *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018)). To determine prejudice, we evaluate the relative strength of the parties' cases along with the materiality and quality of the evidence in question. *Barker*, 77 M.J. at 384.

Applying these factors to the present case, we find the error was harmless. Although the military judge erred by finding SSG BD qualified as a victim, she did limit the scope of her victimhood to that of extramarital sexual relations. The severity of this charge and specification paled in comparison to appellant's assault of his wife with an unloaded firearm. Furthermore, given the absence of government sentencing evidence, and the lenient sentence ultimately imposed despite appellant's significant punitive exposure,⁶ we are convinced the erroneous admission of SSG BD's unsworn statement did not substantially influence the sentence. *See Goins*, 85 M.J. at 650; UCMJ art.59(a).

CONCLUSION

Appellant's petition for a new trial is DENIED. The findings and sentence are AFFIRMED.

Senior Judge COOPER and Judge WILLIAMS concur.

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

⁶ Appellant could have been sentenced to a dishonorable discharge, confinement for fifteen years, total forfeitures, to be reprimanded, and reduced to the grade of E-1.

Certificate of Filing and Service

I certify that a copy of the foregoing in the case of *United States v. Rafael Ayuso*,
Crim. App. Dkt. No 20240332, USCA Dkt. No. _____/AR. was electronically filed
with the Court and the Government Appellate Division on September 15, 2026. the
Government Appellate Division on September 15, 2026.

A handwritten signature in black ink, appearing to read 'W. Burchfield', with a large, stylized initial 'W' and 'B'.

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