IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE FINAL BRIEF
v.	)	Crim. App. Dkt. No. 20170303
Master Sergeant (E-8) **ANDREW D. STEELE,** United States Army, Appellant	)	USCA Dkt. No. 22-0254/AR

JENNIFER A. SUNDOOK
Major, Judge Advocate
Branch Chief, Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0761
jennifer.a.sundook.mil@army.mil
U.S.C.A.A.F. Bar No. 37586

TIMOTHY R. EMMONS
Captain, Judge Advocate
Government Appellate Attorney
U.S.C.A.A.F. Bar No. 37595

JACQUELINE J. DEGAINE
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 37752

CHRISTOPHER B. BURGESS
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 34356

Index of Brief

Table of Cases, Statutes and Other Authorities

Other Authorities

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v.	)	Crim. App. Dkt. No. 20170303
Master Sergeant (E-8) **ANDREW D. STEELE,** United States Army, Appellant	)	USCA Dkt. No. 22-0254/AR

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

Issue Presented

WHETHER THE ARMY COURT IMPROPERLY APPLIED A FEDERAL HABEAS STANDARD THAT IS INCONSISTENT WITH ARTICLE 66, UCMJ, IN FINDING THAT APPELLANT FORFEITED REVIEW OF HIS CLAIM.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016) [UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ. *See United States v. Davis*, 63 M.J. 171, 177 (C.A.A.F. 2006) (holding that "[t]he power of the rehearing to adjudicate a new

sentence derives from the initial court-martial and the appellate action of this court" and jurisdiction is "fixed for purposes of appeal, new trial, sentence rehearing, and new review and action by the convening authority").

Statement of the Case

On May 16, 2017, a military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of one specification of violating a lawful general order and one specification of fraternization in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934 (2012) [UCMJ]. (JA 3). On May 18, 2017, the military judge convicted Appellant, contrary to his pleas, of one specification of indecent exposure and one specification of disorderly conduct in violation of Articles 120c and 134, UCMJ, 10 U.S.C. §§ 920c and 934. (JA 3). The military judge sentenced Appellant to be reduced to the grade of E-3 and a bad-conduct discharge. (JA 3). On March 23, 2018, the convening authority approved the sentence as adjudged. (JA 3).

On March 5, 2019, the Army Court issued its opinion affirming the findings, setting aside the sentence, and authorizing a sentence rehearing due to the lack of a verbatim transcript of the presentencing proceeding. *United States v. Steele*, ARMY 20170303, 2019 CCA LEXIS 95 (Army Ct. Crim. App. Mar. 5, 2019) (mem. op) [*Steele I*].

On January 23, April 3, September 8, September 25, and October 21–23 2020, Appellant's sentence rehearing occurred. On October 23, 2020, an enlisted panel sentenced Appellant to be reduced to the grade of E-5. (JA 11). On May 6, 2021, the convening authority approved the sentence as adjudged.

On June 9, 2022, the Army Court affirmed the findings of guilty and sentence. *United States v. Steele*, 82 M.J. 695 (Army Ct. Crim. App. 2022) [*Steele II*].

Statement of Facts

Appellant, a married company First Sergeant, invited underage, junior-enlisted soldiers from his company to his apartment complex and provided them with alcohol on two occasions in the spring of 2016. (JA 93–94). On each occasion, Appellant and the group of junior-enlisted soldiers socialized in the nude at a common area that included a pool and hot tub. (JA 95–96, 109–115, 128; Pros. Ex. 22).

On the evening of April 29, 2016, Appellant and approximately seven other soldiers met at his apartment complex and got naked in the hot tub. (JA 98, 128; Pros. Ex. 22). While nude in the hot tub, Appellant began performing oral sex on Private First Class (PFC) LW, the only female present. (JA 100, 117–18, 149). Once Appellant finished performing oral sex on PFC LW, two other junior-enlisted

male soldiers, Privates (PV1) MN and AS—also in the hot tub—moved toward PFC LW and performed oral sex on her in turn. (JA 100–01, 118).

Specialists (SPC) JR and JG were also in the hot tub. Once Appellant initiated sexual activity with PFC LW, both of them felt uncomfortable and left the apartment complex. (JA 121, 130). However, SPC JR felt "guilty" leaving PFC LW there on her own because he believed she might be "sexually assaulted." (JA 122–23). Based on his concerns, SPC JR decided to return to the hot tub area and confront Appellant. (JA 124). Appellant told SPC JR, "You're still not helping [PFC LW] just like I'm not helping her right now. So you're just with me. Well, actually you are standing beside me. You are doing the same damn thing, and we are a bystander." (JA 125; Pros. Ex. 25).

Appellant pleaded guilty to one specification of violating a lawful general order for providing alcohol to underage soldiers and one specification of fraternization in violation of Articles 92 and 134, UCMJ. (JA 3). Appellant was convicted, contrary to his pleas, of one specification of indecent exposure and one specification of disorderly conduct in violation of Articles 120c and 134, UCMJ. (JA 3). On his first Article 66 review before the Army Court, Appellant submitted a brief alleging two assignments of error: that the convening authority improperly approved his sentence without a substantially verbatim transcript; and that his conviction for indecent exposure was legally and factually insufficient. *See Steele*

I, 2019 CCA LEXIS 95 at *3, n.4. Appellant did not raise an assignment of error that indecent exposure, Article 120c, UCMJ, was unconstitutionally vague.

The government responded to Appellant's two assignments of error and Appellant submitted a reply brief. On February 12, 2019, the Army Court heard oral argument on both assignments of error. On March 5, 2019, the Army Court issued a memorandum opinion affirming the findings, setting aside the sentence, and authorizing a sentence rehearing because "no audio was recorded for approximately twenty-seven minutes of the defense sentencing case." *Steele I*, 2019 CCA LEXIS 95, *1. In its opinion, the Army Court thoroughly addressed whether the transcript was verbatim, and if not, which remedy would be appropriate under the law and the facts of the case. *Id.* at *4. Additionally, the Army Court considered Appellant's second assignment of error challenging the legal and factual sufficiency of his indecent exposure conviction and declined to grant relief, finding "the record to be correct in fact." *Id.* at *3, n.4.

Appellant's sentence rehearing occurred on January 23, April 3, September 8 and 25, and October 21–23, 2020. He was sentenced to be reduced to the grade of E-5. (JA 11). When Appellant filed his brief on the sentence rehearing with the Army Court, he raised an assignment of error for the first time[1] that his indecent

[1] Appellant raised this error pursuant to *United States v. Grostefon.* 12 M.J. 431 (C.M.A. 1982). Matters raised under *Grostefon* are subject to the same standards

exposure conviction was unconstitutionally vague. He did not raise any alleged errors that arose from the sentence rehearing.

The Army Court declined to consider this assignment of error, finding there was not good cause for Appellant's failure to raise this claim on the court's first review. *Steele II*, 82 M.J. at 700. The Army Court adopted the cause and prejudice standard, following the Air Force and Navy-Marine Corps Courts, and held that it would provide relief for new claims raised in second appeals "where the appellant has shown both 1) good cause for his failure to raise the claim in the prior appeal, and 2) actual prejudice resulting from the newly-raised assignment of error; or 3) that manifest injustice amounting to actual innocence would result if we do not address the new claim." *Id.*

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as errors raised by counsel. *See United States v. Gray*, 51 M.J. 1, 63-64 (C.A.A.F. 1999) ("We note that *Grostefon* does not permit an appellant to raise such issues in an untimely manner without good cause"); *United States v. Sumpter*, 22 M.J. 33, 33 (C.M.A. 1986) (noting "*Grostefon* provides no special basis for noncompliance with the rules of this Court"); A.C.C.A. R. 18.2(c) ("*Grostefon* issues shall be submitted at the same time as appellant's brief"); *cf. United States v. Mitchell*, 20 M.J. 350, 351 (C.M.A. 1985) (remanding a case back for review due to the lower court's refusal to consider *Grostefon* matters without explanation, but noting the appellant is not "entitled as a matter of legal right to bypass time limits that would apply to a motion by his counsel to raise additional issues").

WHETHER THE ARMY COURT IMPROPERLY APPLIED A FEDERAL HABEAS STANDARD THAT IS INCONSISTENT WITH ARTICLE 66, UCMJ, IN FINDING THAT APPELLANT FORFEITED REVIEW OF HIS CLAIM.

Standard of Review

While "[t]his Court recognizes a CCA's broad discretion in conducting its Article 66(c) review," and generally reviews these actions for an abuse of discretion, "this Court conducts a de novo review with respect to the scope and meaning of the CCA's Article 66(c) authority." *United States v. Guinn*, 81 M.J. 195, 199 (C.A.A.F. 2021) (internal citations and quotations omitted); *see also United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) ("The scope and meaning of both Article 66(c), UCMJ, and Article 61, UCMJ, are matters of statutory interpretation, questions of law reviewed de novo.") (internal citations omitted).

Summary of Argument

The cause and prejudice standard adopted by the Army Court—and the Air Force and Navy-Marine Corps Courts—is within a service Court of Criminal Appeals' (CCA) broad discretion and is consonant with its duty under Article 66 to conduct a plenary review. Article 66 requires a CCA to determine, "on the basis of the entire record," what findings and sentence should be approved. In this case, the Army Court reviewed the entire record—including the sentence rehearing—before it completed its Article 66 review. There is no requirement that the record be

reviewed all at once in its entirety. It is a common practice in this Court and all the CCAs to affirm the findings separately from the sentence. Based on the facts of Appellant's case, there is no statutory bar under Article 66 to review and affirm the findings independently from the sentence.

The Army Court completed a plenary, de novo review of Appellant's court-martial, as mandated by Article 66. Continuing jurisdiction gave the Army Court the authority to consider Appellant's case, but it did not define the scope of review under Article 66. The Army Court was not required to re-review findings it had already affirmed simply based on continuing jurisdiction. Nor was the Army Court required to consider Appellant's untimely assignment of error he could have raised on his first review.

Under the cause and prejudice standard, a CCA conducts one plenary review, and thus fulfills its statutory duty, by completing a comprehensive review of the record while retaining the discretion to consider new issues raised on a second review which could have been, but were not, raised on the first review. Not only is this standard in harmony with Article 66, but it promotes the ends of justice by ensuring an even application of appellate review, discouraging piecemeal litigation, and allowing appellants who have received a plenary review to raise new issues when it would be just under the circumstances.

Law and Argument

1. The Army Court reviewed the entire record and performed its duties in accordance with Article 66, UCMJ.[2]

Contrary to Appellant's claim, the Army Court did not "complete plenary review on an incomplete record." (Appellant's Br. 10). Only after the entire record was complete—after the sentence rehearing occurred—did the Army Court *complete* its review. The Army Court reviewed the record, affirmed the findings, and ordered a sentence rehearing on March 5, 2019. *Steele I*, 2019 CCA LEXIS 95, *1. Then, it reviewed the record containing the sentence rehearing and affirmed the sentence on June 9, 2022. *Steele II*, 82 M.J. at 700. Thus, the Army Court reviewed the "entire record" before it completed its duties under Article 66. There is no temporal requirement in Article 66 for when the CCAs must review the "entire record," or that the record be reviewed all at once before affirming any part of the findings or sentence. *See* Article 66(c), UCMJ (2016). As long as the CCA has considered the entire record before completing its review, it has adhered to the mandates of Article 66.

Appellant mischaracterizes the Army Court's review in this case as "piecemeal." (Appellant's Br. 13). Unlike piecemeal litigation, where an appellant

[2] The issue of whether the Army Court completed "plenary review on an incomplete record," (Appellant's Br. 10), is outside the scope of the granted issue. Nevertheless, the government responds in the interest of providing a thorough reply.

unnecessarily fragments claims and duplicates judicial efforts, the Army Court properly conducted a discrete review of the findings because the transcript containing the merits portion of the trial was complete. This is a common and authorized practice in this Court and every other CCA to conduct a review in this practical and efficient manner. *See, e.g.*, *United States v. Tate*, 82 M.J. 291, 299 (C.A.A.F. 2022) (affirming the findings and setting aside the sentence); *United States v. Easterly*, No. ACM 39310, 2019 CCA LEXIS 175, *57 (A. F. Ct. Crim. App. Apr. 12, 2019) (same); *United States v. Sperlik*, 2010 CCA LEXIS 99, *2 (N. M. Ct. Crim. App. Aug. 26, 2010) (same); *United States v. Bevacqua*, 37 M.J. 996, 1004 (C. G. Ct. Crim. App. Aug. 9, 1993) (same).

There is nothing problematic about affirming the findings separately from the sentence. It is axiomatic that "evidence not presented at the trial cannot be used to support or reverse a conviction." *United States v. Lanford*, 6 U.S.C.M.A. 371, 379, 20 C.M.R. 87, 95 (1955). This is true, as well, for evidence presented in the presentencing hearing, with the notable exception of a guilty plea.[3] Evidence

[3] If an accused "after a plea of guilty sets up matter inconsistent with the plea . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty." Article 45(a), UCMJ. In this case, Appellant entered mixed pleas. If, at the sentence rehearing, he had set up a matter inconsistent with his pleas of guilty, then there would be cause for the Army Court to reassess the findings. However, Appellant raises no such challenge to the providence of his pleas. If Appellant had alleged he set up a matter inconsistent with his pleas at the sentence rehearing, then the Army Court would have

presented at a sentence rehearing cannot be used to affirm or set aside the findings. Furthermore, while the sentence follows from the findings, the findings do not follow from the sentence. It is telling that Appellant alleges no specific error from the Army Court affirming the findings before reviewing the sentence rehearing. Simply stated, there is no reason why the findings in this case could not be reviewed and affirmed independently from the sentence rehearing.

As the Army Court did not "conduct a plenary review on an incomplete record," (Appellant's Br. 10), Appellant's attempt to distinguish *United States v. Smith*, 41 M.J. 385 (C.A.A.F. 1995), fails. (Appellant's Br. 10). While *Smith*[4] involved remand from this Court to the CCA, and here the CCA remanded to the trial court, this is a distinction without a difference—nothing from the sentence rehearing affected the findings that the Army Court had already affirmed. Regardless, Appellant's focus on whether a record is technically complete before a CCA begins review obscures the actual issue: whether Article 66 requires a CCA to redo its review of the findings in a case where an appellant untimely raises an error after remand. It does not.

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considered this assignment of error because it is not a claim "that could have been, but was not, raised in appellant's first appeal to this court." *Steele II*, 82 M.J. at 700.

[4] *Smith* is discussed in more detail *infra* pp. 15–16.

2. The Army Court was not required under Article 66 to consider an untimely assignment of error and re-review findings it had already affirmed.

Continuing jurisdiction does not require a court to redo a review it has already completed. Appellant conflates jurisdiction with the scope of Article 66 authority. (Appellant's Br. 4). The Army Court's continuing jurisdiction gave it the power to consider Appellant's case. *See Jurisdiction, Black's Law Dictionary* (9th ed. 2014) (defining jurisdiction as "[a] court's power to decide a case or issue a decree"). Jurisdiction, however, does not mandate the scope of a court's review. Just because the court retained continuing jurisdiction does not mean it had to reconsider the findings of guilty it had already affirmed. When Appellant's case returned to the Army Court, only the sentence required review under Article 66. The Army Court appropriately affirmed the sentence and declined to hear Appellant's new assignment of error that was not related to the sentence rehearing. The Army Court's actions thus aligned with its Article 66 mandate.

Furthermore, a comprehensive review under Article 66 does not *require* consideration of specific assignments of error raised by an appellant. In *United States v. Chin*, this Court detailed the scope of a CCA's Article 66 review, explaining that a complete Article 66 review encompasses a review of the entire record of trial, not only selected portions of a record or allegations of error alone. 75 M.J. 220, 222–23 (C.A.A.F. 2016). Indeed, the CCAs and this Court often go beyond those issues raised by an appellant and "specify issues from time-to-time,

issues not raised by appellate counsel." *United States v. Johnson*, 42 M.J. 443, 447 (C.A.A.F. 1995). Additionally, appellants may be precluded from raising issues on appeal due to waiver, though CCAs are not prevented from considering those issues when conducting their Article 66 review. *See Chin*, 75 M.J. at 223. In *Chin*, this Court recognized that CCAs have the discretion to "determine whether to leave an accused's waiver intact, or to correct the error." *Id.* Likewise, CCAs have the discretion under Article 66 to determine whether to hear an appellant's untimely assignment of error—Article 66 does not oblige CCAs to hear every assignment of error raised by an appellant at any time.

The Army Court performed its statutory duties and "affirm[ed] only such findings of guilty as [it found] correct in law," on its first review. Article 66(c), UCMJ (2016). Article 66 did not require the Army Court to redo its review once the sentence rehearing was complete. The court's continuing jurisdiction did not change that, nor did any additional assignments of error raised by Appellant that did not arise from the sentence rehearing. It was, therefore, within the Army Court's discretion under Article 66 to decline to hear Appellant's new, untimely assignment of error. The cause and prejudice standard adopted by the Army Court aligns with its Article 66 mandate by permitting CCAs the discretion to hear new issues, while also "incentivizing parties to raise claims at the earliest possible time." *Steele II*, 82 M.J. at 699.

3. The cause and prejudice standard is within the broad discretion of the CCAs to implement.

As this Court has recognized, a CCA has "broad discretion in conducting its Article 66(c) review." *Guinn*, 81 M.J. at 199 (*citing United States v. Swift*, 76 M.J. 210, 216 (C.A.A.F. 2017)). It is within a CCA's discretion to adopt the cause and prejudice standard when considering new claims raised after it has fulfilled its Article 66 duties.

The federal system's cause and prejudice standard is an apt structure for a CCA to adopt when considering new claims raised for the first time on a second review. "Since the establishment of the UCMJ, the evolution of military justice has often seen the adaptation of civilian practices when not inconsistent with the purpose of military justice." *United States v. Conley*, 78 M.J. 747, 751 (Army Ct. Crim. App. 2019). Though this standard has its origins in habeas litigation, it is consistent with the Article 66 mandate that CCAs affirm only guilty findings and sentences that are "(1) correct in law; (2) correct in fact; and (3) should be approved." *Id*. The cause and prejudice test only comes into play when an appellant raises a claim that could have been raised during a previous review. *Steele II*, 82 M.J. at 697. Thus, in these scenarios, a CCA has already completed a review under Article 66.

An appellant raising an issue on a successive appeal which could have been previously raised is similar to a collateral attack brought under 28 USC § 2255.

Like in a collateral attack, Appellant raised an issue after his first review that could have been raised on the initial review. As the Supreme Court recognized when it announced the cause and prejudice standard as the proper standard for reviewing motions brought under 28 USC § 2255: "a final judgment commands respect." *United States v. Frady*, 456 U.S. 152, 164–165 (1982). Likewise, a CCA's review commands respect. The cause and prejudice standard affords a CCA's judgment commensurate respect while permitting it the discretion to consider untimely claims raised after its initial review.

This Court has already approved of a CCA declining to hear an appellant's untimely assignment of error which could have, but was not, raised earlier absent good cause shown. In *Smith*, the appellant found his case before a CCA for a second time because this Court ordered a *DuBay* hearing and remanded the case back to the Air Force Court to consider specified issues after the hearing was complete. *Smith*, 41 M.J. at 386. Smith filed new assignments of error not previously raised during the Air Force Court's first review, and the court declined to consider them, finding the appellant failed to show good cause why the court should consider the new issues out of time when the court had already performed its statutory duties on its first review.[5] *United States v. Smith*, 39 M.J. 587, 591–

[5] As discussed *supra* p. 11, Appellant's attempt to distinguish *Smith* fails because the Army Court in this case did not complete review on an incomplete record and

592 (A.F. Ct. Crim. App. 1994). This Court held the Air Force Court did not err by refusing to consider these new assignments of error, concluding "[w]hile [an] appellant is entitled to plenary review under Article 66, [UCMJ] he is only entitled to one such review." *Smith*, 41 M.J. at 386.

By affirming *Smith*, this Court has already approved of a CCA declining to hear an appellant's claim after it has conducted a review, absent a showing of good cause. Thus, this Court has already approved of the first prong of the cause and prejudice test which "asks first whether there was some 'good reason' (e.g., 'cause') for appellant's failure to raise the claim in the prior appeal." *Steele II*, 82 M.J. at 698 (quoting *United States v. Kovic*, 830 F.2d 680, 684 (7th Cir. 1987)).

All of the CCAs have declined to hear an appellant's new claims on a second review without a showing of good cause, and two CCAs—in addition to the Army Court—have implemented the cause and prejudice standard. *See United States v. Bridges*, 61 M.J. 645, 647 (C.G. Ct. Crim. App. 2005), *rev. denied*, 63

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the type of remand is irrelevant to the issue presented by this case. Additionally, Appellant's argument is flawed because he characterizes the record in *Smith* before remand as complete, but the record in this case before remand as incomplete. (Appellant Br. 11). The *DuBay* hearing in *Smith* became part of the record, just like the sentence rehearing became part of the record in this case. Thus, the record in *Smith* was not complete on the Air Force Court's first review, prior to remand. Once the Air Force Court reviewed the *DuBay* hearing and addressed the issues specified in the remand, its review was complete. The CCA was not required to hear additional issues from the appellant and redo its review of the findings it had already completed, like in the instant case.

M.J. 160 (C.A.A.F. 2006) (rejecting an appellant's assignments of error because they lacked merit and he showed no good cause for failing to earlier raise the assignments); *United States v. Chaffin*, NMCCA 200500513, 2008 CCA LEXIS 94, (N.M. Ct. Crim. App. Mar. 20, 2008), *rev. denied*, 2008 CAAF LEXIS 1244 (C.A.A.F. Nov. 13, 2008)) (adopting the cause and prejudice standard and declining to hear new errors raised on a second review following a remand for a rehearing); and *United States v. Shavrnoch*, 47 M.J. 564, 568 (A.F. Ct. Crim. App. 1997) (*aff'd in part, rev'd in part on other grounds,* 49 M.J. 334 (C.A.A.F. 1998)) (adopting the cause and prejudice standard "for the review of issues which could have been, but were not, raised before us in the first instance"). The Army Court's cause and prejudice test is, thus, far from novel in the military justice system: the Air Force and Navy-Marine Corps Courts have already implemented it, and this Court had already approved of its good cause requirement.

Additionally, members of this Court have looked favorably upon applying the cause and prejudice standard. *See Johnson*, 42 M.J. at 447 (Crawford, J. concurring) ("Absent a showing of good cause for failure to raise an issue or manifest injustice, this Court should not exercise its discretion to entertain an issue raised for the first time before this Court."). Judge Crawford explained, "The failure to invoke waiver absent such a showing prevents finality, taxes scarce resources, and encourages withholding of objections . . . . Indeed, our system is

already more protective than others and has a multitude of safeguards to ensure a fair and just review." *Id.* This logic applies with even more force to the CCAs, which are commanded by Article 66 "to look beyond those issues raised by the appellant, and ensure justice is done." *Chaffin*, 2008 CCA LEXIS 94 at *6.

4. The cause and prejudice standard is not "unduly burdensome and strict."

The cause and prejudice standard is not "unduly burdensome and strict," (Appellant's Br. 12), because it allows appellants to raise issues after the CCA has performed its statutory duty under Article 66. It does not "risk[] a 'potted plant role for appellate counsel with regard to new issues"' for two reasons. (Appellant's Br. 9) (quoting *Johnson*, 42 M.J. at 446). First, appellate counsel *can* raise new issues under this standard, as long as they show good cause for the failure to raise the issue previously, and actual prejudice resulting from the new issue, or manifest injustice. Second, even absent a showing of cause and prejudice, appellate counsel can raise new issues with this Court, and this Court can grant the petition for grant of review or can remand the issue back to the CCA for its consideration. *See, e.g., Johnson,* 42 M.J. at 446.

In practice, this standard is no different than time limitation rules adopted by CCAs designed to ensure efficient administration of justice. *See, e.g.*, Joint Rules of Practice and Procedure of the Courts of Criminal Appeals Rule [C.C.A. R.] 18(d) (proscribing time limits for the filing of briefs) and C.C.A. R. 24 (allowing

the court, in its discretion, to extend time limits "in such manner as may appear to be required for a full, fair, and expeditious consideration of the case"). Just as CCAs have the discretion to implement and enforce deadlines, they too have the discretion to employ the cause and prejudice standard when an appellant untimely raises an error on a successive appeal.

Appellant's question, "is cause and prejudice the best way to accomplish the goal of avoiding piecemeal litigation?" (Appellant's Br. 13), is inapposite. It is firmly within the discretion of the CCAs to choose which tests to implement to fulfill their statutory mandate under Article 66. In any event, the cause and prejudice standard is certainly better than Appellant's counterproposal: "A much simpler rule would be for CCAs who order a trial court to conduct additional fact finding or additional proceedings to not begin or conduct their Article 66 review until the record, in its entirety, is complete." (Appellant's Br. 13). This is an impossible task. A CCA that orders an additional proceeding must first conduct a review under Article 66 to determine that an additional proceeding is needed. Appellant's rule would force CCAs to engage in the redundancy of successive and theoretically interminable Article 66 reviews. This is counter to the efficient administration of justice, and not required by Article 66.

As the Army Court explained, the cause and prejudice standard "strikes the right balance between acknowledging that in some cases appellants will be able to

bring new meritorious claims on second and successive appeals, while at the same time incentivizing parties to raise claims at the earliest possible time." *Steele II*, 82 M.J. at 699. This standard also prevents an appellant—like this one—from receiving a second review due to the happenstance of a rehearing, when other appellants would be deprived of this windfall. The cause and prejudice standard thus is in harmony with Article 66's mandate to conduct a plenary review and is within the discretion of the CCAs to implement.

Contrary to Appellant's concerns, (Appellant's Br. 15–16), this standard promotes the ends of justice. It discourages piecemeal litigation and thus encourages the fair, swift, and efficient administration of justice. It also ensures an even application of appellate review, so no appellant unfairly receives a second—or more—bite at the metaphorical apple. Finally, and importantly, this standard is compatible with a CCA's Article 66 mandate to "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c) UCMJ. "True justice," (Appellant's Br. 15–16), does not require a CCA to review what it has already reviewed without reason. Under the cause and prejudice standard, an appellant may receive a second review by a CCA, but only when it would be just.

Conclusion

WHEREFORE, the United States respectfully requests this Honorable Court affirm the Army Court's decision.

JENNIFER A. SUNDOOK
Major, Judge Advocate
Branch Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 37586

TIMOTHY R. EMMONS
Captain, Judge Advocate
Government Appellate Attorney
U.S.C.A.A.F. Bar No. 37595

JACQUELINE J. DEGAINE
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 37752

CHRISTOPHER B. BURGESS
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 34356

APPENDIX

United States v. Chaffin

United States Navy-Marine Corps Court of Criminal Appeals

March 20, 2008, Decided

NMCCA 200500513 GENERAL COURT-MARTIAL

Reporter
2008 CCA LEXIS 94 *; 2008 WL 746812

UNITED STATES OF AMERICA v. CLAYTON A. CHAFFIN, CORPORAL (E-4), U.S. MARINE CORPS

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Review denied by *United States v. Chaffin, 2008 CAAF LEXIS 1244 (C.A.A.F., Nov. 13, 2008)*

Prior History: **[*1]** Sentence Adjudged: 08 April 2004. Military Judge: LtCol Jeffrey Colwell, USMC. Convening Authority: Commanding General, 2d FSSG, U.S. Marine Forces, Atlantic, Camp Lejeune, NC. Staff Judge Advocate's Recommendation: LtCol A.G. Peterson, USMC; Addendum: LtCol J.L. Gruter, USMC.

United States v. Chaffin, 2007 CCA LEXIS 47 (N-M.C.C.A., Feb. 22, 2007)

Counsel: For Appellant: LT Kathleen Kadlec, JAGC, USN.

For Appellee: CDR M.G. Miller, JAGC, USN; LT Craig Poulson, JAGC, USN.

Judges: Before E.S. WHITE, D.E. O'TOOLE, R.E. VINCENT, Appellate Military Judges. Judge O'TOOLE and Judge VINCENT concur.

Opinion by: E.S. WHITE

Opinion

OPINION OF THE COURT

WHITE, Senior Judge:

This case is before us a second time, following remand for a rehearing or sentence reassessment.

Previously, this court set aside findings of guilty to wrongful use of marijuana and distribution of cocaine (Specifications 1 and 3 of Charge III), and affirmed the remaining findings of guilty. [1] We set aside the sentence, and returned the case to the Judge Advocate General for remand to an appropriate convening authority. The convening authority was authorized to order a rehearing on the affected specifications and the sentence, to dismiss the affected specifications and order a rehearing on sentence alone, or to dismiss the affected specifications **[*2]** and reassess the sentence. *United States v. Chaffin, No. 200500512, 2007 CCA LEXIS 47*, unpublished op. (N.M.Ct.Crim.App. 22 Feb 2007).

On 7 June 2007, the convening authority dismissed the affected charge and specifications, and reassessed the sentence. He approved only so much of the sentence as extended to 18 months confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant now assigns four supplemental errors. [2] First, he contends he was prejudiced **[*3]** by "spill over" from improper comments by the trial counsel during opening statement, [3] from the testimony of a witness [4]

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[1] The court affirmed the findings of guilty to Specifications 10, 12, and 13 of Charge V and to Charge V, and to Additional Charge II and the sole specification thereunder. The appellant was acquitted of Charge I and the specifications thereunder, Charge II and the sole specification thereunder, Specification 5 of Charge III, Charge IV and the specifications thereunder, Specifications 1-9 and 14 of Charge V, Additional Charge I and the sole specification thereunder, and Additional Charge III and the sole specification thereunder. The convening authority set aside the findings of guilty to, and dismissed, Specifications 2 and 4 of Charge III and Specification 11 of Charge V.

[2] The appellant originally assigned four errors, all of which were resolved by the court's earlier decision.

[3] The appellant cites a statement by the trial counsel that the

on Specification 11 of Charge V, which specification the convening authority later dismissed, and from Prosecution Exhibits 5 and 6, which this court ruled inadmissible in its prior decision. Second, he argues post-trial delay has denied him due process. Third, he asserts the post-trial delay affects the sentence that should be affirmed under *Article 66*, UCMJ, and asks this court not to affirm the bad-conduct discharge. Fourth, the appellant contends the reassessed sentence is inappropriately severe, and more severe than that which would have been imposed if the erroneous admission of Prosecution Exhibits 5 and 6 had not occurred.

We have examined the record of trial, the appellant's four supplemental assignments of error and brief, and the Government's answer. We have previously affirmed the findings. We now find the sentence is correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. *See* Arts. 59(a) and *66(c)*, UCMJ.

Spillover

The appellant asks this court to set aside the remaining findings of guilty, arguing those convictions were influenced by "spillover." Although he could have, the appellant did not raise this issue as a separate assignment of error when his case first came before this court. [5] Because the appellant has failed to demonstrate either good cause for his failure to raise this issue previously, or that manifest injustice would result if we did not now consider this issue, we hold the appellant has waived this issue. Alternatively, this issue was necessarily decided against the appellant when this court previously affirmed the remaining findings of guilty.

Piecemeal litigation is "counterproductive to the fair, orderly judicial process created by Congress in *Articles 66* and *67*, UCMJ." *Murphy v. Judges of United States Army Court of Military Review, 34 M.J. 310, 311 (C.M.A. 1992)*. It can undermine the finality of judgments, needlessly extend resolution of the case, and burden scarce judicial resources. *See McCleskey v. Zant, 499 U.S. 467, 491-92, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)*(citations omitted). Further, a service court of criminal appeals "cannot effectively carry out its . . . review of . . . cases unless all issues known to or reasonably discoverable by appellant are litigated before that court in its initial review of the case." *Murphy, 34 M.J. at 311*.

Principles of waiver and forfeiture provide the necessary incentive to litigants and counsel to raise issues in a timely fashion **[*6]** and to avoid piecemeal litigation. *See Freytag v. Commissioner, 501 U.S. 868, 895, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)*(Scalia, J., concurring in part and in the judgment); *United States v. Frady, 456 U.S. 152, 163, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)*; *United States v. Causey, 37 M.J. 308, 311 (C.M.A. 1993)*; *United States v. Shavrnoch, 47 M.J. 564, 566-68 (A.F.Ct.Crim.App. 1997)*, *aff'd in part &; set aside in part on other grounds*, *49 M.J. 334 (C.A.A.F. 1998)*. Such principles are routinely applied at the trial level, and are familiar to appellate counsel reviewing records of trial. [6] As well, such principles are implicit in the Courts of Criminal Appeals Rules of Practice and Procedure, 44 M.J. LXIII, 32 C.F.R. Part 150 (2007). Those rules establish deadlines for the submission of assignments of error, and require leave of court to file briefs and motions out of time. CCA Rules 15 and 23.

On the other hand, just as the Plain Error Doctrine permits the court to address evidentiary errors not objected to at trial, the interests of justice and the dictates of *Article 66*, UCMJ, require that any forfeiture rule for issues not timely raised on appeal must also

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Government's evidence would show the appellant had used and distributed illegal drugs during a break in service between enlistments. The judge permitted the trial counsel to make the objected-to statement, but later ruled evidence of that fact inadmissible.

[4] Mr. William **[*4]** Wallace.

[5] The appellant did, however, partially argue spillover in support of his third original assignment of error. At that time, he asked the court to dismiss Specifications 1 and **[*5]** 3 of Charge III, Specification 10 of Charge V, and Additional Charge II, due to the trial counsel's improper remarks during opening statement, the improper admission of Prosecution Exhibits 5 and 6, and the insufficiency of the evidence. He did not raise the allegedly prejudicial effect of Mr. Wallace's testimony, nor did he argue for dismissal of Specifications 12 and 13 of Charge V.

[6] *See, e.g.* Rule for Courts-Martial 912(f)(4), Manual for Courts-Martial, United States (2005 ed.)(challenge for cause), R.C.M. 910(j)(factual issues waived by guilty plea); R.C.M. 405(k)(objection to pretrial investigation); R.C.M. 707(e)(speedy trial); R.C.M. 801(g)(failure to timely raise defenses, objections &; motions); Military Rule of Evidence 103(a) Manual **[*7]** For Courts-Martial, United States (2005 ed.)(evidentiary errors only preserved by objection); Mil. R. Evid. 311(i)(guilty plea waives *4th Amendment* errors).

have exceptions. *Article 66*, UCMJ, commands us to affirm only such findings and sentence as we find correct in law and fact, and determine, on the basis of the entire record, should be approved. That mandate requires this court to look beyond those issues raised by the appellant, and ensure justice is done. The appellate court rules, likewise, permit the court to grant enlargements and leave to file out of time, as well as to suspend the rules. CCA Rules 23, 24 and 25.

The avoidance of piecemeal litigation and our Article 66 mandate are easily reconciled by adopting, as the standard for determining when not to apply forfeiture, the "cause and prejudice" standard used by the United States Supreme Court in its procedural default and habeas corpus jurisprudence. *See* McCleskey, 499 U.S. at 493; **[*8]** United States v. Simoy, No. 30496, 2000 CCA LEXIS 183, unpublished op. (A.F.Ct.Crim.App. 7 Jul 2000), *aff'd,* 54 M.J. 407 (C.A.A.F. 2001).

The cause and prejudice standard requires a litigant to show "'some objective factor external to the defense impeded counsel's efforts'" to raise the claim in a timely manner. McCleskey, 499 U.S. at 493 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). Cause can be established by showing, *inter alia*, official interference preventing compliance with procedural rules, that "'the factual or legal basis for a claim was not reasonably available to counsel,'" or that counsel was constitutionally ineffective. Id. at 494 (quoting *Carrier*). In addition to showing cause, the appellant must also show actual prejudice resulting from the error. *Id.* (quoting Frady, 456 U.S. at 168 (internal quotations omitted)). Alternatively, a litigant may show that a constitutional violation probably caused an innocent person to be convicted, resulting in a fundamental miscarriage of justice. *Id.* (citing Carrier, 477 U.S. at 485). [7]

In this case, the appellant has shown neither cause and prejudice nor that manifest injustice would result if the court does not consider his first supplemental assignment of error. The facts and law necessary to raise prejudicial spillover were known when this case first came before the court, yet it was not assigned as an error. Even if it were not until after the court had ruled Prosecution Exhibits 5 and 6 erroneously admitted that the spillover argument first crystallized for the appellant -- which is clearly not the case, since he alluded to spillover in his argument on the third original assignment of error -- the appellant could have then sought reconsideration of our decision affirming the remaining findings. He did not. Nor has the appellant clearly shown he was prejudiced by spillover, where the military judge correctly instructed the members on spillover, [8] the members acquitted the appellant on a number of specifications, [9] and there was adequate independent evidence to find the appellant guilty of the remaining specifications.

Alternatively, we conclude the court has already decided the question presented by the appellant's first supplemental assignment of error. The court's earlier decision specifically stated the court was satisfied the appellant had not been harmed by the trial counsel's comments during opening statement. *Chaffin*, unpublished op., at 5 n.7. Further, in previously contending there was insufficient evidence on specification 10 of Charge V and Additional Charge II, the appellant argued that the erroneously-admitted Prosecution Exhibits 5 and 6 had **[*11]** contributed to his conviction. Nevertheless, the court held the evidence was legally and factually sufficient. *Id.* at 5. Finally, the court's decision affirming the findings of guilty to the remaining charges and specifications necessarily implied the conclusion that the appellant had not been materially prejudiced by improper evidentiary spillover. We decline to revisit them.

Post-Trial Review

In his second and third supplemental assignments of error, the appellant alleges the delay in completing appellate review has denied him due process and

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[7] Former Chief Judge Crawford of our superior court has referred to this showing as one of "manifest injustice." United States v. Johnson, 42 M.J. 443, 447 (C.A.A.F. 1995)(Crawford, **[*9]** J. concurring in the result).

[8] Record at 1018; Appellate Exhibit LXXIII at 23-25. Absent evidence to the contrary, we presume members follow the **[*10]** military judge's instructions, United States v. Loving, 41 M.J. 213, 235 (C.A.A.F. 1994); United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991). "[P]roperly drafted and delivered instructions are sufficient to prevent juries from cumulating evidence, thus avoiding improper spill-over." United States v. Myers, 51 M.J.570, 579 (N.M.Ct.Crim.App. 1999)(citing United States v. Duncan, 48 M.J. 797, 803 (N.M.Ct.Crim.App. 1998)).

[9] Although charged with 31 separate specifications under eight separate charges, the members convicted the appellant on only nine specifications. Of the 12 drug-related specifications, the members acquitted the appellant of three.

affects the sentence that should be affirmed under *Article 66*, UCMJ. [10] He specifically points to the 154 days between adjournment of the court-martial and authentication of the record of trial, and to the 681 days between the original docketing of the case with this court and our earlier decision. [11]

"[I]n cases involving claims that an appellant has been denied his due process right to speedy post-trial review and appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt." *United States v. Allison, 63 M.J. 365, 370-71 (C.A.A.F. 2006)*. **[*13]** The appellant here has not identified any specific harm from the delay, nor do we find any. He has not suffered oppressive incarceration pending the resolution of his appeal. [12] He has not alleged any anxiety or concern beyond that normal for people awaiting appellate decisions. As the convening authority dismissed Specifications 1 and 3 of Charge III and we affirmed the remaining findings of guilt, there is no danger his defense has been impaired by the delay.

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[10] Although the appellant did not raise post-trial delay in his initial assignments of error, we will nonetheless consider these two supplemental assignments on their merits. First, relevant facts have changed; the post-trial delay is now greater than it was when the appellant filed his original assignments of error. Second, had it been raised originally, **[*12]** the court would have declined to decide the issue at that time as unripe, given the decision the case needed to be returned to the convening authority for either rehearing or sentence reassessment.

[11] The latter delay, the appellant says, is "unreasonable, unexplained and can only be attributed to gross negligence." Appellant's Supplemental Brief and Assignment of Errors of 20 Jul 2007 at 14. Examination of the record, however, reveals that 517 of those 681 days were spent waiting for the appellant to file his initial brief and assignment of errors. Once the appellant filed his brief and assignment of errors, this court issued its decision in 164 days. While, in hindsight, it may not have been prudent to have accommodated the appellant's counsel by granting their nine requests for enlargement of time, we cannot agree with the appellant that doing so was grossly negligent, or that the length of time his case was pending before the court is unexplained.

[12] According to the appellant's clemency submission of 16 May 2007, he was released from confinement on 3 March 2005, 329 days after conclusion of his trial. LT A. Souders Ltr of 16 May 07 at 1. Even if this case had proceeded in strict accordance with the timelines established in *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*, it is highly doubtful our initial decision, or the convening authority's sentence reassessment, would have taken place before the appellant was released from confinement.

Accordingly, we conclude any denial of due process was harmless beyond a reasonable doubt. Further, we find the delay in this case is not so egregious that tolerating it would adversely affect the public's perception of the fairness **[*14]** and integrity of the military justice system. *See United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*.

Finally, having considered the factors set out in *United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)*(en banc), we decline to reduce the sentence pursuant to our authority under *Article 66*, UCMJ. *See Toohey, 63 M.J. at 363*; *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004)*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*.

Sentence Appropriateness

In his fourth supplemental assignment of error, the appellant asserts his sentence to 18 months confinement is inappropriately severe, and argues a sentence of 10 months confinement is more appropriate. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)*. This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)*(quoting *United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959))*.

In this case, **[*15]** the appellant, a noncommissioned officer, was found guilty of repeatedly soliciting junior Marines to use and possess drugs. The specifications of which the appellant now stands convicted carry a maximum punishment of 14 years confinement. They are offenses with serious ramifications for military good order, discipline and readiness. Based on the entire record, we find the appellant's sentence is not inappropriately severe, and conclude it is appropriate for this offender and his offenses. *United States v. Baier, 60 M.J. 382 (C.A.A.F. 2005)*; *Snelling, 14 M.J. at 268*; *see* Art. *66(c)*, UCMJ.

Further, we conclude that, absent the prejudicial error necessitating the sentence reassessment, the sentence would have been at least as severe as that approved by the convening authority on 8 June 2007. *See United*

States v. Harris, 53 M.J. 86, 88 (C.A.A.F. 2000); *United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986)*; R.C.M. 1107(e)(1)(B)(iv).

Conclusion

We have previously affirmed the findings of guilty. We now affirm the sentence, as approved by the convening authority on 8 June 2007.

Judge O'TOOLE and Judge VINCENT concur.

United States v. Easterly

United States Air Force Court of Criminal Appeals

April 12, 2019, Decided

No. ACM 39310

Reporter
2019 CCA LEXIS 175 *; 2019 WL 1616526

UNITED STATES, Appellee v. Chase J. EASTERLY, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Motion denied by *United States v. Easterly, 79 M.J. 300, 2019 CAAF LEXIS 780 (C.A.A.F., Oct. 31, 2019)*

Affirmed by, Remanded by *United States v. Easterly, 2020 CAAF LEXIS 77 (C.A.A.F., Feb. 4, 2020)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Charles E. Wiedie, Jr. Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 25 April 2017 by GCM convened at Joint Base Pearl Harbor-Hickam, Hawaii.

United States v. Easterly, 2014 CCA LEXIS 40 (N-M.C.C.A., Jan. 31, 2014)

Counsel: For Appellant: Major Todd M. Swensen, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Captain Michael T. Bunnell, USAF; Captain Sean J. Sullivan, USAF; Mary Ellen Payne, Esquire.

Judges: Before HUYGEN, MINK, and POSCH, Appellate Military Judges. Senior Judge HUYGEN delivered the opinion of the court, in which Judge MINK joined. Judge POSCH filed a separate opinion concurring in the result in part and dissenting in part.

Opinion by: HUYGEN

Opinion

HUYGEN, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of attempted premeditated murder in violation of *Article 80, Uniform Code of Military Justice (UCMJ)*, *10 U.S.C. § 880*.[1],[2] The members adjudged a sentence of a dishonorable discharge, confinement for seven years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Appellant asserts six assignments of error: (1) whether the military judge abused his discretion by admitting Appellant's confidential communications with a psychotherapist;[3] (2) whether the military judge abused his discretion by admitting statements Appellant made in the presence of his first sergeant without being advised of his rights under *Article 31, UCMJ*, *10 U.S.C. § 831*; (3)—(5) whether the conviction of attempted premeditated murder was legally and factually insufficient because the Government failed to prove

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[1] The members found Appellant not guilty of communicating a threat in violation of *Article 134, UCMJ*, *10 U.S.C. § 934*. A charge for fraudulent enlistment in violation of *Article 83, UCMJ*, *10 U.S.C. § 883*, was withdrawn and dismissed after arraignment.

[2] All references in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence are to the UCMJ and rules found in the *Manual for* ***[*2]*** *Courts-Martial, United States* (2016 ed.) (*MCM*).

[3] The trial transcript, exhibits, and briefs addressing the first assignment of error were sealed pursuant to Rule for Courts-Martial (R.C.M.) 1103A. These portions of the record and briefs remain sealed, and any discussion of sealed material in this opinion is limited to that which is necessary for our analysis. *See* R.C.M. 1103A(b)(4).

specific intent and substantial step and because Appellant abandoned his effort to commit murder; and (6) whether, at the time of the offense, Appellant lacked the mental responsibility to commit the offense. We also specified the issue of whether the military judge committed plain error by failing to instruct *sua sponte* on the impact of a punitive discharge on permanent retirement for physical disability, and we considered the issue of timely appellate review. We find prejudicial error with regard to the military judge's failure to instruct the court members on the impact of a punitive discharge on retirement. Thus, we affirm the findings but set aside **[*3]** the sentence.

I. BACKGROUND

In September 2015, Appellant was deployed to southwest Asia. While there, he had homicidal thoughts, which worried him. He told his deployed first sergeant about these thoughts, and, as a result, he was medically evacuated to Landstuhl Regional Medical Center (Landstuhl), Germany and, after a couple of weeks of treatment, to Travis Air Force Base, California. While at Landstuhl, Appellant received his first diagnosis of schizophrenia.

In October 2015, when Appellant reached his home station of Joint Base Pearl Harbor-Hickam, Hawaii, he began treatment consisting of prescribed medication and regular (usually weekly) sessions with a psychologist, Major (Maj) ER. Maj ER confirmed the diagnosis of schizophrenia, which triggered the process to evaluate Appellant for a discharge based on disability.

On 26 April 2016, an Informal Physical Evaluation Board (IPEB) confirmed a specific diagnosis of "Schizophrenia Spectrum, Persistent Auditory Hallucinations" and found Appellant unfit for military service. However, the IPEB also found that Appellant's condition existed prior to military service and was not permanently aggravated by military service. The IPEB concluded **[*4]** that Appellant should be discharged with no compensable disability, despite his "significant risk of recurrence and/or progression of his disease" and need for "frequent follow-up with a medical specialist."

In May 2016, the victim of Appellant's offense, EE, met Appellant through a dating website. At the time, EE was approximately 60 years old and Appellant was 22. EE testified at trial and recounted the following: Their first date was a dinner on Monday, 23 May 2016. EE described Appellant as "charming" and "a Jimmy Stewart sort of nice." After dinner, they drove in Appellant's car to the beach. EE was cold and wanted Appellant to put his arm around her. He declined to do so, at which point EE wanted to go home. They drove back to the restaurant. Appellant asked for a goodnight kiss, but EE spurned him because he smelled like cigar smoke. On Tuesday night, they went country dancing, and EE described Appellant as "a complete gentleman." Appellant asked EE to go out with him on Wednesday, but she said no.

That Friday, 27 May 2016, EE and Appellant went on their third date, which was planned as a dinner and a nighttime hike. When Appellant showed up in casual clothes, EE was disappointed **[*5]** because "the first night I was with Jimmy Stewart, the second night I was with like John Wayne, and then there's this guy that looks like he's going to fix his car," an impression that turned out to be prophetic. On the way to dinner, Appellant's car broke down, and EE pushed it into the restaurant parking lot while he steered. His previously mild stutter became "thick" as he was making phone calls to arrange a tow. After dinner, they took a taxi to EE's apartment so that she could drive Appellant back to base. When they were about to get into her car, he asked to use her bathroom and added that he could check what tools he would need the next day to hang a mirror she had asked him to hang. Once in her apartment, she pointed him toward the guest bathroom but, shortly afterwards, found him in her bathroom. She told him to get out of her bathroom, which she did not like guests to use, and he went into her bedroom and sat on her bed. After they argued about a news story being reported on television, Appellant was "very apologetic," asked EE to let him "relax" her, and offered to perform oral sex on her. She initially declined but then acquiesced. According to EE, the oral sex was not **[*6]** "something that he was wanting to do or skilled at." She stopped Appellant by sitting up "like the Exorcist" and yelling, "I hope someone's having fun because I'm not." Her outburst saddened Appellant, who struggled to say that he wanted to take a short walk. EE said, "why don't you take a long walk," and Appellant left the apartment.

EE expected Appellant to return the next day, Saturday, 28 May 2016, to hang a mirror and build an armoire for her. She called him repeatedly and left voicemail messages, the last one ending with her calling him a "coward." He did not return her calls or otherwise respond.

On the afternoon of Sunday, 29 May 2016, EE heard a knock on her apartment door. She was not expecting

anyone, assumed there was a delivery, and decided not to answer. She then heard Appellant say her name and apologize repeatedly; she did not respond. After 10 to 15 minutes had passed, Appellant called out to EE's roommate, who was not at home, and said that he was there to retrieve his wallet. EE did not want to talk with Appellant, so she stayed out of Appellant's view but watched through a window as Appellant took "another look around" and left.

In a videotaped interview by Air Force **[*7]** Office of Special Investigations (AFOSI) agents that was presented at trial, Appellant described his actions of the weekend as follows: on 27 May 2016, Appellant was at EE's apartment when "my body went like numb . . . . I just stared at a wall for a good like five, 10 minutes. And then I told her I wanted to go for a walk." He left the apartment and took a taxi back to base.

On 28 May 2016, Appellant had "the urge to want to hurt [EE]" and thought, "I don't want to do this but I can't stop myself." He went to the Base Exchange and bought a knife, lighter, and lighter fluid. He gathered a bag of "items," including the knife, lighter, and lighter fluid, trash bags, gloves, extra clothes, bleach, and a dust mask. He planned to make sure he would not get "caught" by using the bleach "for DNA," specifically, to remove his DNA from the knife and EE's apartment, the gloves "for no [finger]prints," and the lighter and lighter fluid to start a fire in EE's apartment, as he had learned to do by watching television shows.

On 29 May 2016, Appellant borrowed another Airman's car and drove to EE's apartment complex. He parked a few blocks away and claimed that he avoided the security cameras around **[*8]** the complex as he approached EE's building. Once inside, he followed another resident on to the elevator and arrived at EE's apartment. Standing with his hands at his sides and his bag at his feet, he knocked on her door, waited 5 to 10 minutes, and then knocked again. While he was nervous, he also felt "a power of like strength almost, feels like a thrill ride." But as he stood at her door for a total of approximately 20 minutes, "my brain clicked, like went back to normal me. And I realized what I had done." He further explained to AFOSI, "thank God she wasn't home. . . . 'Cause otherwise I may have done it. . . . I might have actually harmed her in some way. I don't think I actually would have . . . killed her, but I'm sure I might have tried actually harm[ing her]." He initially remembered leaving the building and throwing his bag into a dumpster but then recalled taking it out of the dumpster and back to his dormitory room. Although Appellant told AFOSI that, "the day after," he spoke with a chaplain and then went with the chaplain to see Maj ER, he actually spoke with a chaplain three days later and went by himself to see Maj ER.

Monday, 30 May 2016, was a federal holiday. On **[*9]** Wednesday, 1 June 2016, Appellant talked with a military chaplain, who referred Appellant to Maj ER, the psychologist who had been treating him since October 2015. Appellant—of his own volition and by himself—went to see Maj ER. Events unfolded as described below, and the day ended with Appellant voluntarily admitted for in-patient treatment at the Behavioral Health Unit of Tripler Army Medical Center (TAMC), Hawaii.

On the following Monday, 6 June 2016, Appellant's first sergeant, Master Sergeant (MSgt) JM, became the first person to contact AFOSI about Appellant. On 7 June 2016, AFOSI agents executed a search authorization and seized from Appellant's dormitory room a black bag that contained various items, including a bottle of bleach, a multipurpose lighter, a bottle of lighter fluid, a face dust mask, an eight-inch knife in a sheath, a trash bag, shorts, and a t-shirt. Documents and security camera video footage from the Base Exchange indicated that Appellant bought the knife and, in a separate transaction, the lighter and lighter fluid on 28 May 2016. Security camera video footage from EE's apartment complex showed Appellant, wearing a suit and carrying a black bag, as he walked **[*10]** to and waited for the elevator in EE's apartment building on 29 May 2016. On 8 June 2016, AFOSI agents interviewed Appellant while he was still an in-patient at TAMC.

Meanwhile, the PEB process continued. On 21 June 2016, a Formal Physical Evaluation Board (FPEB) determined that Appellant "has a chronic disease [schizophrenia] that has no cure and is characterized by unpredictable exacerbations and remissions. Clinical notes state that [Appellant] will require lifelong treatments." Overriding the earlier finding of the IPEB, the FPEB found that Appellant's condition was permanently aggravated by military service. As a result, the FPEB recommended "Permanent Retirement" with a disability rating of 100 percent.

Also on 21 June 2016, Appellant was released from in-patient treatment at TAMC and ordered into pretrial confinement, where he remained until he was sentenced on 25 April 2017.

II. DISCUSSION

A. Psychotherapist—Patient Privilege

Appellant first asserts that the military judge abused his discretion by admitting Appellant's confidential communications with a psychotherapist, which were made to facilitate mental health treatment. We disagree.

1. Additional Background

During a motions hearing, **[*11]** Maj ER described a meeting with Appellant on 1 June 2016 when Appellant told her that he was worried he might hurt someone. He explained that, a couple days earlier, a woman with whom he had a brief sexual relationship "stood him up." He then obtained items to kill her and went to her home, but she was not there. While he was not planning to try again, he was scared about the possibility that he might. When Maj ER asked Appellant if he was willing to be admitted for in-patient mental health treatment, he indicated that he was.

Maj ER notified Appellant's chain of command, specifically, his first sergeant, MSgt JM, that Appellant posed a potential danger to other people. Maj ER considered her notice to be an exception to the psychotherapist—patient privilege. Maj ER relayed to MSgt JM that Appellant had planned to murder a woman with whom he had a brief sexual relationship; that he bought certain items to kill her; and that he went to her apartment and knocked on her door but she was not at home. Appellant identified EE only by her first name and did not provide her telephone number or address. In notifying Appellant's unit and providing details about what Appellant had told Maj ER, **[*12]** Maj ER was trying to convey the gravity of the situation and to differentiate it from previous incidents when Appellant had told her about homicidal thoughts he was having. Although Appellant had previously described having such thoughts to Maj ER, he had never before described planning or taking any action to commit murder.

After Maj ER spoke with MSgt JM, she provided the same information about what Appellant had told her in two telephone calls to TAMC, first to the Emergency Room attending physician and second to the Behavioral Health Unit attending psychiatrist. Maj ER did so intending for Appellant to be evaluated at the Emergency Room and then admitted for in-patient hospitalization at the Behavioral Health Unit. She also expected that, if there was a "duty to warn," TAMC would handle it.

Maj ER "handed off" Appellant to MSgt JM, and MSgt JM escorted Appellant to TAMC. Maj ER expected MSgt JM to stay with Appellant until he was admitted or to contact her if he was not. Although Maj ER was supporting Appellant's decision to seek voluntary admission for in-patient treatment at TAMC, she was fully prepared to take the necessary steps to have him admitted involuntarily if he changed **[*13]** his mind.

At Appellant's court-martial, the Defense moved to suppress Appellant's statements to Maj ER and derivative evidence pursuant to Mil. R. Evid. 513. The military judge conducted a closed hearing and denied the motion based on the exceptions articulated in Mil. R. Evid. 513(d)(4) and Mil. R. Evid. 513(d)(6). The military judge also determined that Maj ER did not disclose more information than necessary.

2. Law

"We review a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Jenkins, 63 M.J. 426, 428 (C.A.A.F. 2006)* (citing *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)*). "We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)* (quoting *United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)*). "[A] judge has a range of choices and will not be reversed so long as the decision remains within that range." *Id.* (citing *United States v. Wallace, 964 F.2d 1214, 1217 n.3, 296 U.S. App. D.C. 93 (D.C. Cir. 1992)*).

Mil. R. Evid. 513(a) states the general rule for the psychotherapist—patient privilege and provides that a patient has a privilege to refuse to disclose and to prevent anyone else from disclosing a confidential communication made to a psychotherapist for the purpose of facilitating diagnosis or treatment. "Psychotherapist" includes a clinical psychologist or other mental health professional. Mil. R. Evid. 513(b)(2). A "confidential" communication is "not intended to **[*14]** be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services." Mil. R. Evid. 513(b)(4).

Mil. R. Evid. 513(d) describes seven exceptions to the psychotherapist—patient privilege. The two relevant to Appellant's case are when a psychotherapist "believes

that a patient's mental or emotional condition makes the patient a danger to any person," Mil. R. Evid. 513(d)(4), and when disclosure is "necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission," Mil. R. Evid. 513(d)(6).

3. Analysis

The record in Appellant's case, which includes the military judge's written ruling denying the Defense's motion to suppress Appellant's statements to Maj ER, makes clear that those statements qualified under Mil. R. Evid. 513 as confidential communications subject to the psychotherapist—patient privilege. Appellant made the statements to Maj ER as his treating psychologist for the purpose of facilitating mental health treatment, or, as Appellant put it when explaining to AFOSI how he came to be admitted at TAMC, "I went straight [to Maj ER], said I need the help."

Had Appellant not told Maj ER about his attempt to kill EE, the Government, **[*15]** particularly AFOSI or any law enforcement agency, would never have known of Appellant's crime. The Airman whose car Appellant drove to EE's apartment on Sunday and who Appellant asked to sharpen his newly purchased knife on Saturday had no idea of what Appellant intended; EE did not—and had no reason to—suspect that Appellant presented a threat when she saw him at her door on Sunday; and the chaplain who referred Appellant to Maj ER let him make the decision to go and let him go unescorted. But because of what Appellant told Maj ER, she notified MSgt JM and providers at TAMC; MSgt JM escorted Appellant to TAMC and was present during Appellant's medical examination; and MSgt JM connected what he saw in Appellant's dormitory room—the black bag and its contents—to what Maj ER had disclosed to MSgt JM and what Appellant had said when being admitted to TAMC about Appellant's plan to commit murder. As a result, MSgt JM contacted AFOSI; AFOSI seized the bag and interviewed Appellant; and Appellant provided the details of what he had done.

Appellant now contends that the military judge abused his discretion by not suppressing the statements Appellant made to Maj ER and all of the fruit that **[*16]** sprang from that purportedly poisonous tree. We are not persuaded. The military judge issued a written denial of the Defense's motion to suppress, which laid out his bases and reasoning with more than sufficient information to leave us with a definite and firm conviction that the military judge did not commit any error, much less abuse his discretion. In the denial, the military judge addressed the three concerns Appellant raised at trial and raises again on appeal, and we find in the military judge's determinations neither a clearly erroneous finding of fact nor an erroneous view of the law.

First, Appellant points to Maj ER's testimony that, at the time Appellant made the confidential communications, he "did not have an active plan [to kill EE] or intention to go out and do it again." Appellant argues that the Mil. R. Evid. 513(d)(4) exception requires a "present" danger and that, when he went to see Maj ER, more than two days had passed since his attempt to kill EE and he did not want to hurt anyone at that time. We agree with Appellant's reading of Mil. R. Evid. 513(d)(4) to require a "present" danger insofar as a strictly "past" danger would be insufficient to trigger the exception. For example, Appellant's homicidal thoughts **[*17]** before his September 2015 medical evacuation would not have allowed Maj ER to disclose his confidential communications to her in May 2016.

However, we disagree with Appellant's reading insofar as he would have "present" mean "at that exact moment." As the military judge explained, Maj ER disclosed Appellant's confidential communications because she believed he was a "present" danger. While Maj ER played her part in Appellant's voluntary admission for in-patient treatment at TAMC, she was fully prepared to have him admitted involuntarily. No more than Maj ER and the military judge, we cannot ignore the fact that Appellant went to see Maj ER on 1 June 2016 not only because he had planned and attempted to kill EE the weekend before but also because he was scared he might try again. That Maj ER believed Appellant was a danger to anyone and thus the Mil. R. Evid. 513(d)(4) exception applied was a fact-specific determination for the military judge that we decline to override. *See* Jenkins, 63 M.J. at 430-31 (holding that "[w]hether the exceptions [to Mil. R. Evid. 513] apply is necessarily a fact-specific determination for a military judge to consider with an accurate awareness of the facts underlying the dispute" and that the military judge properly applied **[*18]** Mil. R. Evid. 513(d)(4) and (6) where the appellant made a verbal threat while "brandishing" a knife and, two days later, made the confidential communications at issue on appeal).

Second, Appellant asserts that the Mil. R. Evid.

513(d)(6) exception did not apply because EE was a civilian and therefore he did not endanger the safety and security of himself or other military personnel, military dependents, military property, or a military mission. However, the military judge explained that he applied the exception specifically because of Appellant's military status:

> [Appellant] is a military member assigned to a military unit. While he remains a member of that military unit, he has a role to play in the accomplishment of the mission. His fitness for duty has a direct impact on his ability to perform his Air Force function. . . . [T]here was a real and immediate concern about his fitness for duty.

As with the Mil. R. Evid. 513(d)(4) exception, the application of the Mil. R. Evid. 513(d)(6) exception was a fact-specific determination for the military judge that we leave undisturbed.

Third, Appellant claims that Maj ER disclosed more privileged information than was necessary to have Appellant admitted at TAMC and therefore more than was necessary to ameliorate the danger Appellant presented **[*19]** or to ensure military safety and security. To support this claim, Appellant relies on Air Force Instruction 44-172, *Mental Health*, ¶ 6.6.2 (13 Nov. 2015), which directs mental health practitioners to "provide the minimum amount of information to satisfy the purpose of the disclosure." The military judge resolved the issue to our satisfaction by finding that the attempt to kill EE "was very different in [Maj ER's] mind" from the previous incidents when Appellant experienced homicidal thoughts; his "unit needed to understand how this situation was different"; and "this was best accomplished by explaining what [Appellant] had done that made it different." Thus, the military judge's decision to deny the Defense's motion to suppress Appellant's statements to Maj ER was well within the range of choices available to him, rested on neither a clearly erroneous finding of fact nor an erroneous view of the law, and did not constitute an abuse of discretion.

B. Article 31, UCMJ, Rights Advisement

Appellant next avers that the military judge abused his discretion by admitting statements Appellant made while seeking medical treatment and in the presence of his first sergeant, MSgt JM, without being **[*20]** advised of his rights under *Article 31, UCMJ*. We are not convinced.

1. Additional Background

On 1 June 2016, Maj ER "handed off" Appellant to MSgt JM. During a motions hearing, MSgt JM described what happened next: Appellant and MSgt JM first drove separately to Appellant's dormitory, where Appellant parked his car and changed clothes. Appellant then rode with MSgt JM to the TAMC Emergency Room.

At the Emergency Room, Appellant, accompanied by MSgt JM, checked in at the front desk and, after a brief wait, was shown to an examination room where his vital signs were checked and a blood sample taken. Still accompanied by MSgt JM, Appellant was shown to another examination room. As described by MSgt JM, a woman—identified later in the record as a nurse—came into the room and asked Appellant questions such as "was he feeling anything on his skin, hearing any voices, seeing any visions, stuff like that." She did not ask and Appellant did not offer why Appellant was at TAMC. After the woman left, a man—identified later as the Emergency Room attending physician, Dr. RD—came in and asked Appellant several questions, including why he was there. MSgt JM remembered Appellant telling Dr. RD that Appellant **[*21]** bought everything he needed "to commit the perfect murder" and that he did not go through with it because "she wasn't home." After additional questions and answers, Dr. RD left. Another man who MSgt JM described as a "doctor" and was the Behavioral Health Unit attending psychiatrist[4] entered the room, had MSgt JM step out, and asked MSgt JM what was happening with Appellant. After the doctor and MSgt JM spoke, the doctor told MSgt JM that he would be with Appellant for an hour to an hour and a half and that MSgt JM could leave during that time. After an hour had passed, MSgt JM returned and waited outside the examination room. The doctor came out and informed MSgt JM that Appellant had voluntarily "agreed to be admitted to the Behavioral Health Unit."

When Dr. RD, the Emergency Room attending physician, examined Appellant, MSgt JM was present. According to Dr. RD, it is "typical" for "command members" to be present during an examination of a military-member patient if the patient is "brought in by command." Furthermore, Dr. RD does not have "command" leave unless the patient so requests.[5] The

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[4] There is no definitive by-name identification of the "doctor" in the record.

[5] Dr. RD described his interactions with patients as "privileged" but, when questioned, clarified that he was referring to

purpose of Dr. RD's examination is to determine if the patient is "medically cleared" for admission **[*22]** to the Behavioral Health Unit. If Dr. RD decides that "nothing else needs to be done from a medical standpoint," a psychiatrist conducts an evaluation and decides whether to admit the patient.

Dr. RD began Appellant's examination by asking what had brought Appellant to the Emergency Room. According to Dr. RD's notes, Appellant said that he had "gotten the idea in his head to . . . go and kill a girl. . . . He got his materials. . . . Went to her home. She wasn't home and he said he panicked and realized he would have killed her."

After Appellant was admitted on Wednesday, 1 June 2016, MSgt JM next saw Appellant when he visited Appellant on Friday, 3 June 2016. Appellant asked him if he could bring Appellant a uniform and toiletries from Appellant's dormitory room, which he agreed to do on Monday, 6 June 2016. When MSgt JM went to Appellant's dormitory room that Monday, he first looked for a bag to carry everything. He saw an unzipped black bag, opened it, saw items that he assumed Appellant referenced as the items Appellant bought "to commit the perfect murder," including trash bags, bleach, black shorts, and a dust mask, and closed the bag. After collecting the things he had come for **[*23]** and putting them in another bag, MSgt JM looked in the first bag again "to make sure I saw what I thought I saw," left the first bag in the room, departed the room, and contacted AFOSI that same day.

On 7 June 2016, AFOSI agents executed a search authorization and seized from Appellant's dormitory room the black bag that MSgt JM had looked in the day before. On 8 June 2016, AFOSI agents interviewed Appellant while he was still an in-patient at TAMC. Before asking Appellant about the events of 28-29 May 2016, one of the agents advised Appellant of his rights under *Article 31, UCMJ*. After asking a few questions and acknowledging his understanding of his rights, Appellant waived them.

At Appellant's court-martial, the Defense moved to suppress his statements to Maj ER and TAMC personnel, including those statements made in the presence of MSgt JM, and derivative evidence pursuant to *Article 31, UCMJ*, and the *Fifth Amendment to the United States Constitution*, *U.S. CONST. amend. V*. The military judge conducted a hearing and denied the motion because there was no requirement to advise Appellant of his *Article 31, UCMJ*, rights, including the right against self-incrimination, before he made the statements at issue.[6]

2. Law

The standard of review of a military judge's **[*24]** decision to admit or exclude evidence for an abuse of discretion is as stated above. "When there is a motion to suppress a statement on the ground that rights' warnings were not given, we review the military judge's findings of fact on a clearly-erroneous standard, and we review conclusions of law *de novo*." *United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000)* (citing *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995))* (additional citation omitted).

Article 31(a), UCMJ, articulates a military member's right against self-incrimination. *10 U.S.C. § 831(a)*. *Article 31(b), UCMJ*, requires that a person subject to the UCMJ first inform a military member suspected of an offense of "the nature of the accusation" and advise the member of the right against self-incrimination before interrogating the member or asking for a statement. *10 U.S.C. § 831(b)*; *see also* Mil. R. Evid. 305(c)(1).

3. Analysis

The only self-incriminating statements Appellant made in MSgt JM's presence while Appellant was seeking medical treatment were the statements to Dr. RD, the TAMC Emergency Room attending physician. In particular, MSgt JM recalled Appellant telling Dr. RD that Appellant bought items "to commit the perfect murder." MSgt JM thought he saw those items when he opened a bag in Appellant's dormitory room and then contacted AFOSI.

"physician-patient confidentiality" and protections for health information that he guessed would fall under the *Health Insurance Portability and Accountability Act (HIPAA)*. He was not referring to any privilege for psychiatry or mental health treatment or diagnosis.

[6] Unlike during motions practice at trial, Appellant now limits his claim of an *Article 31, UCMJ*, rights violation to the statements Appellant made in the presence of MSgt JM while Appellant was seeking admission and treatment at TAMC. As a result, we do not address the applicability of *Article 31, UCMJ*, to the statements Appellant made to Maj ER and the Behavioral Health Unit attending provider, which statements were made outside of MSgt JM's presence.

The Article 31, UCMJ, issue raised by Appellant is **[*25]** a two-part question of first whether Dr. RD was required to advise Appellant of his rights and second whether MSgt JM was required to do so. The military judge answered both parts in the negative, as do we.

In the military judge's written denial of the Defense's motion to suppress the statements made to medical personnel in MSgt JM's presence, the judge cited, *inter alia,* United States v. Loukas, 29 M.J. 385, 387 (C.M.A. 1990), for the general proposition that Article 31(b), UCMJ, applies if a military member is questioned by someone acting in a law enforcement or disciplinary capacity. *See also* United States v. Cohen, 63 M.J. 45, 49-50 (C.A.A.F. 2006). We find no error with the military judge's determination that Dr. RD and MSgt JM were not acting in such a capacity and therefore neither was required to advise Appellant of his Article 31, UCMJ, rights. *See also* United States v. Moses, 45 M.J. 132, 134-35 (C.A.A.F. 1996) ("[I]n United States v. Fisher, 21 U.S.C.M.A. 223, 44 C.M.R. 277 (1972), this Court held that a military doctor was not required to give Article 31(b) warnings before asking questions for the purpose of diagnosing a patient."). We further note, as did the military judge, that MSgt JM did not interrogate Appellant or ask him for a statement about his offense, did not use the medical process or medical personnel to circumvent Article 31, UCMJ, and was present during Dr. RD's medical examination to **[*26]** ensure Appellant's health and safety by ensuring he was admitted for in-patient treatment. Accordingly, we find that the military judge did not abuse his discretion by admitting the statements Appellant made to Dr. RD in the presence of MSgt JM without Appellant being advised of Appellant's Article 31, UCMJ, rights.

C. Legal and Factual Sufficiency

Appellant challenges the legal and factual sufficiency of his conviction of attempted premeditated murder in three respects: (1) the Government failed to prove specific intent; (2) the Government failed to prove substantial step; and (3) Appellant abandoned his effort to commit murder. We conclude that Appellant's conviction is legally and factually sufficient.

1. Additional Background

The evidence at trial indicated that the romantic relationship developing between Appellant and EE came to an abrupt end with an awkward sexual encounter on 27 May 2016. On 28 May 2016, while EE was leaving angry voicemail messages, Appellant bought an eight-inch knife, lighter fluid, and a lighter. On 29 May 2016, he drove to EE's apartment and twice knocked on her door with a bag at his feet containing the knife, lighter fluid, and lighter as well as a bottle of bleach, face dust **[*27]** mask, trash bags, shorts, and a t-shirt. After he waited for 20 or so minutes, he left.

When interviewed by AFOSI on 8 June 2016, Appellant made several, seemingly inconsistent statements. He described his state of mind during the events of 28-29 May 2016 as "I still knew what I was doing somewhat, but my brain, like I could not stop myself from doing things." He also claimed that he "actually didn't want to do anything. So as far as I know I didn't actually like actually do anything wrong. But you know I did have the thoughts that I did want to do something but [I] wasn't in my right mind at the time." Appellant admitted, "[The] only other time I've actually felt like I had actual thoughts of wanting to harm someone was when I was deployed." Comparing the deployed incident to the charged incident, Appellant described the former as "I only had thoughts. I never took any sort of action at all. . . . I wasn't even close to . . . wanting to harm someone or anything like that 'cause I stopped myself so soon. This time I had [no] chance to stop myself."

While Appellant conceded that "[i]f she were home I'm pretty sure I would've harmed her in some way," he found it significant that he wore **[*28]** "a thousand dollar suit" to EE's apartment:

> I wouldn't want to mess that up . . . with blood or anything. I think that's like another small part of me that was like . . . you're not [going] to do this . . . 'cause why would I wear a thousand dollar suit to do that. That doesn't even make sense.

Furthermore, when Appellant "realized what [he] was doing," he "went home" and "never went back again," a fact he thought important because "I'm sure if I really wanted to do it I would've gone back again to her house, which I never did." Yet, he also told AFOSI, "thank God she wasn't home. . . . [O]therwise I may have done it. . . . I might have actually harmed her in some way. I don't think I actually would have . . . killed her, but I'm sure I might have tried actually harm[ing her]."

2. Law

We review issues of legal and factual sufficiency de novo. *Article 66(c), UCMJ*, *10 U.S.C. § 866(c)*; United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)

(citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential **[*29]** elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (alteration in original) (quoting *Washington, 57 M.J. at 399*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*. The term "beyond a reasonable doubt" does "not mean that the evidence must be free from conflict." *Id.* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986)*.

In order for Appellant to be found guilty of attempted premeditated murder under *Article 80, UCMJ*, the Government was required to prove beyond a reasonable doubt that (1) Appellant did a certain overt act, that is, went to the residence of EE with a knife and other **[*30]** items, purposely avoided security cameras, snuck on to the elevator, and knocked on her door; (2) the act was done with the specific intent to commit premeditated murder; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of the intended premeditated murder. *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 4.b.

An attempt requires more than preparation; it requires an overt act.

> The overt act required . . . is a direct movement toward the commission of the offense. . . . The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt.

Id. ¶ 4.c.(2).

Although failure to complete the offense is not a defense, voluntary abandonment is. *Id.* ¶ 4.c.(2), (4).

> It is a defense to an attempt offense that the person voluntarily and completely abandoned the **[*31]** intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person . . . decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties . . . .

Id. ¶ 4.c.(4).

The elements of premeditated murder under *Article 118, UCMJ*, *10 U.S.C. § 918*, are (1) that a certain person is dead; (2) that the death resulted from an act or omission of the accused; (3) that the killing was unlawful; and (4) that, at the time of the killing, the accused had a premeditated design to kill. *Id.* ¶ 43.b.(1). Premeditated murder is explained as "murder committed after the formation of a specific intent to kill someone and consideration of the act intended." *Id.* ¶ 43.c.(2)(a). "The existence of premeditation may be inferred from the circumstances." *Id.*

3. Specific Intent

Appellant's contention that the Government failed to prove his specific intent to kill EE relies on his ambivalent statements to AFOSI, such as "I might have actually harmed her in some way. I don't think I actually **[*32]** would have actually gone through [with it] and killed her," and the fact that, while standing at her apartment door, he never took the knife out of the bag. Conversely, the Government points to Appellant's statement that he "bought everything he needed to commit the perfect murder" and his plan to use those items to kill EE and evade detection by law enforcement: stab EE with a knife but wear gloves to

avoid leaving his fingerprints at the scene of the crime, pour bleach on the knife and in the apartment to remove his DNA, change from bloody clothes to clean ones, and light the apartment on fire to destroy the evidence. The Government's argument rests on the legal premise that the intent to commit premeditated murder can be shown by direct or circumstantial evidence, *United States v. Davis, 49 M.J. 79, 83 (C.A.A.F. 1998)* (citation omitted), and the logical conclusion that, had Appellant intended only to harm EE, he would have needed only a means to do so and not everything "to commit the perfect murder."

We are persuaded by the Government's argument. While Appellant never explicitly stated that he intended to kill EE, such a statement was not necessary for the Government to prove specific intent. *See id.* Furthermore, we find the evidence **[*33]** sufficient to determine Appellant's specific intent to kill EE despite his attempts to minimize the deadly nature of his actions during his AFOSI interview. He had developed a plan to "harm" EE and gathered particular items to cover up his crime of "harming" EE. But Appellant made no attempt to hide his identity from EE, the "harm" was to be done with a knife, and the cover-up involved setting the apartment on fire. The circumstantial evidence supports the logical conclusion that Appellant intended to kill EE by stabbing her to death, lest she survive any lesser harm and identify him as the perpetrator.

Considering the totality of the evidence, both direct and circumstantial, and drawing every reasonable inference from that evidence in favor of the prosecution, we are convinced that a reasonable factfinder could have found beyond a reasonable doubt all the essential elements of attempted premeditated murder, including that Appellant had the specific intent to commit the offense. Furthermore, we have weighed the evidence in the record of trial and made our own independent determination that the Government proved beyond a reasonable doubt each required element of the convicted offense, **[*34]** including Appellant's specific intent to kill EE as a premeditated act.

4. Substantial Step

Appellant asserts on appeal, as he did at trial, that the Government failed to prove that Appellant took a substantial step to committing premeditated murder and thus failed to prove that Appellant attempted the offense.[7] Appellant argues that his actions did not include taking out the knife, trying to break into EE's apartment, waiting for EE, or returning to the apartment and therefore amounted only to "mere preparation." We are instead persuaded by the Government's position and the actions Appellant did take: he bought a knife, borrowed a car, drove to EE's apartment, got on to the elevator without notifying her, and twice knocked on the door in a 20-minute time period during which he waited for her to answer with a bag at his feet that contained the knife to kill her and items to cover up the crime. These actions constitute a substantial step, or overt act.

Understanding that the overt act need not be the last act essential to committing the offense, *see MCM*, pt. IV, ¶ 4.c.(2), we determine that Appellant's overt act, particularly the last step of knocking, waiting, and knocking again, completed **[*35]** the attempt offense. *See United States v. Brooks, 60 M.J. 495, 498-99 (C.A.A.F. 2005)* (conviction for attempted carnal knowledge of a child under the age of 12 was found legally sufficient where the appellant brought a stuffed animal and other gifts suitable for a young child to a planned meeting with the purported eight-year-old girl and was apprehended at the door of the hotel room where the meeting was supposed to occur); *United States v. Schweitzer, No. ACM 39212, 2018 CCA LEXIS 453, at *2-13* (A.F. Ct. Crim. App. 8 May 2018) (unpub. op.), *rev. denied*, *78 M.J. 110 (C.A.A.F. 2018)* (conviction for attempted sexual assault of a child under the age of 16 was found legally and factually sufficient where the appellant bought condoms, put them in the glove box of his car, drove to the home of the purported 14-year-old girl, and knocked on the back door). As Appellant himself admitted, "thank God she wasn't home. . . . [O]therwise I may have done it." *See United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012)* (holding that the appellant's request for the victim to lift her shirt was an "overt act" sufficient to constitute attempt and that, but for her refusal to do so, the appellant would have committed the offense of indecent conduct). A reasonable factfinder could have found beyond a reasonable doubt that Appellant took a substantial step and therefore attempted to commit premeditated murder, **[*36]** and we are convinced beyond a reasonable doubt of the same.

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[7] The Defense moved for a finding of not guilty pursuant to R.C.M. 917 "as there was insufficient evidence to establish a substantial step that tended to effectuate the commission of the murder of [EE] by knife." The military judge denied the motion, and Appellant does not now challenge that denial.

5. Abandonment

The military judge instructed the court-martial panel members that the "defense of voluntary abandonment has been raised by the evidence." The military judge continued:

> If you're satisfied, beyond a reasonable doubt, of each of the elements of attempted premeditated murder . . . you may not find [Appellant] guilty . . . if, prior to the completion of [the offense], [Appellant] abandoned his effort to commit the offense, under circumstances manifest in a complete and voluntary renunciation of [Appellant]'s criminal purpose. . . . Renunciation of a criminal purpose is not voluntary if it is motivated, in whole or in part . . . by the inability to commit the crime. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time.
>
> The burden is on the prosecution to establish [Appellant]'s guilt, beyond a reasonable doubt. Consequently, unless you are satisfied, beyond a reasonable doubt, that [Appellant] did not completely and voluntarily abandon his criminal purpose, you may not find [Appellant] guilty . . . .

Appellant contends that, while standing at the **[*37]** door of EE's apartment, he realized what he was doing and that it was wrong, so he left, thus abandoning his plan to harm EE. Had the evidence supported this theory—Appellant abandoned his plan solely because of his own sense that it was wrong—then we would agree that the defense of voluntary abandonment would prevent a finding of guilt. But the evidence does not support this theory.

In Appellant's interview by AFOSI, he explained why he did not execute his plan when he said, "[T]hank God she wasn't home. . . . 'Cause otherwise I may have done it. . . . I might have actually harmed her in some way. I don't think I actually would have . . . killed her, but I'm sure I might have tried actually harm[ing her]." This admission, combined with Appellant's actions of knocking twice and waiting for 20 minutes and his recollection that he first threw his bag in a dumpster but then retrieved it and took it back to his dormitory room, convinces us beyond a reasonable doubt that he did not execute his plan simply because he was unable to—not because he realized that what he was doing was wrong. A reasonable factfinder could have made the same determination and found beyond a reasonable doubt that **[*38]** Appellant did not completely and voluntarily abandon his plan to kill EE.

In summary, we find the Government carried its burden to prove that Appellant specifically intended to kill EE and that he took a substantial step towards accomplishing that objective and thus attempted to commit premeditated murder. We also find Appellant did not completely and voluntarily abandon his criminal plan. A reasonable factfinder could have found beyond a reasonable doubt all the essential elements of the offense with which Appellant was charged and convicted, and we are convinced beyond a reasonable doubt of his guilt. Therefore, his conviction is legally and factually sufficient.

D. Lack of Mental Responsibility

In Appellant's final assignment of error, he claims that, because of his diagnosed schizophrenia, he lacked the mental responsibility at the time of the offense to commit the offense and therefore his conviction was legally and factually insufficient. We are not persuaded.

1. Additional Background

Appellant was first diagnosed with schizophrenia when he was medically evacuated to Landstuhl in September 2015. In October 2015, Maj ER confirmed the diagnosis, and the disability evaluation process **[*39]** began. In April 2016, an IPEB found Appellant unfit for military service and recommended his discharge with no compensable disability. In June 2016, an FPEB overrode the IPEB and recommended "Permanent Retirement" with a disability rating of 100 percent.

When AFOSI interviewed Appellant on 8 June 2016, he had been an inpatient at the TAMC Behavioral Health Unit since 1 June 2016 and would remain there until 21 June 2016. After checking with the unit's attending psychiatrist, the AFOSI agents met Appellant, advised him of his *Article 31, UCMJ*, rights, which he waived, and then conducted the interview, which was videotaped and played at trial.

During the interview, Appellant made several references to his mental state during the events of 28-29 May 2016, beginning with the following:

> I wasn't in my right mind. Like my brain like clicked, to like where it switched. . . . [I have] schizophrenia, so I hear voices and like see things. So with that like I've had a series of like strange events to where

> I actually like lose time and things like that, to where I don't know what I did. And this is kind of like one of those times to where I still knew what I was doing somewhat, but my brain, like **[*40]** I could not stop myself from doing things. So that's kind of what happened, almost like a psychotic break in a way, to where like I didn't understand it. That's why I immediately went over here, sought treatment, 'cause I was like I don't know what's going on.

Appellant went on to describe his actions of the weekend in significant detail. Although his memory was not completely accurate and he misremembered the three-day gap between when he went to EE's apartment and when he talked with the chaplain, he did not appear to suffer memory loss for any significant action or period of time during the weekend of 28-29 May 2016.

After the Government rested its case during the findings portion of Appellant's trial, the military judge and counsel discussed the possibility of a defense of lack of mental responsibility and expert opinion testimony by Maj ER, which the judge decided to allow. When the court-martial resumed the next day, the military judge denied the Defense's motions for findings of not guilty and then asked whether the Defense was "going to offer the defense of [lack of] mental responsibility." The civilian defense counsel responded, "The defense intends to rest when we go back on **[*41]** the record," and the Defense in fact rested without presenting any evidence on any matter, including lack of mental responsibility.

For findings, the military judge instructed the court-martial panel members that the "evidence in this case raises the issue of whether [Appellant] lacked criminal responsibility for the [charged offenses and lesser included offenses] as a result of a severe mental disease or defect." The military judge continued with a lengthy instruction that informed the members if, when, and how to consider the defense. The instruction also covered the presumption of mental responsibility, the defense burden "of proving by clear and convincing evidence that [Appellant] was not mentally responsible," and the procedure to decide the issue. The military judge then said:

> To summarize, you must first determine whether [Appellant], at the time of these offenses, suffered from a severe mental disease or defect. If you are convinced by clear and convincing evidence that [Appellant] did suffer from a severe mental disease or defect, then you must further consider whether he was unable to appreciate the nature and quality or the wrongfulness of his conduct. If you are convinced **[*42]** by clear and convincing evidence that [Appellant] suffered from a severe mental disease or defect, and you are also convinced by clear and convincing evidence that he was unable to appreciate the nature and quality or wrongfulness of his conduct, then you must find [Appellant] not guilty only by reason of lack of mental responsibility.

During closing argument for findings, the Government addressed mental responsibility by pointing out that the Defense presented "zero evidence" that Appellant lacked mental responsibility at the time of the offense. The Defense countered that "the documents that are important, that show a lack of mental responsibility are Prosecution Exhibits 23 and 24." Those exhibits were the respective forms documenting the results of the IPEB and FPEB, or, as the Defense explained them, "one that shows that [Appellant is] 100% disabled for schizophrenia, and the specific diagnosis is other specified schizophrenia disorder with auditory hallucinations." The Defense went on to argue that Appellant could not appreciate the wrongfulness of his actions because of his serious mental disease or defect of schizophrenia.

2. Law

The standard of review of legal and factual sufficiency **[*43]** is as stated above. "It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts." *Article 50a(a), UCMJ*. *10 U.S.C. § 850a(a)*; *see also* R.C.M. 916(k). "The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence." *Article 50a(b), UCMJ*, *10 U.S.C. § 850a(b)*; R.C.M. 916(b)(2).

> The affirmative defense of lack of mental responsibility requires the accused to prove, by clear and convincing evidence, that at the time of the offense, (1) the accused suffered from a "severe mental disease or defect," and (2) as a result of that mental disease or defect, the accused was "unable to appreciate" either (a) the "nature and quality" of his acts, or (b) the "wrongfulness" of his acts.

United States v. Mott, 72 M.J. 319, 323 (C.A.A.F. 2013)

(quoting *Article 50a, UCMJ*, *10 U.S.C. § 850a (2006)*). Wrongfulness is determined using an "objective standard." *Id. at 326*.

In *United States v. Martin*, the United States Court of Appeals for the Armed Forces (CAAF) decided to test for "reasonableness" non-guilt findings of fact made by members on the question of mental responsibility but to test **[*44]** for "clear error" such findings if made by a military judge. *56 M.J. 97, 107 (C.A.A.F. 2001)*. Testing for reasonableness, an appellate court should reject non-guilt findings of fact made by members on the question of mental responsibility "only if no reasonable trier of fact could have failed to find that the [accused's lack of mental responsibility] at the time of the offense was established by clear and convincing evidence." *Id.* (citations omitted).

3. Analysis

As the Defense simultaneously acknowledged and argued at trial, the only evidence to prove Appellant's lack of mental responsibility was the evidence from the IPEB and FPEB. The document from the IPEB showed that Appellant had a diagnosis of "Schizophrenia Spectrum, Persistent Auditory Hallucinations," which many of the trial participants shortened to "schizophrenia." The document from the FPEB indicated that, because of Appellant's diagnosis, he was recommended for "Permanent Retirement" with a disability rating of 100 percent.

Assuming *arguendo* that it is appropriate to shorten the diagnosis of "Schizophrenia Spectrum, Persistent Auditory Hallucinations" to a diagnosis of "schizophrenia" and that schizophrenia is a severe mental disease or defect, we turn **[*45]** to the question of whether, as a result of schizophrenia, Appellant was unable to appreciate the nature and quality or the wrongfulness of the acts constituting the offense of attempted premeditated murder. Appellant's own statements, especially those made to AFOSI, indicate that he could. Appellant bought, collected, and put in a bag the items he believed he needed to "commit the perfect murder." He claimed he evaded the security cameras as he approached EE's apartment. He was prepared to destroy not only any evidence he left at the scene of the crime but also the crime scene itself in order to avoid getting caught. These statements lead us to conclude that, even if Appellant was not fully in control of all his mental faculties at the time of the offense, he was never unable to appreciate the nature and quality or the wrongfulness of his actions. Thus, we determine that a reasonable panel could have found that Appellant failed to carry his burden to prove by clear and convincing evidence that he was not mentally responsible at the time of the offense. In other words, the defense of lack of mental responsibility fails the test for reasonableness and was not proven. *See Martin, 56 M.J. at 107*. Appellant's **[*46]** conviction of attempted premeditated murder remains legally and factually sufficient.

E. Retirement Instruction

We specified the following issue: whether the military judge committed plain error by failing to instruct *sua sponte* on the impact of a punitive discharge on permanent retirement for physical disability. Despite the thorough brief submitted by Appellee, we find plain error and set aside the sentence.

1. Additional Background

The documentation of the IPEB and FPEB findings and recommendations was offered by the Government and admitted during the findings portion of Appellant's court-martial as Prosecution Exhibits 23 and 24 respectively.

During the presentencing proceeding, the Defense called Colonel (Col) DB, a psychiatrist and the Director of the Center for Forensic Behavioral Sciences, Walter Reed National Military Medical Center, Washington, District of Columbia. Col DB testified that "a finding of 100% disability. . . . What that would afford [a person severely disabled by an illness], in addition to disability payments is, lifelong access to medical care and treatment through the [Veterans Affairs (VA)] system . . . ." As Prosecution Exhibits 23 and 24 indicated and Col DB **[*47]** explained, Appellant's 100 percent disability rating acknowledged that Appellant's mental health condition would require long-term treatment and "likely interfere with [his] ability to lead a productive life in any occupation." In Appellant's written and verbal unsworn statements, he expressed his hope that he could continue to receive medications through the VA, which he could not if he was punitively discharged. The Defense did not present evidence on the impact of a punitive discharge on permanent disability retirement, which is what the FPEB recommended.

When the military judge and counsel discussed sentencing instructions, the Defense did not request and the military judge did not ask about an instruction on the

impact of a punitive discharge on permanent retirement for physical disability. The Government did request an instruction on collateral consequences, which the military judge modified. After a defense objection and discussion on the record, the military judge further modified the instruction and decided to give it.

The military judge instructed the members on, *inter alia*, the effects of a punitive discharge, including that "[s]uch a discharge deprives one of substantially **[*48]** all benefits administered by the Department of Veterans Affairs and the Air Force establishment." The military judge later instructed, "The consequences that flow from a federal conviction, other than the punishment, if any you impose, are collateral consequences of the conviction. The collateral consequences stemming from a federal conviction should not be part of your deliberations in arriving at a sentence."

The Government argued for a sentence that included ten years of confinement and a dishonorable discharge. The Defense argued that ten years of confinement and a dishonorable or bad-conduct discharge were not appropriate and noted that a punitive discharge "strips [Appellant] of all his benefits. It strips him of all his Veteran[s] Affair[s] benefits."

Although there had been discussion of the FPEB's recommendation for permanent disability retirement during the findings portion of trial, there was no mention of Appellant's eligibility for retirement during the presentencing proceeding when the members were present.

2. Law

In *United States v. Boyd*, the CAAF articulated the general proposition that, "[w]hen an accused is eligible for retirement, 'the potential loss of retirement benefits **[*49]** [is] a proper matter for consideration by factfinders[.]'" *55 M.J. 217, 220 (C.A.A.F. 2001)* (second and third alterations in original) (quoting *United States v. Sumrall, 45 M.J. 207, 209 (C.A.A.F. 1996))* (additional citation omitted). The CAAF then considered retirement for length of service and temporary disability retirement. *Id. at 220-22*. Regarding the former, the Defense requested an instruction, which request the military judge denied. The CAAF concluded that "any failure to instruct the members about the impact of a dismissal on future retirement benefits did not have a substantial influence on the sentence." *Id. at 221*.

Regarding Boyd's temporary disability retirement, the Defense did not request an instruction. The CAAF determined that "[b]ecause the defense did not request an instruction on the impact of a punitive discharge on temporary disability retirement, we will grant relief only if the military judge's failure to instruct *sua sponte* was plain error. *See United States v. Grier, 53 M.J. 30, 34 (C.A.A.F. 2000)* . . . ." *Id. at 222*. In *Boyd*, "there was no factual predicate for an instruction on temporary disability retirement," as no evidence about the appellant's eligibility for disability retirement was presented to the members. *Id.* The CAAF held therefore "that there was no error at all, much less plain error." *Id.*

As cited by the CAAF in *Boyd* ***[*50]*** (and the Government in its brief on the issue we specified), *Grier* holds, "To be plain error: (1) there must be an error; (2) the error must be plain (clear or obvious); and (3) the error must affect the substantial rights of the defendant." *53 M.J. at 34* (citing *United States v. Powell, 49 M.J. 460, 463 (C.A.A.F. 1998))*.

3. Analysis

As Appellee repeatedly points out, the Defense did not request an instruction on the impact of a punitive discharge on permanent disability retirement. Therefore, we will grant relief only if the military judge's failure to instruct *sua sponte* was plain error.

First, we find there was error. Contrary to Appellee's assertion, there was an evidentiary predicate that established Appellant's eligibility for permanent disability retirement: the FPEB findings and recommendation presented to the members in the form of Prosecution Exhibit 24. *See Boyd, 55 M.J. at 222* (holding that there was no error where there was no "factual predicate," or any evidence presented to the members reflecting the appellant's eligibility for disability retirement). Despite this evidence before the members, the military judge did not ask the Defense about or *sua sponte* give a retirement instruction, and the members were not instructed on whether or how to consider the impact **[*51]** of a punitive discharge on permanent disability retirement.

Second, we find the error was clear or obvious. Prosecution Exhibits 23 and 24 were both discussed during the findings portion of trial, particularly when the Defense first objected to Prosecution Exhibit 23 but then withdrew the objection after the Government offered Prosecution Exhibit 24. In addition, the Government argued during findings that Appellant was concerned

about his retirement pay and 100 percent disability compensation when he communicated the threat to kill any doctor who changed his diagnosis.[8] As the assistant trial counsel put it, "There is a reason he made that threat. He needed to make sure that that diagnosis did not change and . . . that his medical retirement would go through." Furthermore, Prosecution Exhibit 24, Appellant's documented diagnosis, and the FPEB's recommendation for retirement and disability compensation were all discussed before and while Col DB testified as a defense sentencing witness. Outside of the presence of the panel but on the record, the military judge himself described Prosecution Exhibit 24 as "the official retirement . . . . this is the Air Force, on [Appellant's] permanent **[*52]** record, saying, you know, you are hereby retired and this is based upon this diagnosis." The military judge then asked the trial counsel "Is that not correct?" and "But the Air Force is prepared to retire [Appellant] with a diagnosis of schizophrenia, correct?" The trial counsel responded "yes."

Third, we find the error of the military judge's failure to instruct on retirement affected the substantial rights of Appellant, specifically, his right to have the court-martial panel members consider all of the information they were allowed to consider before they adjudged his sentence. Underlying our assessment of the effect of the error is the premise articulated by CAAF that retirement pay "is a critical matter of which the members should be informed in certain cases before they decide to impose a punitive discharge." *United States v. Luster, 55 M.J. 67, 71 (C.A.A.F. 2001)* (citation omitted). Unlike in a case where an accused may become eligible for retirement based on years of service at a future date, *see, e.g., Boyd, 55 M.J. at 220-21*, Appellant was going to be permanently retired with a 100 percent disability rating once the FPEB issued its findings and recommendation. It was a matter of when, not if. In addition, the 100 percent disability rating meant lifetime **[*53]** care and treatment for the mental health condition that was not only the sole driver of Appellant's retirement but also a central matter in Appellant's trial.

Our consideration of the effect of the error in Appellant's case is further informed by the context in which it occurred. While the military judge gave the standard instruction on the effects of a punitive discharge, including the deprivation "of substantially all benefits administered by the Department of Veterans Affairs and the Air Force," the CAAF has determined that "[w]here a servicemember is perilously close to retirement . . . a general collateral-consequences instruction disregarding the effects of a punitive discharge on retirement will not suffice." *United States v. Talkington, 73 M.J. 212, 217 (C.A.A.F. 2014)* (quoting *United States v. Greaves, 46 M.J. 133, 139 (C.A.A.F. 1997)*). Furthermore, it is significant that the military judge gave—at the Government's request and over the Defense's objection—a collateral consequences instruction that in effect directed the members not to consider the impact on Appellant's permanent disability retirement when deciding his sentence. As the CAAF described in *Talkington*, "[t]he general rule concerning collateral consequences is that 'courts-martial [are] to concern themselves with the appropriateness **[*54]** of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration,'" even if the collateral consequences may be referenced in an accused's unsworn statement. *73 M.J. at 215-16* (second alteration in original) (quoting *United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988)*). But retirement is different:

> [I]n reality, the impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single-most important sentencing matter to that accused and the sentencing authority. Thus, it is only in a theoretical sense that the effect a punitive discharge has on retirement benefits can be labeled collateral. Moreover, the impact on benefits -- whatever it may be -- can only be a direct and proximate consequence of the sentence.

Griffin, 25 M.J. at 424.

Lastly, we reject Appellee's contention that Appellant was not prejudiced because "his crime was such that a punitive discharge was a foregone conclusion." While we appreciate the gravity of Appellant's convicted offense of attempted premeditated murder, we also weigh Appellant's particular circumstances as a young man who will be released from confinement before he turns 30, who faces a lifetime of uncertain educational and **[*55]** employment opportunities, and who must deal with a mental health condition that was permanently aggravated by military service and that, if left untreated, could make him a danger to himself and others. The court-martial process provides for sentencing by members or a military judge at the election of the accused, includes a presentencing proceeding in which the Government, victim, and the

[8] As noted previously, Appellant was found not guilty of this charge.

accused all have the opportunity to be heard, and does not involve sentencing guidelines. Aside from mandatory-minimum punishments, there is no aspect of an adjudged sentence that is a foregone conclusion.

We therefore conclude that the military judge's failure to instruct *sua sponte* on the impact of a punitive discharge on Appellant's permanent retirement for physical disability was plain error. We set aside the sentence and authorize a sentence rehearing. *See* Greaves, 46 M.J. at 140.

F. Timeliness of Appellate Review

We review de novo whether an appellant has been denied the due process right to a speedy post-trial review and appeal. United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed. Id. at 142. When a **[*56]** case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." Moreno, 63 M.J. at 135 (citations omitted).

Appellant's case was originally docketed with the court on 22 August 2017. The delay in rendering this decision by 22 February 2019 is presumptively unreasonable. However, we determine no violation of Appellant's right to due process and a speedy post-trial review and appeal.

Analyzing the Barker factors, we find the length of the delay—seven weeks—is not excessively long. The reasons for the delay include the time required for Appellant to file his brief on 9 July 2018 and the Government to file its answer on 28 August 2018. The court then specified an issue for the parties to brief by 20 February 2019. Appellant has not asserted his right to speedy appellate review. With regard to possible prejudice, we recognize that Appellant began his seven years of confinement on 25 April 2017. Because of our conclusion on the specified issue, we are setting aside the sentence and authorizing **[*57]** a sentence rehearing. Having also considered the potential effect of appellate delay on a rehearing, we still find no prejudice to Appellant resulting from the delay for the court to complete appellate review of his case.

Finding no Barker prejudice, we also find the delay is not so egregious that it adversely affects the public's perception of the fairness and integrity of the military justice system. As a result, there is no due process violation. *See* United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In addition, we determine that Appellant is not due relief even in the absence of a due process violation. *See* United States v. Tardif, 57 M.J. 219, 223-24 (C.A.A.F. 2002). Applying the factors articulated in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we find the delay in appellate review justified and relief for Appellant unwarranted.

III. CONCLUSION

The findings are **AFFIRMED** and the sentence is **SET ASIDE**. A rehearing on the sentence is authorized. Articles 59(a) and *66(c), UCMJ*, 10 U.S.C. §§ 859(a), *866(c) (2016)*.

Concur by: POSCH (In Part)

Dissent by: POSCH (In Part)

Dissent

POSCH, Judge (concurring in the result in part and dissenting in part):

I agree with my esteemed colleagues in the majority on the resolution of Appellant's six assignments of error and the issue of timely appellate review and affirm the findings of guilty of attempted premeditated murder in violation of **[*58]** Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. However, I respectfully dissent with regard to the majority's conclusion that the military judge's failure to instruct on the effect of a punitive discharge on Appellant's apparent eligibility for permanent disability retirement materially prejudiced Appellant's substantial rights under Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Ultimately, the court must determine whether any error of law had a "substantial influence on the sentence" adjudged by the court-martial. *See* United States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001) (concluding that "any failure to instruct the members about the impact of a dismissal on future [length of service] retirement

benefits did not have a substantial influence on the sentence.") (citing *Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*). "If so, then the result is material prejudice to Appellant's substantial rights." *United States v. Griggs, 61 M.J. 402, 410 (C.A.A.F. 2005)* (setting out the test for the erroneous admission or exclusion of evidence). *See also United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009)*; *United States v. Bridges, 66 M.J. 246, 249 (C.A.A.F. 2008)*.

Assuming *arguendo* that the military judge's failure to *sua sponte* instruct on the impact of a punitive discharge on permanent disability retirement was error that was clear or obvious, I cannot conclude, after considering all the sentencing evidence and weighing Appellant's conviction against his sentence, that, if there was error, **[*59]** it was prejudicial.

Appellant never sought the retirement instruction that the majority today concludes the military judge was required to give. Nor did the Defense present evidence or argument[1] with regard to the effect that a punitive discharge would have on Appellant's eligibility for disability retirement pay that might result from the recommendation by the Formal Physical Evaluation Board (FPEB) that Appellant was medically unfit to serve,[2] distinct from disability pay and benefits administered by the Department of Veterans Affairs (VA).[3] It was the recognized loss of these latter benefits that was a significant focus of Appellant's sentencing case. The Defense argued that a dishonorable discharge would "strip[] [Appellant] of all his [VA] benefits" and that, considering "how expensive [Appellant's] medications are," a punitive discharge was not in Appellant's interest or society's. Nonetheless, the members considered Prosecution Exhibits 23 and 24, along with Col DB's testimony and Appellant's verbal and written unsworn statements,[4] and adjudged a punitive discharge, knowing full well that doing so would deprive Appellant "of substantially all benefits administered by the Department **[*60]** of Veterans Affairs and the Air Force," as the military judge properly instructed the members that it would.

This was not a case "where the decision to award a punitive discharge was such a close call." *See United States v. Luster, 55 M.J. 67, 72 (C.A.A.F. 2001)* (finding prejudicial error in the exclusion of sentencing evidence of the appellant's expected retirement pay after he was convicted of a single specification of wrongful use of marijuana). This case stands in stark contrast to *Luster*, where the crime was relatively minor and the appellant "had no record of prior convictions or non-judicial punishments (although he was not a perfect airman)." *Id.* Here, Appellant was convicted of attempting a cruel and savage premeditated murder. If not for EE's decision to not open the door to her home, Appellant might **[*61]** have killed her with his eight-inch knife as Appellant intended and then covered up the crime, using his lighter, lighter fluid, trash bags, gloves, extra clothes, dust mask, and bottle of bleach.

Because the members were convinced that the more severe punitive discharge was appropriate and knew that a dishonorable discharge would sever Appellant's eligibility for medical treatment from the VA, I find it to be improbable on these facts that Appellant would have fared better and avoided a punitive discharge altogether if the military judge had instructed the members *sua sponte* on the possible loss of disability retirement pay as a result of the FPEB's recommendation.

The majority also finds error affecting Appellant's substantial rights, in part, because of a collateral consequences instruction given by the military judge.[5]

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[1] As the Defense may have deduced, the possibility that an appellant would receive retirement benefits can be a reason *for* adjudging a punitive discharge. *See, e.g., United States v. Stargell, 49 M.J. 92, 93 (C.A.A.F. 1998)* (finding no error where the appellant was "knocking at retirement's door" and trial counsel argued the appellant "will get an honorable retirement unless you give him a [bad-conduct discharge].").

[2] The fitness determination is made by the Air Force. *See 10 U.S.C. § 1201*.

[3] Col DB testified that a finding of 100 percent disability would afford Appellant access to disability payments as well as medical treatment through the VA system.

[4] Appellant explained to the panel in his verbal unsworn statement *inter alia*:

> I will continue to try to get help no matter what the sentence is. I am worried though about my ability to continue to receive medication. I hope that I can continue to receive medications through the VA. I know that it will not be easy to determine what an appropriate sentence is. I ask for your leniency and mercy. I ask that you give me hope that I can continue to receive my medication once I leave jail.

[5] The Government asked for this instruction after Appellant's mother testified that Appellant might have difficulty "finding a job, because of a felony [conviction]." The military judge

The instruction that the majority finds concerning read, "the consequences that flow from a federal conviction, other than the punishment, if any you impose, are collateral consequences of the conviction. The collateral consequences stemming from a federal conviction should not be part of your deliberations in arriving at a sentence." The majority concludes that this **[*62]** instruction "in effect directed the members not to consider the impact on Appellant's permanent disability retirement when deciding his *sentence*." (Emphasis added.) I disagree. Had the instruction, in fact, charged that the collateral consequences of Appellant's *sentence* should not be part of the member's deliberations, I might be more aligned with the majority's conclusion. But it did not. I would be persuaded to agree with the majority's conclusion if the instruction directed the members to disregard the consequences of a sentence that included a punitive discharge (in conflict with the VA benefits instruction), but it did no such thing. Rather, the military judge properly informed the panel that the consequences that flowed from Appellant's federal *conviction*—other than, obviously, the punishment itself—were collateral and should not be a part of their deliberations. *See* *United States v. Talkington, 73 M.J. 212, 216-17 (C.A.A.F. 2014)* ("Collateral consequences" of a court-martial conviction are ordinarily not germane to determining an appropriate sentence because the collateral consequence "operates independently of the sentence adjudged."). This is in contrast to an "impact on benefits" as a "direct and proximate consequence of the *sentence* ***[*63]*** ." *Id. at 217* (emphasis added) (citing *United States v. Griffin, 25 M.J. 423, 425 (C.M.A. 1988))*.[6] I conclude the collateral consequences instruction in Appellant's case was both proper and benign.

I am not persuaded that the military judge's failure to instruct *sua sponte* on the impact of a punitive discharge on Appellant's permanent retirement for physical disability had a substantial influence on the sentence and thus materially prejudiced Appellant's substantial rights. The adjudged dishonorable discharge may not have been a foregone conclusion as Appellee argues, but it was not a close call either. *See* *Luster, 55 M.J. at 72*. I would not, therefore, set aside the sentence but would instead affirm the sentence as adjudged and approved by the convening authority.

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provided the instruction after concluding that her testimony alluded to a collateral consequence of Appellant's court-martial conviction.

[6] A collateral consequence may be the result of a conviction of a crime or the result of a particular sentence. A collateral consequences instruction may address either or both (i.e., a "general" collateral consequences instruction in the case of the latter). *Compare, e.g.,* *United States v. Talkington, 73 M.J. 212, 216-17 (C.A.A.F. 2014)* (addressing both conviction and sentence), *with, e.g.,* *United States v. Greaves, 46 M.J. 133, 136-37 (C.A.A.F 1997)* (addressing sentence only).

United States v. Sperlik

United States Navy-Marine Corps Court of Criminal Appeals

August 26, 2010, Decided

NMCCA 200900497

Reporter
2010 CCA LEXIS 99 *; 2010 WL 3350452

UNITED STATES OF AMERICA v. SCOTT L. SPERLIK CHIEF HOSPITAL CORPSMAN (E-7), U.S. NAVY

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Subsequent appeal at *United States v. Sperlik, 2011 CCA LEXIS 802 (N-M.C.C.A., Mar. 29, 2011)*

Prior History: **[*1]** SPECIAL COURT-MARTIAL. Sentence Adjudged: 11 June 2009. Military Judge: CDR Holiday Hanna, JAGC, USN. Convening Authority: Commanding Officer, Naval Ophthalmic Support and Training Activity, Yorktown, VA. Staff Judge Advocate's Recommendation: LCDR G.W. Saybolt, JAGC, USN.

Counsel: For Appellant: Maj Kirk Sripinyo, USMC; LT Sarah Harris, JAGC, USN.

For Appellee: LCDR Sergio Sarkany, JAGC, USN.

Judges: Before J.A. MAKSYM, L.T. BOOKER, J.R. PERLAK Appellate Military Judges. Senior Judge MAKSYM and Senior Judge BOOKER concur.

Opinion by: J.R. PERLAK

Opinion

PERLAK, Judge:

A special court-martial consisting of officer members convicted the appellant of one specification of false official statement and one specification of wrongful use of cocaine in violation of *Articles 107* and *112a*, Uniform Code of Military Justice, *10 U.S.C. §§ 907* and *912a*. The appellant was sentenced to a bad-conduct discharge, and the convening authority approved the sentence as adjudged.

The appellant raises two errors: first, that his conviction for false official statement was legally and factually insufficient, and second, that in light of *Melendez-Diaz v. Massachusetts, ___ U.S. ___ , 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)*, the admission of the results from the Navy Drug **[*2]** Screening Laboratory violated his *Sixth Amendment* right to confront witnesses. This court specified a third issue as to whether the military judge erred by failing to give proper sentencing instructions.

For the reasons set out below, we find the appellant's assignments of error to be without merit and affirm the findings of guilty as to the specifications under Charges I and II. However, due to error in the sentencing instructions addressed in the specified issue, we set aside the sentence and authorize a rehearing.

Statement of Facts

The appellant was serving as the Command Chief for a shore activity in the tidewater region of Virginia. He and friends went to a bar on Saturday, 13 September 2008, had a few drinks, and stayed until closing. The following Monday, 15 September 2008, the appellant provided a urine sample as part of his command's monthly random urinalysis program. The appellant's sample tested positive for the cocaine metabolite.

On 16 October 2008, the appellant was informed of the positive urinalysis by the command legal officer. After being informed of his *Article 31(b), UCMJ*, rights, the appellant made a statement. Before the legal officer, he opened a calendar on his **[*3]** computer and stated that his medical appointment the Friday before the urinalysis explained the positive test result. Then at the bottom of his Navy's Military Suspect's Acknowledgement and Waiver of Rights Form, the appellant voluntarily wrote, "I have been followed by [Ear Nose and Throat] for UPPP operation including a scope recently [with] local anesthetic." Prosecution Exhibit 8. The appellant provided the same explanation five days later to the Command's Drug and Alcohol Programs Advisor (DAPA).

On 21 October 2008, the appellant emailed the DAPA to inform her that he did not actually have an ENT appointment on the Friday. The appellant did have an orthopedic appointment that Friday, but he explained he accessed the ENT clinic through the backdoor and had a scoping procedure done without an appointment. At trial, the appellant could not identify the doctor who performed the scope and ultimately stated that no medication was used during the brief examination.

In support of the positive urinalysis, the Government presented the Full Documentation Report from the Navy Drug Screening Laboratory, Prosecution Exhibit 7, and the testimony of the urinalysis coordinator, the observer, and **[*4]** the Senior Chemist at the Navy Drug Screening Laboratory. The Senior Chemist at the drug laboratory laid the evidentiary foundation to introduce the lab reports into evidence. He testified as to the reliability of the tests, the results of the appellant's urine testing, how urine samples are handled and how results are generated at the laboratory. Neither party called the lab technicians at the Navy Drug Screening Laboratory whose names appeared on the lab report and chain of custody documents, and who reviewed the appellant's paperwork, tested his urine sample, or prepared the lab report. The appellant's civilian defense counsel cross-examined the Government's witnesses, but did not object to the introduction of the lab results into evidence.

False Official Statement

The standard of review for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *United States v. Pimienta, 66 M.J. 610, 615 (N.M.Ct.Crim.App. 2008)*, *rev. denied*, *67 M.J. 194 (C.A.A.F. 2008)*. We review factual sufficiency by determining whether this court is convinced of the **[*5]** appellant's guilt beyond a reasonable doubt after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. This court, like the trier of fact, may accept one part of a witness' testimony while rejecting another. *United States v. Abdirahman, 66 M.J. 668, 672 (N.M.Ct.Crim.App. 2008)*.

The Government was required to prove beyond a reasonable doubt (1) that the appellant made a certain official statement, (2) that the statement was false in certain particulars, (3) that the appellant knew it was false at the time he made the statement, and (4) that the false statement was made with the intent to deceive. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 31(b). The appellant must have actually known the false statement was false, but proof may come by circumstantial evidence. *Id*. at ¶ 31(c)(5). It is a defense if the accused held an honest, although erroneous, belief that the statement was true. *Id*.

The appellant made an official statement to the legal officer, wherein he stated that an ENT appointment the Friday before the urinalysis explained his positive test **[*6]** result. That statement proved to be false, as the appellant did not have an ENT appointment on the Friday before the urinalysis. The questions then remaining are whether the Government proved beyond a reasonable doubt that the appellant knew the statement was false at the time he made it and whether it was made with the intent to deceive. The essence of the appellant's argument was that he had merely been brainstorming or exploring possible explanations for the positive result, not stating as fact the nexus of the appointment to the result, and was simply mistaken.

The trial included testimony of the appellant, those he made his statements to, and the officer responsible for the medical treatment facility referred to in the appellant's version of events. At the close of the evidence, the testimony and non-existence of documentation that would have necessarily been generated by the appellant's version of events left the members to concluded that there was no scheduled ENT appointment, no walk-in ENT appointment, no backdoor access to the treatment area, no physician or other provider identified, no record of any scoping procedure performed, no associated anesthetic, and no evidence to **[*7]** show that any putative clinical anesthetic would produce a positive cocaine metabolite result. Considering all of the evidence and circumstances surrounding its making, we conclude that a reasonable trier of fact could indeed have found that the appellant knew the statement was false when he made it and that he made it with the intent to deceive. As such, we find each element of the offense of false official statement was proven beyond a reasonable doubt. This assignment of error is without merit.

Drug Lab Reports

Citing the Supreme Court's decision in *Melendez-Diaz*, the appellant argues that the laboratory reports contain testimonial statements and, as such, the *Confrontation*

Clause requires that the witnesses who made the statements be unavailable, and that the accused have had a prior opportunity to cross-examine the witnesses before the reports could be admitted into evidence. *See, Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. There being no compelling basis to distinguish the instant case, we disagree with the assertions in support of the assigned error and follow *United States v. Magyari, 63 M.J. 123 (C.A.A.F. 2006)*, in which the Court of Appeals for the Armed Forces found **[*8]** drug laboratory documents to be non-testimonial in nature and, in applying the indicia of reliability analysis set forth in *Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)*, concluded that the lab report was a record of a regularly conducted activity of the Navy Drug Screening Laboratory that qualifies as a business record under MILITARY RULE OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) a firmly rooted hearsay exception.

Accordingly, we do not find that admission of the drug lab reports and the allied documents submitted by the prosecution in the appellant's case was error. This assignment of error is without merit. [1]

Sentencing

The military judge, in discussing proposed instructions, stated his intention to give, "the standard instructions with respect to a punitive discharge." Record at 777. A colloquy ensued, wherein civilian defense counsel argued that the military judge's proposed instructions were inadequate. He argued, in essence, that the state **[*9]** of the instructions, absent greater discussion of administrative consequences, would leave the members with the mistaken impression that the appellant's "career will just continue on unimpeded, and the danger is obvious, that they may choose to impose a BCD only because they think they have to do that to prevent the career from continuing." *Id*. at 778. Civilian defense counsel specifically addressed this concern in a proposed instruction, Appellate Exhibit XXI, which was not given. The state of the record is that civilian defense counsel objected to the instructions proposed, maintained that objection and at best acquiesced in a partial instruction posited by the military judge, stating, "We requested the long instruction, but we'll take what we can get, obviously." Record at 779. The military judge amended his proposed instructions to state, "Not awarding a bad conduct discharge does not mean the accused will necessarily be retained in the naval service." Record at 815; AE XLVIII at 4.

In argument on sentence, the Government asked for neither a punitive discharge nor confinement, limiting the specifics of their recommendation to reduction. Record at 801. The trial defense counsel argued **[*10]** that the conviction alone was sufficient punishment. *Id*. at 804.

Within an hour of receiving their instructions on sentencing, the members submitted two questions to the military judge during sentencing deliberations: first "[g]iven the Navy's Zero Tolerance on drugs and the fact of 2 convictions here, why would the prosecution only ask for reduction to E-6?;" and second "if punative [sic] discharge is not given—your instructions indicate that accused may still not be retained in Naval Service. What does that mean—how does that happen (determined by whom?)." AEs XLIX and L.

During an ensuing *Article 39(a), UCMJ*, session, the military judge denied the civilian defense counsel's request that he declare a mistrial based on the questions asked. Record at 835. The military judge also denied the civilian defense counsel's request for instructions on administrative processing. Instead, the military judge instructed the members:

> I cannot answer the question raised by Appellate Exhibit XLIX. I can, however, remind you that the Navy's policy known as - or referred to as "zero tolerance" or any such similar policies—similar administrative policies should not be considered in fashioning a sentence **[*11]** for this court-martial.

Id. at 837. The members answered that they understood what they were told. *Id*. Then, in response to Appellate Exhibit L, the military judge instructed:

> Administrative processing is separate from the issue of a punitive discharge in this case. You should concern yourself with whether a punitive discharge should be awarded in this case. The decision about whether the accused will be discharged for these offenses administratively is not before the court.

Id. at 837-38. Fourteen minutes later, the members returned, sentencing the appellant to a bad-conduct

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[1] We decide this assignment of error based on current jurisprudence and mindful of *Confrontation Clause* matters involving military urinalysis testing pending decision before the Court of Appeals for the Armed Forces this term.

discharge. *Id*. at 840.

Discussion

The military judge has a duty to give appropriate instructions in sentencing. RULE FOR COURTS-MARTIAL 1005(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). If a military judge denies a party's requested sentencing instruction, that decision is reviewed for an abuse of discretion. *United States v. Hopkins, 56 M.J. 393, 395 (C.A.A.F. 2002)*(citing *United States v. Greaves, 46 M.J. 133 (C.M.A. 1997)*). The military judge's discretion is not unbridled. It requires exercising correct principles of applicable law and proper tailoring of instructions based on the particular facts and **[*12]** circumstances of the case. *Greaves, 46 M.J. at 139*. In this case, in light of the sequence of events above and further considerations developed herein, we find that the military judge abused his discretion in failing to tailor his instructions to the facts and circumstances of the case. *Id*.

The record demonstrates that the policy of zero tolerance, and its seemingly reflexive relationship to a punitive discharge in the minds of the members, carried into deliberations. Specific, clearly curative instructions were required in order to dispel the members' biases or improper consideration of that policy. None were given by the military judge.

We note that during initial questioning by the military judge on *voir dire*, the members indicated their ability to disregard the military policy of "zero tolerance" and "base [their] decision on an appropriate sentence . . . solely on the evidence presented in [court] and the instructions which [he would] give. . . ." Record at 106-07. In general, the members are presumed to follow the instructions of the military judge. *United States v. Ashby, 68 M.J. 108, 123 (C.A.A.F. 2009)*(citing *United States v. Jenkins, 54 M.J. 12, 20 (C.A.A.F. 2000)*. However, **[*13]** the members' questions during deliberations called that presumption into question. Aware of this, the efforts of the military judge to cure were inadequate and constitute an abuse of discretion.

The Government presented no evidence during sentencing that hinted at zero tolerance. Their theme was a betrayal of trust by the appellant, particularly as the senior enlisted leader of his activity. But the Government did not ask for a punitive discharge. Consequently, when the members specifically asked about zero tolerance during sentencing deliberations, it evidenced that an improper consideration may have been impacting their deliberations. The civilian defense counsel noted the need to dispel the members' bias to the point of asking for a mistrial during the *Article 39(a)* session and alternatively for an instruction explaining zero tolerance. But rather than ensuring the members' biases were eradicated, the military judge only provided a minimal instruction — that he could not instruct on zero tolerance and only reminded them that it should not be considered.

The military judge further abused his discretion, in light of the specific questions presented by the members, in failing to fully **[*14]** address their concerns about administrative processing. Here, the appellant was an E-7 chief hospital corpsman at nearly nineteen years of service with no further enlistments required to vest his retirement. PE 1. The essence of the members' questions was to request guidance on the effects of administrative processing and a punitive discharge on the appellant's career. The military judge's unsatisfactory gloss over the issues of punitive discharge and administrative processing, in the face of a defense objection and members' questions clearly signaling a requirement for proper instructions, constitutes an abuse of discretion. [2] We provide appropriate relief in our decretal paragraph.

Conclusion

The findings are affirmed. The sentence is set aside and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with a rehearing on sentence authorized. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved. **[*15]** R.C.M. 1107(e)(1)(C)(iii).

Senior Judge MAKSYM and Senior Judge BOOKER concur.

End of Document

[2] The Military Judge's Benchbook contained at the time of trial, and still contains, guidance on the affect of a punitive discharge on retirement benefits. *See* Chapter 2, § V, ¶ 2-5-22.

United States v. Steele

United States Army Court of Criminal Appeals

March 5, 2019, Decided

ARMY 20170303

Reporter
2019 CCA LEXIS 95 *

UNITED STATES, Appellee v. Master Sergeant ANDREW D. STEELE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Steele, 79 M.J. 73, 2019 CAAF LEXIS 412, 2019 WL 2454153 (C.A.A.F., May 7, 2019)*

Motion granted by *United States v. Steele, 79 M.J. 91, 2019 CAAF LEXIS 440, 2019 WL 2454557 (C.A.A.F., May 24, 2019)*

Review dismissed by, Without prejudice *United States v. Steele, 79 M.J. 267, 2019 CAAF LEXIS 717, 2019 WL 5107030 (C.A.A.F., Sept. 24, 2019)*

Decision reached on appeal by *United States v. Steele, 2022 CCA LEXIS 346 (A.C.C.A., June 9, 2022)*

Prior History: **[*1]** Headquarters, 7th Infantry Division. Lanny J. Acosta, Jr. and Sean Mangan, Military Judges. Lieutenant Colonel James W. Nelson, Acting Staff Judge Advocate.

Counsel: For Appellant: Captain Steven J. Dray, JA (argued); Colonel Elizabeth G. Marotta, JA; Major Julie L. Borchers, JA; Captain Steven J. Dray, JA (on brief); Colonel Elizabeth G. Marotta, JA; Lieutenant Colonel Tiffany D. Pond, JA; Major Julie L. Borchers, JA; Captain Steven J. Dray, JA (on reply brief).

For Appellee: Captain Brian Jones, JA (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Captain Jeremy Watford, JA; Captain Brian Jones, JA (on brief).

Judges: Before WOLFE, BURTON, and EWING[1], Appellate Military Judges. Judge BURTON and Judge EWING concur.

Opinion by: WOLFE

[1] Judge Ewing decided this case while on active duty.

Opinion

CORRECTED COPY[*]

MEMORANDUM OPINION

WOLFE, Senior Judge:

During appellant's trial, no audio was recorded for approximately twenty-seven minutes of the defense sentencing case. Given the incomplete record of trial, we are compelled to order a rehearing of appellant's sentence.

BACKGROUND

As appellant entered mixed pleas, we summarize the background facts from both the contested and uncontested portions of appellant's trial.[2]

When security cameras catch the hot ***[*2]*** *tub party*

Appellant was the First Sergeant of the 45th Hazardous Response Company. In April 2016, appellant invited and entertained a group of about seven enlisted soldiers

[*] The opinion is corrected to properly reflect the initials of the court reporter.

[2] A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of violating a general order and one specification of fraternization in violation of *Articles 92* and *134*, Uniform Code of Military Justice [UCMJ], *10 U.S.C. §§ 892* and *934 (2012)*. Contrary to appellant's pleas, the military judge convicted appellant of one specification of indecent exposure and one specification of disorderly conduct in violation of *Articles 120c* and *134,* UCMJ, *10 U.S.C. §§ 920c* and *934 (2012)*. The military judge sentenced appellant to a bad-conduct discharge and reduction to the grade of E-3. The convening authority approved the sentence as adjudged.

from the company to his former apartment complex. Most of the soldiers were the rank of Specialist or below. Private First Class (PFC) W was the sole female in the group. Appellant provided alcohol to the group, knowing that some of them were not of the legal drinking age. The apartment complex's outdoor common area had a hot tub and a security camera.

Everyone got naked in the hot tub.

With most of the group in the hot tub, appellant performed oral sex on PFC W. Linking the security camera video with witness testimony, appellant placed each of PFC W's legs on his shoulders and placed his head between her legs. When done, two other soldiers serially performed oral sex on PFC W, with appellant telling them to "go for it."[3] Appellant gets in and out of the hot tub naked and walks directly in front of the security camera.

Appellant pleaded guilty to fraternization and violating an order for providing alcohol to persons underage. The government then sought to prove up numerous other offenses. However, the defense was ready **[*3]** and presented a vigorous and well-prepared defense. As a result, only two additional offenses, indecent exposure and disorderly conduct, were proven beyond a reasonable doubt.[4]

The red light means it is recording.

After the military judge rendered findings, the case proceeded to sentencing. During the defense case-in-chief, the court reporter, Staff Sergeant (SSG) DW, noticed that he had not been recording audio since the last recess. Accordingly, there was no audio recording of the entire direct testimony of appellant's mother[5] and part of the direct testimony of Lieutenant Colonel (LTC) Jones. Lieutenant Colonel Jones had served with appellant in a Special Forces unit in Europe.

It was during LTC Jones' testimony that SSG DW noticed that the red light on his recording system was not illuminated. The red light indicates that the audio is being recorded. He then began recording the court-martial. Staff Sergeant DW did not inform the military judge of the recording gap, and would later state that this was consistent with the training he had received from senior court reporters.[6]

The military judge became aware of the recording gap before authenticating the record and directed a post-trial **[*4]** *Article 39(a)*, UCMJ, session. The government arranged for both witnesses to be present so they could testify and the missing testimony could be recaptured. The defense, sensing that there was more to be gained on appeal than by fixing the error at trial, strongly objected to the witnesses being recalled and instead asked the military judge to authenticate the record as is.

The military judge denied the government request to recall the witnesses, "because the court does not believe that [their testimony] would be an accurate or adequate reconstruction of the record of trial as it occurred."[7] Instead, and without the aid of the two

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[3] We are not reviewing a case of sexual assault. In an audio recording, which is recorded later in the evening, PFC W is asked by another soldier whether she consented. She responded, "Yes, one hundred and ten percent, you guys have nothing to worry about." She jokes that she is more likely to be the subject of a sexual assault complaint than to file one. Naked, she is offered a towel to cover up, but she declines the offer of a towel stating she is "already dry." She further states she is totally sober, which is consistent with both how she sounds in the audio recording and her gait and appearance as she later dresses herself in the video.

[4] In a separate assignment of error, appellant alleges that his conviction for indecent exposure is insufficient. We certainly agree with appellant that not all instances of nudity, even public nudity, are indecent. Being naked at a nude beach is qualitatively different than flashing a school bus or strangers on the street. Appellant's acts fall between these two extremes. In other words, context matters. Having considered the context in this case, and given the mandate in ***Article 66***, UCMJ, that we "recognize" the trial court saw and heard the evidence, we find the record to be correct in fact.

[5] There was no cross-examination.

[6] The Clerk of Court is directed to forward a copy of this opinion to the Senior Court Reporter Instructor at The Judge Advocate General's Legal Center and School for consideration of any lessons learned that may be adopted into the future training of Army court reporters. The costs, both to the Army and to Master Sergeant Steele, are enormous for an error which likely could have been fixed if SSG DW had, contrary to his alleged training, immediately brought it to the military judge's attention.

[7] We might suggest that the wiser course of action would have been to first hear the witnesses' testimony (especially as they were present) before deciding that their testimony would be inadequate. In *United States v. Davenport*, for example, a *DuBay* hearing was ordered in an attempt to reconstruct the testimony. *73 M.J. 373, 377-76 (C.A.A.F. 2014)*. While the *DuBay* was inadequate in *Davenport*, recalling the witnesses

witnesses re-testifying, the military judge summarized the testimony from his notes and the court-reporter provided a memorandum for record.

LAW AND DISCUSSION

We address this appeal in two steps. First, we consider whether the transcript is verbatim. We determine it is not. Second, we address the range of remedies in this case. We conclude a rehearing on sentence is the required remedy.

A. Is there a verbatim record?

In *United States v. Davenport*, our superior court stated that a record is not verbatim if "the omitted **[*5]** material was substantial, either qualitatively or quantitatively." 73 M.J. 373, 377 (C.A.A.F. 2014) (internal quotations and citations omitted). Or, put less technically, a record is not verbatim if either (a) there is a lot of missing material; or (b) the missing material is important.

We easily determine that the transcript has substantial quantitative omissions. An entire defense sentencing witness is missing.

It is clear from the Court of Appeals for the Armed Forces' (CAAF) opinion in *Davenport*, that for the transcript to be verbatim, it must be *both* qualitatively and quantitatively substantially complete. Id. at 377. An omission on either prong is fatal. Having found the transcript to fail on the quantitative prong, we conclude this case lacks a verbatim record.

B. Do we test for prejudice when a transcript is not verbatim?

There are certainly instances where a missing portion of the transcript is irrelevant to any issue on appeal. Consider, for example, if the record omits the testimony of a witness at a suppression hearing. Certainly, if the defense suppression motion is denied, this court would likely need the testimony to weigh the correctness of the military judge's ruling. But, what if the suppression motion was granted? **[*6]** Or, what if the accused knowingly and voluntarily waived the suppression issue while later pleading guilty? Or, what if the transcript omits the voir dire of a panel member whom the defense successfully challenged? A record under such circumstances would likely be viewed as having substantial quantitative omissions; after all, a whole suppression hearing could be missing.

In their brief to this court, the government argues that they have successfully shown that the omissions in the record have not prejudiced appellant.[8] The CAAF's case in *Davenport*, however, specifically proscribes an alternative remedy.

> [W]hile in the case of most incomplete records prophylactic measures are not prescribed, and the missing material or remedy for same are tested for prejudice, where the record is incomplete because the transcript is not verbatim, the procedures set forth in [Rule for Courts-Martial] 1103(f) control.

Id. at 377. Accordingly, we find that under *Davenport*, we do not test for prejudice when we have a non-verbatim transcript.[9]

C. Understanding Davenport in light of the changes to Article 60, UCMJ

Under Rule for Courts-Martial [R.C.M.] 1103(f), a convening authority faced with a non-verbatim transcript may either (1) approve **[*7]** a sentence that does not

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in this case was more likely to be successful. First, the Article 39(a) session was only five months after trial. Second, both witnesses were defense sentencing witnesses rather than government merits witnesses. Third, the missing testimony did not include complex interwoven direct and cross-examination as only the direct testimony was missing. A military judge could allow the defense (who bore no responsibility for the error) wide latitude to reconstruct a favorable record for appeal. However, we conclude that the military judge's quoted language above is a finding of fact, which we will give deference. Accordingly, we rule out a fact-finding hearing to try to reconstruct the missing testimony.

[8] Given the nature of the missing content, that it was a small part of the defense sentencing case, that we have the military judge's summary of the missing testimony, that the accused's sentence is otherwise lenient given the offenses, and the absence of any claim that weighty material is missing, we would find the government's argument to have some merit.

[9] In *Davenport*, the CAAF returned the case to the convening authority *without* setting aside the findings or the sentence. Thus, the CAAF in *Davenport* did not violate Article 59(a), UCMJ. *See* UCMJ art. 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."). As we will see below, we are in a bit of a bind.

include a punitive discharge or more than six months of confinement; or (2) order a rehearing. In *Davenport*, the CAAF returned the case to the convening authority for action in compliance with R.C.M. 1103(f). *73 M.J. at 379*.

The foundation of the CAAF's reasoning in *Davenport* is, however, unsettled given subsequent amendments to *Article 60, UCMJ*. The National Defense Act for Fiscal Year 2014 substantially curtailed a convening authority's traditional powers under *Article 60, UCMJ*, in cases involving offenses that occurred after 24 June 2014.[10] *See* Pub. L. No. 113-291, 128 Stat. 3292, 3365 (2014). In a case where a punitive discharge was adjudged, such as this one, the convening authority cannot set aside the findings or the punitive discharge. *Id.*; *see also* R.C.M. 1107(c).

Indeed, the instances where a verbatim transcript is required (a punitive discharge or more than six months of confinement are adjudged) *are exactly* the circumstances where the convening authority is no longer allowed to set aside the findings and sentence.

Thus, were we to strictly follow *Davenport*, we would place the convening authority in an impossible position. If there is no verbatim transcript, the convening authority **[*8]** cannot *approve* a sentence with a punitive discharge. The convening authority also cannot *disapprove* the punitive discharge because Congress specifically removed this power.[11] The convening authority also cannot order a rehearing because setting aside the sentence is a precondition to ordering a rehearing. *See* *UCMJ art. 60(f)(3)*.

We decline to sanction the "absurd" result of remanding the case to a state of eternal appellate limbo, where the convening authority can neither approve the sentence under R.C.M. 1103(f), nor disapprove the sentence under *Article 60, UCMJ*. Because we see R.C.M. 1103(f) and *Article 60, UCMJ*, to be in conflict, the presidentially promulgated rule must yield to the more recently enacted statute.[12]

At oral argument, defense appellate counsel aptly stated this was quite the "pickle." And, we agree.

D. Between a rock (Davenport) and a hard place (Article 59(a))

In essence we have a chicken and egg problem. We cannot affirm appellant's sentence based on a convening authority action that violates R.C.M. 1103. But, the convening authority cannot comply with R.C.M. 1103 because of amendments to *Article 60*. We could break this do-loop if we determined that the missing transcript pages were harmless, however this **[*9]** is exactly what we see *Davenport* as prohibiting.

We conclude the only off-ramp from this highway to nowhere is to deviate slightly from the CAAF's course in *Davenport* and set aside the sentence ourselves before returning the case to the convening authority. By first setting aside the sentence, we can return the case to the convening authority who may then fulfill his responsibilities under RCM 1103(f) without violating *Article 60*.

We acknowledge that this decision is questionable. Based on an error of law (no verbatim transcript) we are setting aside appellant's sentence without assessing whether the error of law prejudiced appellant. *See* *UCMJ art. 59(a)*. Perhaps of some relevance, this is also a case where it was appellant who specifically objected to recalling the witnesses to try to reconstruct the missing transcript.

However, we leave it to the CAAF to determine whether we have misapplied *Davenport* or whether the case should be revisited in light of the subsequent changes to *Article 60*.[13] For now, we err on the side of giving effect

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[10] Over the first sixty plus years of the UCMJ, the girders on which the system was built relied, in part, on the traditional *Article 60* convening authority power. The 2014 amendment to *Article 60* did more than take away a convening authority's ability to grant significant clemency. It also removed the beams that policy makers had relied on when correcting pure legal errors. We faced a similar problem in *In re Vance* where the Army's military justice regulation had relied on the traditional *Article 60* power to give effect to Secretarial administrative separations. *78 M.J. 631 (Army Ct. Crim. App. 2018)*.

[11] There are two exceptions to the prohibition on disapproving a punitive discharge, neither are present here. *See* R.C.M. 1107(d)(1)(C).

[12] *See, e.g.,* *United States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013)* ("[T]he plain language of a statute will control unless it leads to an absurd result.").

[13] A Presidential rule cannot compel a convening authority to take an action prohibited by an Article of the UCMJ. *See* *UCMJ art. 36*. By its text, *Article 59(a)* does not state that its

to the CAAF's decision in *Davenport*.

CONCLUSION

Upon consideration of the entire record, the findings of guilty are AFFIRMED. The sentence **[*10]** is SET ASIDE. The record of trial is returned to The Judge Advocate General for return to the Convening Authority for action consistent with R.C.M. 1103(f). A rehearing on sentence is authorized.

Judge BURTON and Judge EWING concur.

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limitations only apply to the appellate courts. If *Article 59(a)* applies with equal force to a convening authority granting relief based on an error of law, then following *Article 59(a)* would prohibit both the convening authority and this court could from setting aside a finding or sentence for a violation of R.C.M. 1103(f) without first assessing whether the accused was prejudiced by the action. If this is correct, while the convening authority traditionally had broad clemency powers, when correcting an error of law, R.C.M. 1103(f) cannot compel a result that *Article 59(a)* prohibits. But, the CAAF returned the case in *Davenport* to the convening authority, without assessing prejudice, and with the direction that the convening authority follow R.C.M. 1103(f). And, it is hard to read the CAAF's remand in *Davenport* as not requiring the convening authority to follow R.C.M. 1103(f) without regard to a prejudice assessment. Accordingly, we see our decision today as consistent with what *Davenport* requires.

CERTIFICATE OF COMPLIANCE WITH RULE 21

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 5,675 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

JENNIFER A. SUNDOOK
Major, Judge Advocate
Attorney for Appellee
January 3, 2023

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on January 3, 2023.

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