February 2, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MILFORD C. SCOTT
Capt (O-3), USAF
Appellant.

Crim. App. No. 39352 (reh)

USCA Dkt. No. 22-0084/AF

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

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ISSUE PRESENTED

WHETHER APPELLANT HAD A CONSTITUTIONAL RIGHT TO A UNANIMOUS GUILTY VERDICT?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).[1]

STATEMENT OF THE CASE

Capt Milford C. Scott, ("Appellant"), was originally tried at a general court-martial before a panel of officers at Davis-Monthan Air Force Base (AFB), Arizona, from June 19-24, 2017. Original Record (O.R.) at 84; Record of Trial (ROT) at Vol. 4 – Coversheet.[2] Contrary to

1. Unless otherwise specified, all references to the UCMJ are to the *Manual for Courts-Martial, United States* (*MCM*) (2016 ed.).

2. Appellant's original Record of Trial consisted of six volumes. However, following his rehearing, his Record of Trial was renumbered and now totals nine volumes—the first three consisting of his rehearing and the last six comprising his original court-martial. Thus, what was previously Volume 1 is now Volume 4. This brief differentiates between the transcript from these two proceedings by referring to the first as "Original Record" (O.R.) and the rehearing as "Record" (R.).

his pleas, Appellant was found guilty (by exceptions and substitutions) of one charge and three specifications of assault consummated by a battery, in violation of Article 128, UCMJ, and one charge and specification of fraternization, in violation of Article 134, UCMJ. O.R. at 11.4-11.6, 584. The panel acquitted Appellant of one charge and specification of conduct unbecoming an officer allegedly in violation of Article 133, UCMJ, and also acquitted Appellant of a specification alleging that he had wrongfully communicated a threat in violation of Article 134, UCMJ. *Id.* Appellant was sentenced by the panel to be confined for eight months and to be dismissed from the service. O.R. at 673. The Convening Authority approved the sentence as adjudged, and except for the dismissal, ordered it executed. ROT at Vol. 8 – Action of the Convening Authority (Oct. 12, 2017).

The Air Force Court of Criminal Appeals ("Air Force Court") then considered Appellant's case pursuant to Article 66, UCMJ, and issued its first opinion on May 10, 2019. *United States* v. *Scott*, No. ACM 39352, 2019 CCA LEXIS 232, at *1 (A.F. Ct. Crim. App. 10 May 2019) (unpub. op.) (Appendix A). Finding Appellant's fraternization convictions both legally and factually insufficient, it set aside and

dismissed those specifications with prejudice. *Id.* at *11, *24. It did not disturb Appellant's convictions for violating Article 128, UCMJ, however. *Id.* at *11. The Air Force Court then set aside Appellant's sentence and authorized a rehearing on sentence. *Id.* at *24.

Appellant's sentencing rehearing took place between January 27-28, 2020 at Davis-Monthan AFB. ROT at Vol. 1 – Coversheet. This time, Appellant elected to be sentenced by a military judge. Record (R.) at 26. For the three specifications of assault consummated by a battery that remained, the military judge sentenced Appellant to be reprimanded, confined for two months, and dismissed from the service. R. at 116. The military judge also credited one day of pretrial confinement credit against the term of confinement. *Id.* As before, the Convening Authority approved the sentence as adjudged, and except for the dismissal, ordered it executed. ROT at Vol. 2 – Action of the Convening Authority (Apr. 30, 2020). The Convening Authority also ordered that Appellant was to "be credited with confinement served under the sentence adjudged at the former trial against the current sentence to confinement." *Id.*

Following the sentencing rehearing, Appellant's case was then considered by the Air Force Court for a second time. *United States* v. *Scott*, No. ACM 39352 (reh), 2021 CCA LEXIS 608, at *1 (A.F. Ct. Crim. App. 18 Nov. 2021) (unpub. op.) (Appendix B). Appellant raised ten issues on appeal pertaining to his sentence rehearing, but the Air Force Court declined to grant relief on any of them. *Id*. at *4-5. The Court, instead, affirmed the findings and sentence, concluding that "no error materially prejudicial to the substantial rights of Appellant occurred." *Id*. at *35-36. Judge Meginley joined the opinion of the court and authored a separate concurrence. *Id*. at *36 (Meginley, J., concurring). Appellant timely filed a petition for grant of review before this Court on January 12, 2022. *United States* v. *Scott*, No. 22-0084/AF, 2022 CAAF LEXIS 30, at *1 (C.A.A.F. Jan. 12, 2022) (mem.).

STATEMENT OF FACTS

Background

The charge and three specifications of which Appellant stands convicted arose out of an isolated incident between Appellant and several civilians in March 2016 outside of an off-base nightclub in Tucson, Arizona. *See generally* Rehearing Prosecution Exhibit (Reh.

Pros. Ex.) 1; Reh. Pros. Ex. 2. According to a 911 call made on March 19, 2016 by a putative witness to the encounter, Appellant purportedly initiated a verbal confrontation with these individuals in a parking lot while he was in his car and they were walking past. Reh. Pros. Ex. 1 at 2, 6. Although this witness did not know Appellant, he described him to the operator as a "black guy" wearing a white shirt and jeans. *Id*. at 4. This witness stated that Appellant "socked" three different individuals he was with that night in the face. *Id*. at 3. At trial, the military judge instructed the members that the evidence presented had raised the issue of self-defense in relation to each of the three Article 128, UCMJ, specifications. O.R. at 489. Specifically, he noted that there had been testimony which suggested that "the accused was charged by one or more of the three named victims in this case." *Id*.

Appellant's Forum Selection, Pleas, and Convictions

Prior to making his choice of forum, the military judge advised Appellant that he had the right to be tried by a panel consisting of at least five officer members. O.R. at 10. He was further advised that a two-thirds concurrence of the members was required in order to return a guilty verdict. *Id*. Appellant elected to be tried by members. *Id*.

Following voir dire, an eight-member panel was assembled. O.R. at 84. Appellant pled not guilty to all charges and specifications. O.R. at 12. The panel was, indeed, instructed that a guilty verdict required a two-thirds vote.[3] O.R. at 554.

After deliberating for some time, the panel president sought clarification regarding the manner and means by which they were to consider and vote on guilt by exceptions and substitutions. O.R. at 564, 566. After the members were brought back in to answer these questions they had submitted and were re-instructed by the military judge, the panel president asked a clarifying question: "if the wording is different in each of those exceptions, how do we handle that?" O.R. at 567-68. The panel president elaborated upon his specific concern:

> I may need to think about it and clarify, rewrite the question, potentially. My concern is if the wording each person votes and has different wording on that exception, specifically, say, Charge, Specifications of Charge I, if different members use a different word, substitute, except for one word and substitute another, and those words are different, how do we handle that situation?

3. Appellant's original court-martial took place in June of 2017, prior to the effective date of the 2016 Military Justice Act (MJA).

O.R. at 568. After being instructed again, the panel president followed up by stating: "Then sir, one more clarification, if we get to that point of exceptions, at that point we can discuss what the exception would be amongst ourselves and then take a vote?" R. at 569. After an extended colloquy with the parties to sort out how to instruct the members on this matter, the military judge ultimately told the members the following:

> So, with respect to Charge I, and all three specifications of assault and battery, you are allowed to make findings of guilt by exceptions and substitutions. So, there is essentially three different ways you can vote: guilty as charged; not guilty as charged, not even with exceptions and substitutions; or guilty with exceptions and substitutions.
>
> So, I am going to reinstruct you--. Just vote however, exactly, however you feel at that time: guilty as charged; guilty with exceptions and substitutions; not guilty as charged, not even with anything changed. If you have six individuals who have voted either guilty or guilty with exceptions and substitutions, at that point, then have a discussion about what those exceptions and substitutions might be. At that point, six of you then have to agree on whatever term you are going to except and substitute, and they have to be the same for all six of you. So, whatever general body part you are thinking about, it all has to match up and the words have to be agreed on. Whatever word you choose has to be agreed on by six individuals as the substituted word for whatever you are excepting out. Does that make sense?
>
> So, that is an affirmative response from all members. So, ignore what I said earlier. Just vote how you feel: guilty;

> guilty with exceptions and substitutions; not guilty, period. If you do not have six individuals who have voted guilty or guilty by exceptions and substitutions, then your finding for that particular offense must be a finding of not guilty. Does that make sense?
>
> That is an affirmative response from all members.

O.R. at 578. After being so advised, the panel president still sought additional instruction: "Sir, one clarification. You said on Charge I on those Specifications, if there are six who agree, six deciding guilty or guilty with exceptions, we then discuss the term and just decide the term?" O.R. at 579. The military judge responded, "Correct. If you can." *Id.*

Of the six total specifications submitted to the panel, not one of them resulted in an affirmed conviction as drafted. *See* O.R. at 11.4-11.6, 584; *Scott* 2019 CCA LEXIS 232, at *11. The panel acquitted Appellant of two specifications, convicted Appellant of one specification of fraternization, and convicted Appellant of three specifications of assault consummated by a battery by exceptions and substitutions. *Id.*

On appeal, Appellant challenged all of the charges and specifications of which he was convicted on both factual and legal sufficiency grounds. *Scott*, 2019 CCA LEXIS 232, at *1. While the Air

Force Court agreed that the panel's findings as to the Article 134, UCMJ, charge were neither factually nor legally sufficient, it disagreed with Appellant's contention that his Article 128, UCMJ, specifications were improper on such grounds. *Id.* at *11.

REASONS TO GRANT REVIEW

The issue presented in this case falls squarely within this Court's criteria for granting review because it concerns an important and recurring constitutional question that has "not been, but should be, settled by this Court," C.A.A.F. R. 21(b)(5)(A), i.e., whether courts-martial accused have a constitutional right to a unanimous guilty verdict after and in light of *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020). And until this Court settles that question, it will continue to be heavily and repeatedly litigated across every service branch. Rarely is this Court presented with a question of such constitutional magnitude the resolution of which will so directly and immediately impact every single non-capital court-martial that is tried to a panel.

Indeed, the question of whether non-unanimous courts-martial verdicts remain constitutional after and in light of *Ramos* and *Edwards* is an immensely significant one that has, to date, provoked a flurry of

challenges in the lower military courts, and at least one trial court ruling answering that question in the negative. *See United States v. Dial*, Army Trial Judiciary (January 3, 2022) (mem.) (Appendix C). Appellant recognizes that this ruling was by a single trial judge, but—at a minimum—it demonstrates the growing uncertainty in the post-*Ramos* law, which will only continue to cause confusion until this Court conclusively resolves the matter. Granting review of a case, such as this one, which presents the issue on direct appeal rather than via a petition for extraordinary relief provides a better vehicle for providing such clarity. And, whatever the answer, having this Court weigh in sooner, rather than later, will be of enormous value to the entire military justice system—including the government.

ARGUMENT

APPELLANT HAD A CONSTITUTIONAL RIGHT TO A UNANIMOUS GUILTY VERDICT

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States* v. *Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already

concluded." *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1554 (2021). Thus, as this Court has explained, when an appellant fails to object at trial to an error of constitutional dimension that was not yet resolved in his favor at the time of his trial, the "error in the case is forfeited rather than waived." *See Tovarchavez*, 78 M.J. at 462. In such circumstances, military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id.* (internal quotations omitted).[4]

This is the same approach the Oregon Supreme Court recently took when it was tasked with answering this question in relation to a non-unanimity error that was not raised at a pre-*Ramos* trial:

> This case presents the question of whether a defendant is entitled to reversal even where the challenge to a nonunanimous verdict was not preserved in the trial court and was raised for the first time on appeal—that is, whether such a challenge may be raised as a "plain error" that an appellate court should exercise its discretion to correct. We conclude that the answer is yes.

4. At the time Appellant was convicted in June 2017, the Supreme Court had not yet resolved or even considered the question presented in *Ramos*, 140 S. Ct. at 1391. Even by the time Appellant's sentencing rehearing concluded in January 2020, the Supreme Court had not decided *Ramos*. *See id.*

State v. *Ulery*, 366 Or. 500, 501 (2020); *see also State* v. *Kincheloe*, 367 Or. 335, 339 (2020) ("As to defendant's nonunanimous verdict for first-degree rape, we would reverse that conviction even if defendant had failed to preserve an objection."). This Court should likewise review this constitutional issue for plain error, with the Government bearing the burden of proving harmlessness beyond a reasonable doubt.

Law & Analysis

In *Ramos*, the Supreme Court "repudiated [its] 1972 decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal (civilian) convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As the Supreme Court reiterated last April, in so holding, *Ramos* unequivocally broke "momentous and consequential" new ground. *See Edwards*, 141 S. Ct. at 1559; *see also id*. at 1555–56 (noting that "[t]he jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" beforehand). Indeed, the

Edwards majority recognized that *Ramos* was on par with other "landmark" cases of criminal procedure "like *Mapp, Miranda, Duncan, Batson,* [and] *Crawford* . . . ." *Id.* at 1559.

For decades, the prevailing assumption has been that, as was true for state courts until 2020, the Constitution does not require unanimous verdicts for non-capital courts-martial.[5] *See, e.g.*, *United States* v. *Lebron*, 46 C.M.R. 1062, 1068–69 (A.F.C.M.R. 1973). As the Air Force Court explained in 1973, this purportedly followed from the Supreme Court's recognition in cases such as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942), that the Sixth Amendment's jury-trial right does not extend to military tribunals. *See Lebron*, 46 C.M.R. at 1068–69; *see also United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986) ("[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.").[6]

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5. The UCMJ and the Constitution both require unanimous verdicts as to the conviction and sentence in capital cases. *See* Article 52(b)(2), UCMJ; *United States* v. *Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

6. In fact, the Supreme Court has never squarely *held* that the Sixth Amendment Jury Trial Clause is inapplicable to courts-martial. The oft-quoted statements to that effect in *Milligan* and *Quirin*, both cases about military *commissions* rather than courts-martial, were dicta at best. *Cf. Ortiz* v. *United States*, 138 S. Ct. 2165, 2179 ("[N]ot every military

Ramos turns that assumption on its head. It does this not by expressly applying the Sixth Amendment Jury Trial Clause to courts-martial, but by emphasizing two features of the unanimity requirement that *do* apply to military trials, whether through the Sixth Amendment or the Due Process Clause of the Fifth Amendment: First, *Ramos* makes clear that the right to a unanimous verdict is an essential aspect of the Sixth Amendment right to an *impartial* jury—a right that, as CAAF has recognized, both the UCMJ and the Constitution provide to the accused in a court-martial. *See, e.g.*, *United States* v. *Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005).

Second, *Ramos* recognizes that unanimity is central to the fundamental *fairness* of a jury verdict—as opposed to a verdict rendered by a judge. Under *Milligan* and *Quirin*, Congress may not have been under a constitutional obligation to provide Appellant with the right to be tried by a panel in the first place. But as this Court has long held, "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States* v. *Wiesen*56 M.J. 172, 174 (C.A.A.F. 2001). Thus, whether under the Sixth

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tribunal is alike.")..

Amendment or the Fifth, Congress's choice to provide a *statutory* right to trial by a panel necessarily triggered *constitutional* requirements of fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by non-unanimous convictions for the offenses for which Appellant was tried.

Because the trial court's failure to require a unanimous guilty verdict, in light of the Supreme Court's intervening decisions in *Ramos* and *Edwards*, violated Appellant's rights under both the Fifth and Sixth Amendment they were plainly erroneous under this Court's precedents. And because the government cannot prove that the error was harmless beyond a reasonable doubt, Appellant is entitled to relief.

a. *Ramos* Unequivocally Holds That Unanimous Verdicts are Central to a Defendant's Right Not Just to a Trial by Jury, But to a Jury That is Itself Impartial

The Supreme Court's landmark decision in *Ramos* was not just a technical interpretation of the Sixth Amendment's Jury Trial Clause. Rather, both the holding and the result in *Ramos* were based upon "a fundamental change in the rules thought necessary to ensure *fair criminal process*." *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting) (emphasis added). Indeed, Part I of Justice Gorsuch's opinion for the

Ramos Court opens with three pages on the extent to which it was understood at the Founding that unanimity was central not just to the right to *a* petit jury in a criminal case, but to the right to an *impartial* jury—which, unlike unanimity, the text of the Sixth Amendment expressly requires. *See Ramos*, 140 S. Ct. at 1395–97. As he explained, "[w]herever we might look to determine what the term 'trial by an *impartial* jury' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id*. at 1395 (emphasis added).

This analysis was more than just a frolic or detour. As Justice Gorsuch repeatedly stressed, the proposition that the Sixth Amendment Jury Trial Clause requires unanimous verdicts had long been settled by the Supreme Court. Likewise, the Court has also long made clear that constitutional provisions that have been incorporated against the states through the Fourteenth Amendment's Due Process Clause, *including* the Sixth Amendment Jury Trial Clause (which was incorporated in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)), necessarily have the same scope and

meaning as applied to states as they do directly against the federal government. Neither of these principles was in dispute. *See Ramos*, 140 S. Ct. at 1397. Rather, the question was whether, taken together, they justified overruling *Apodaca*—in which Justice Powell's enigmatic solo concurring opinion had attempted to split the difference. And the Court's central justification for relegating *Apodaca* "to the dustbin of history," *id.* at 1410 (Sotomayor, J., concurring in part), was the extent to which it was inconsistent with fundamental (and Founding-era) understandings of procedural fairness.

In her concurring opinion, Justice Sotomayor reinforced the connection between unanimity and fairness. As she wrote, non-unanimous verdicts can give rise to at least a "perception of unfairness," especially when there are racial disparities in the pool of defendants and/or the composition of the jury. *See id.* at 1418 (Sotomayor, J., concurring in part).[7] In that respect, *Ramos* did more than just overrule

7. The historical origins of non-unanimous verdicts in courts-martial do not share the troubled, racially motivated underpinnings behind the Louisiana and Oregon statutes that *Ramos* struck down. *See* Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 239 & n.13 (1971). That said, many of the concerns about racial disparities to which Justice Sotomayor adverted in her *Ramos* concurrence are undeniably present in

Apodaca and incorporate the unanimous jury requirement against the states; it reinforced that unanimous juries are part-and-parcel of the Constitution's *separate* requirements to *impartial* juries and *fair* verdicts. *See, e.g.*, *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) ("[T]he [*Ramos*] Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt."). That distinction is critical here, for it underscores why, even if Appellant had no constitutional right to a trial by petit jury in his court-martial, the Constitution nevertheless required that, once he was tried by a jury that Congress chose to provide, his convictions had to be unanimous. *See, e.g.*, *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985) (explaining why, even if a criminal defendant has only a statutory—rather than a constitutional—right to appeal a conviction, "the procedures used in deciding appeals must comport with the demands of

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contemporary courts-martial—including in the Air Force. *See* Air Force Inspector General, Report of Racial Inquiry, Independent Racial Disparity Review, December 2020. In any event, Justice Gorsuch's majority opinion in *Ramos* made explicit that "a jurisdiction adopting a nonunanimous jury rule, *even for benign reasons*, would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1440 n.44 (emphasis added).

the Due Process and Equal Protection Clauses of the Constitution"); *see also United States* v. *Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) ("[A] military criminal appeal is a creature . . . solely of statutory origin, conferred neither by the Constitution nor the common law. However, once granted, the right of appeal must be attended with safeguards of constitutional due process." (internal quotations and citations omitted)). Appellant may only have a statutory right to be tried by a panel in the first place, but *Ramos* establishes that his *constitutional* right to a fair and impartial panel requires that guilty verdicts be unanimous.

b. As this Court Has Repeatedly Recognized, the UCMJ and the RCM Create Both Statutory *and* Constitutional Rights for the Accused Vis-à-Vis the Panel

In the abstract, the argument that the Constitution protects rights to an impartial panel and a fair verdict even in cases in which there is no constitutional right to a trial by petit jury may seem unorthodox. But this Court's jurisprudence unequivocally establishes that proposition—and has reflected it for decades. Thus, it is the combination of the Supreme Court's decision in *Ramos* and the line of CAAF decisions recognizing constitutional rights to both an impartial decisionmaker and a fair

verdict that required the panel in this case to return unanimous convictions for Appellant's offenses.

As far back as 1964, this Court's predecessor explicitly recognized that, even if servicemembers do not have a constitutional right to trial by petit jury, "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of *impartial* triers of the facts." *United States* v. *Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (emphasis added); *see also United States* v. *Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice."). More recently, this Court suggested that the right to an impartial court-martial panel comes not only from the Due Process Clause of the Fifth Amendment, as in *Crawford*, but from the Sixth Amendment *itself*. *See, e.g.*, *United States* v. *Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he *Sixth Amendment* requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations." (emphasis added)).

Lambert is hardly the only case in which this Court has extended Sixth Amendment protections to courts-martial. To the contrary, this

Court has also held that court-martial accused are entitled under the Sixth Amendment—and not just the UCMJ—to (1) a speedy trial, *see United States* v. *Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014); (2) a public trial, *see United States* v. *Hershey*, 20 M.J. 433, 435 (C.M.A. 1985); (3) the ability to confront witnesses, *see United States* v. *Blazier*, 69 M.J. 218 (C.A.A.F. 2010); (4) notice of the factual and legal bases for the charges, *see United States* v. *Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); (5) the ability to compel testimony that is material and favorable to the defense, *see United States* v. *Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016); (6) counsel, *see United States* v. *Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985); and (7) the effective assistance thereof, *see United States* v. *Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). *Lambert*'s reasoning—that the Sixth Amendment right to an *impartial* jury also applies to court-martial panels—is deeply consistent with this large body of case law. *See also United States* v. *Castellano*, 72 M.J. 217, 219 (C.A.A.F. 2013) (holding that, by finding a *Marcum* factor by himself rather than having it found by the panel, the judge violated "Appellant's due process rights [to have it found by the panel] under the Fifth and Sixth Amendments").[8]

8. One of the cases that this Court cited in *Castellano* for the

Thus, once an accused elects to be tried by a panel, *Lambert* establishes that he has a *constitutional* right to impartiality under the Sixth Amendment with respect to both how the panel members are selected and how they deliberate their verdict. If, as *Ramos* suggested, unanimous convictions are necessary to impartiality, then it follows that an accused in a court-martial who elects to be tried by a panel has a Sixth Amendment right to a unanimous guilty verdict.

c. Even if the Sixth Amendment Does Not Require Unanimous Verdicts for Serious Offenses Tried By Court-Martial, the Due Process Clause of the Fifth Amendment Does

The above analysis demonstrates why Appellant had a right to a unanimous guilty verdict as part of his right to an impartial panel under the Sixth Amendment. But he also had a right to a unanimous guilty verdict as part of his right to due process under the Fifth Amendment—because "[i]mpartial court-members are a *sine qua non* for a fair court-

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proposition that *Marcum* factors must be found by the panel is *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)—in which the Court held that the Sixth Amendment Jury Trial Clause, *not* the Fifth Amendment Due Process Clause, requires that any facts that increase the penalty for a crime beyond the prescribed statutory maximum be submitted to the jury and proved beyond a reasonable doubt. *See* 72 M.J. at 219 (citing *Apprendi*, 530 U.S. at 490).

martial." *United States* v. *Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *see also United States* v. *Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." (citations omitted)). As this Court's predecessor held in *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988), if a right applies by virtue of due process, "it applies to courts-martial, just as it does to civilian juries." *Id.* at 390. In *Santiago-Davila*, that meant extending *Batson v. Kentucky*, 476 U.S. 79 (1986), to courts-martial.[9] Similar logic applies here.

As with any number of other due process contexts, Congress may not have been obliged to offer Appellant the option of being tried by a panel, but once it chose to provide that option, it had to do so in a manner consistent with fundamental notions of procedural fairness—because criminal trials necessarily implicate the accused's liberty. *See, e.g.*, *Wilkinson* v. *Austin*, 545 U.S. 209, 221–24 (2005). Put another way,

9. Since *Santiago-Davilla* was decided, this Court "has repeatedly held that the *Batson* line of cases . . . applies to the military justice system." *United States v. Witham*, 47 M.J. 297, 300 (C.A.A.F. 1997).

Congress could hardly rely upon an accused's lack of a constitutional right to a trial by jury to provide a panel that reaches its verdict by, for instance, flipping a coin. *See Evitts*, 469 U.S. at 393.

As the Supreme Court made clear in *Weiss* v. *United States*, 510 U.S. 163 (1994), when it comes to an accused's procedural rights in a court-martial, the relevant question under the Due Process Clause is "'whether the factors militating in favor of [the right] are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Id*. at 177–78 (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976)). In *Weiss*, the Petitioners challenged whether they had a right to have their courts-martial presided over by military judges with fixed terms in office. In holding that the Due Process Clause did not require fixed terms, the Court expressly tied its analysis to the *lack* of a connection between fixed terms and impartiality, rejecting Petitioners' claim that "a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality." *Id*. at 178.

Ramos, in contrast, establishes the precise connection that the *Weiss* Petitioners could not. Indeed, it is impossible to read *Ramos*—or the Court's subsequent discussion of it in *Edwards*—and *not* come away

with the conclusion that "the factors militating in favor of [unanimous verdicts] are . . . extraordinarily weighty." *Weiss*, 510 U.S. at 177. If unanimous verdicts are necessary in the civilian criminal justice system "to ensure impartiality," as *Ramos* held, it ought to follow that they are equally necessary in a court-martial.[10]

What's more, unanimity is also central to a distinct due process right possessed by courts-martial accused: the right to have the government prove its case beyond a reasonable doubt. *See United States* v. *Gay*, 16 M.J. 475, 477 (C.M.A. 1983) ("Due process requires proof beyond a reasonable doubt for conviction of a crime." (citing *In re Winship*, 397 U.S. 358 (1970))). *See generally United States* v. *Hills*, 75 M.J. 350, 356 (C.A.A.F. 2015). For decades, federal civilian courts have recognized a direct connection between this right and the requirement of

10. Notably, in *Middendorf*, the Supreme Court recognized that "the Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel." 425 U.S. at 32 n.13. At the time *Middendorf* was decided, it was an open question whether an accused had a Sixth Amendment right to counsel at court-martial. *Id.* at 33. Although *Middendorf* itself did not settle that issue, this Court now has—in favor of a right to counsel. *See, e.g.*, *Gooch*, 69 M.J. at 361. If *Middendorf* meant what it said, then that only further underscores why Appellant should prevail under *Ramos*.

jury unanimity as to guilt. As Judge Prettyman wrote in *Billeci* v. *United States*, 184 F.2d 394 (D.C. Cir. 1950),

> An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

Id. at 403; *see also Hibdon* v. *United States*, 204 F.2d 834, 838 (6th Cir. 1953) ("The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms.").

More recently, the three dissenting Justices in *Edwards* recognized the interplay between a unanimous guilty verdict and the right to have one's guilt proven beyond a reasonable doubt. Repeatedly citing to *Winship*, Justice Kagan observed that unanimity was "similarly integral" to the jury-trial right that requires proof beyond a reasonable doubt.

Edwards, 141 S. Ct. at 1576–77 (Kagan, J., dissenting). As she elaborated,

> Allowing conviction by a non-unanimous jury "impair[s]" the "purpose and functioning of the jury," undermining the Sixth Amendment's very "essence." It "raises serious doubts about the fairness of [a] trial." And it fails to "assure the reliability of [a guilty] verdict." So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment."

Id. at 1577 (alterations in original; citations omitted).

So long as *Apodaca* was the law of the land, there was at least a plausible argument that this understanding applied only in federal civilian courts—because the gravamen of Justice Powell's solo opinion (filed in the companion case, *Johnson* v. *Louisiana*, 406 U.S. 366 (1972)), was that the unanimity right did *not* have the same valence in all courts—and that other tribunals retained "freedom to experiment with variations in jury trial procedure." *Id.* at 376 (Powell, J., concurring in the judgment); *see also Mendrano* v. *Smith*, 797 F.2d 1538, 1547 (10th Cir. 1986) (rejecting the "close and troubling question[]" of whether non-unanimous court-martial convictions violate due process). It is the functional nature of this approach to the unanimity question that *Ramos*

decisively rejected. *See* 140 S. Ct. at 1398–1400. As Justice Gorsuch put it,

> The deeper problem is that [*Apodaca*] subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. . . . As judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics."

Id. at 1401–02. Because *Ramos* thus makes clear that unanimity is central to the underlying *fairness* of a criminal proceeding in *any* U.S. forum, it likewise makes clear that military accused such as Appellant have a due process right to a unanimous guilty verdict.[11] If anything, the unanimity requirement is even *more* important in trial courts, such as courts-martial, that utilize panels with fewer than twelve members. *See*

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11. Because the right to a unanimous verdict is an individual right held by the accused, it does not require that *acquittals* be unanimous. As the Oregon Supreme Court explained last year, "*Ramos* does not imply that the Sixth Amendment prohibits *acquittals* based on nonunanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals." *State* v. *Ross*, 481 P.3d 1286, 1293 (Or. 2021) (emphasis added). Thus, recognizing that the Constitution requires a panel to return a unanimous verdict to *convict* is not akin to invalidating all non-unanimous verdicts. Even if Article 52(a)(3), UCMJ, is unconstitutional to the extent that it authorizes less than unanimous guilty verdicts, *Ross* makes clear that is very much constitutional to the extent that it authorizes 5-3 acquittals.

Ballew v. Georgia, 435 U.S. 223, 234 (1978) ("Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes."). Appellant's panel in this case had only eight members.

d. Appellant Could Not Raise His Unanimity Objection Below

As noted above, Appellant was tried, convicted, and appealed to the Air Force Court before *Ramos* was decided. That court's initial ruling, and the sentence rehearing it provoked, also preceded the decision in *Ramos*. And although *Ramos* was decided before the Air Force Court resolved Appellant's post-rehearing appeal, the only issues properly before the Air Force Court the second time around were those that had arisen from the initial appeal and the reheard sentence. In other words, Appellant is invoking a new rule of constitutional law while his direct appeal is pending, at the first proper moment for doing so. *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Thus, if Appellant has a constitutional right to a unanimous guilty conviction, then the trial court plainly erred by not so instructing the members. *See Henderson v. United States*, 568 U.S. 266, 273–74 (2013) ("[A]n (un-objected to) error by a trial judge will also fall within Rule 52(b)'s word 'plain' . . . . if the trial judge's decision was plainly correct at the time when it was made but subsequently

becomes incorrect based on a change in law." (citing *Johnson* v. *United States*, 520 U.S. 461, 468 (1997))); *see also United States v. Harcrow*, 66 M.J. 154, 161 (C.A.A.F. 2008) (Ryan, J., concurring) (describing "the curious outcome flowing from the confluence of the retroactivity rule and the plain error doctrine").

Because Appellant has established plain error, he is entitled to relief unless the government can demonstrate that the trial court's plain error was harmless beyond a reasonable doubt. This, the government cannot do. Rule 922(e) of the Rules for Courts-Martial specifically prohibits polling the members with respect to the vote for conviction in non-capital cases, and Rule 1007(c) likewise prohibits polling the members as to the vote for non-capital sentencing (although Appellant in this case agreed to be sentenced by the trial judge at his rehearing). It is therefore impossible for the government to show that the guilty verdicts in Appellant's case *were* unanimous—and to therefore show that the trial judge's failure to instruct the panel that a guilty verdict must be unanimous was harmless.

That said, there is at least some record evidence that gives rise to a plausible inference that the verdict was *not* unanimous. In fact, the panel

in this case convicted Appellant of a crime which was later overturned not just for factual insufficiency, but *also* for legal insufficiency (i.e., *no* reasonable factfinder could have concluded that the Government met its burden of proof). That the panel returned such a legally insufficient guilty verdict implicates some of the very same concerns about non-unanimity recently echoed by a number of Supreme Court justices. *See, e.g.*, *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring) (noting that a non-unanimous guilty verdict "sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule); *see also Edwards*, 141 S. Ct. at 1576 (Kagan, J., dissenting) (citing *Ramos* for the proposition that unanimity was historically understood to serve "as a critical safeguard, needed to protect against wrongful deprivations of citizens' hard-won liberty" (internal quotations omitted)).

In a similar vein, the record expressly indicates that—having already begun their deliberations—the panel president felt it necessary to repeatedly ask the military judge how to go about conducting a vote in the face of potential disagreement. *See, e.g.*, O.R. at 567-68 (asking the military judge what to do about voting on guilt by exceptions and

substitutions "if the wording is different in each of those exceptions, how do we handle that?"). Indeed, the panel did not return a guilty verdict on any of the assault specifications it was presented with as drafted; it only returned guilty verdicts by exceptions and substitutions—further underscoring the possibility of non-unanimity in the panel's verdict. Given that there can never be a court-martial in which the non-unanimity of a guilty verdict can be proven, this case is therefore an appropriate vehicle in which this Court can—and therefore must—reach Appellant's constitutional claims.

***

It was only three years ago that the Supreme Court claimed that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S. Ct. at 2174. But as this case illustrates, until the right to a unanimous conviction is guaranteed at courts-martial, that pronouncement will ring more than a little hollow.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court grant review of his case on the above-specified issue.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on February 2, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULES 21(b) AND 37

This Supplement complies with the type-volume limitation of Rule 21(b) because it contains 7,179 words. This Supplement complies with the typeface and type style requirements of Rule 37.

Respectfully submitted,

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APPENDIX A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39352

UNITED STATES
Appellee

v.

Milford C. SCOTT
Captain (O-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 10 May 2019

Military Judge: Joseph S. Imburgia.

Approved sentence: Dismissal and confinement for 8 months. Sentence adjudged 24 June 2017 by GCM convened at Davis-Monthan Air Force Base, Arizona.

For Appellant: Major Todd M. Swensen, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, HUYGEN, and POSCH, *Appellate Military Judges.*

Senior Judge HUYGEN delivered the opinion of the court, in which Senior Judge JOHNSON and Judge POSCH joined.

HUYGEN, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of three specifications of assault consummated by a battery and one specification of fraternization in violation of Articles 128 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 934.[1,2] The members adjudged a sentence of a dismissal and confinement for eight months. The convening authority approved the sentence as adjudged.

Appellant raises three assignments of error (AOE): (1) Appellant's convictions of three specifications of assault consummated by a battery are not legally and factually sufficient; (2) Appellant's conviction of fraternization is not legally and factually sufficient; and (3) the military judge erred by admitting improper evidence during sentencing.[3] We also considered the issue of timely appellate review. We find prejudicial error with regard to AOE (2) and thus set aside Appellant's conviction of fraternization and the sentence.[4]

I. BACKGROUND

On the night of Friday, 18 March 2016, Appellant, a captain (O-3), and EC, then an airman first class (E-3),[5] stopped in several places to play pool and went to Playground, a nightclub in Tucson, Arizona. They left the club at approximately 0100 or 0200 hours on Saturday, 19 March 2016. EC was driving and Appellant was riding in the front passenger seat of EC's car. They

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[1] For the three assault specifications, the members found Appellant not guilty of the excepted word "fist" (as in "strike in the face with his fist") but guilty of the substituted word "hand." The members also found Appellant not guilty of one specification of conduct unbecoming an officer and gentleman and one specification of communicating a threat in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934.

[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 Courts-Martial, United States* (2016 ed.) (*MCM*).

[3] We do not address AOE (3) because of our resolution of AOE (2).

[4] The military judge failed to announce that the court-martial was assembled. *See* Rule for Courts-Martial (R.C.M.) 911 ("The military judge shall announce the assembly of the court-martial."). Assembly of the court is significant for a variety of reasons. *See* R.C.M. 911, Discussion. However, we find that the military judge's failure had no substantive effect on Appellant's trial and thus was harmless error.

[5] EC, a senior airman (E-4) at the time of Appellant's trial, was ordered to testify under a grant of immunity and listed as a prosecution witness but was actually called and testified as a defense witness.

tried to drive out of the parking lot, but a group of six to eight people stood in the way and would not move, even after EC flashed the car's headlights and honked the horn. The group included RD, JA, and VG.

RD, JA, VG, and several other friends had been drinking at Zen Rock, a nightclub near Playground. After leaving the club, they were walking through a parking lot when RD and JA stopped in front of EC's car. Appellant yelled at the two women that they were "hot" but "you bi[**]hes need to get the f[**]k out of the way." RD testified that she heard the word "bi[**]h," "got mad," and yelled back while JA tapped the hood of EC's car and also refused to move. Appellant got out of the car and EC followed Appellant to try to convince him to get back into the car. Both Appellant and EC appeared to be drunk according to AM, who was in the group with RD, JA, and VG.

Appellant got "in [RD's] face," and the two had what RD described as "a pretty heated argument" with each cursing at the other. Appellant said to RD, "I'm not afraid to slap a bi[**]h," and RD replied, "Oh yeah, you going to hit me? Then hit me then." Appellant then hit RD with his hand. JA testified that RD was knocked down but popped right back up and raised her hand to hit Appellant. But "before she even touched his face," Appellant hit RD a second time. As JA described it, "That's when I go into the scene and I'm like yelling at him, cursing at him. . . . And when I'm going towards him and he says, 'Oh, you want some of this too?'" AM testified that he was "holding back" JA when Appellant hit JA. VG saw Appellant hit RD and JA, ran towards her two friends, followed EC around the back of the car, and then, cursing and yelling, approached Appellant, at which point Appellant hit VG. As other people came closer, Appellant and EC got back into the car and drove away. AM called 911 and reported the incident to the Tucson Police Department. RD left before the police arrived, but JA and VG provided statements to the police and had their injuries photographed. Each of the women's faces had a reddened mark where she was apparently hit.

When Appellant testified at trial, he described the first physical contact of the confrontation as him being pushed in the chest by a Hispanic male, possibly AM. After more words were exchanged, Appellant thought that the group was walking away until one Hispanic female turned around and "everyone starts to charge me. . . . And two females shoved me and that is why I shoved them back." He did not remember a third female being involved. RD, JA, and VG were each described as a Hispanic woman less than five feet five inches in height but wearing high-heeled shoes on the night in question. Everyone in their group of six to eight people, including AM, was described as Hispanic. Appellant was described as a six foot two inch African American man and EC as a five foot ten inch Hispanic man.

Almost one month later, on the night of 16 April 2016, JA, VG, and two others were at Playground when JA saw Appellant and EC and recognized Appellant as her assailant. One of JA's companions contacted the police, who arrested Appellant when he walked out of the club.

II. DISCUSSION

A. Legal and Factual Sufficiency: Assault Consummated by Battery

Appellant first asserts that his convictions of three specifications of assault consummated by a battery are not legally and factually sufficient. Appellant points to (1) the contradictory and "false" statements of the three victims—RD, JA, and VG; (2) the evidence that RD used her status as a crime victim to try to get preferential treatment for a visa and that the victims' injuries were not consistent with their accounts; and (3) the evidence that Appellant acted in self-defense. Contrary to Appellant's assertion, we conclude the assault convictions are legally and factually sufficient.

1. 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 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 (1979)).

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." *Id.* 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).

In order for Appellant to be found guilty of assault consummated by a battery under Article 128, UCMJ, the Government was required to prove beyond a reasonable doubt that (1) Appellant did bodily harm to RD, JA, and VG by striking each in the face with his hand and (2) the bodily harm was done with unlawful force or violence. *See Manual for Courts-Martial*, *United States*

(2016 ed.) (*MCM*), pt. IV, ¶ 54.b.(2). An "assault" is done without legal justification or excuse and without the lawful consent of the victim. *Id.* ¶ 54.c.(1)(a). A "battery" is an assault in which the attempt to do bodily harm is consummated by the infliction of that harm. *Id.* ¶ 54.c.(2)(a).

Self-defense is a defense to assault consummated by a battery and requires that (1) Appellant had a reasonable belief that physical harm was about to be inflicted on him and (2) Appellant actually believed that the amount of force he used was required to protect himself. *See* Rule for Courts-Martial (R.C.M.) 916(e)(3). The right to self-defense is lost if Appellant was an aggressor, engaged in mutual combat, or provoked the attack that gave rise to the apprehension, unless Appellant had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred. R.C.M. 916(e)(4). Failure to retreat, when retreat is possible, does not deprive a person of the right to self-defense. R.C.M. 916(e)(4), Discussion. The availability of avenues of retreat is one factor that may be considered in addressing the reasonableness of a person's apprehension of bodily harm and the sincerity of the person's belief that the force used was necessary for self-protection. *Id.* The principles of self-defense apply to defense of another. R.C.M. 916(e)(5). The prosecution has the burden of proving beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1).

2. Analysis

Appellant argues that the weaknesses in the Government's case should lead us to conclude that the assault convictions are legally and factually insufficient. This argument fails to account for three key considerations.

First, with regard to the trial testimony of RD, JA, VG, and AM about the assaults, there was no significant contradiction. Instead, all the testimony was consistent that RD and JA prevented EC's car from exiting the parking lot, Appellant yelled and cursed at RD and JA, RD yelled back and JA tapped the hood of the car, and then Appellant got out of the car. Appellant and RD were in each other's "face" when Appellant warned RD he would hit her, RD acknowledged the warning, and Appellant hit RD. After Appellant hit RD a second time, he hit JA and VG in quick succession. We decline to interpret RD's acknowledgement ("Oh yeah, you going to hit me? Then hit me then.") of Appellant's warning ("I'm not afraid to slap a bi[**]h.") as RD's consent to being hit. We also decline Appellant's invitation to interpret his acquittal of the threat charge either as an affirmative finding that RD, JA, and VG were lying about Appellant communicating a threat and therefore lying about other matters or as anything more than the Government's failure to prove beyond a reasonable doubt that Appellant communicated a threat.

Second, we agree with Appellant that RD tried to use her status as a crime victim to get preferential treatment for a visa. However, we do not agree that the attempt undermined her credibility when she testified at trial about the basic facts of the assaults, especially because she did not remember Appellant hitting her the first time, which was described by JA, and she did not try to minimize the hostile nature of her actions or the fact that she was about to retaliate when Appellant hit her a second time. In addition, we find that the other witnesses' testimony about RD being hit and the photographic evidence of JA and VG's injuries were substantially consistent with the three victims' accounts as well as the court members' findings that Appellant hit each victim with his hand but did not punch any of them with his fist.

Third, we are convinced that Appellant did not act in self-defense when he hit RD, JA, or VG. Although RD and JA's refusal to move from in front of EC's car was obnoxious, Appellant was the first to engage when he yelled at them and called them "bi[**]hes." Even after he got out of the car, he could have regained the right to self-defense if he had withdrawn, *see United States v. Behenna*, 71 M.J. 228, 235 (C.A.A.F. 2012), but he did not withdraw. Although Appellant was not required to retreat, the totality of his actions, including his ignoring EC's entreaty to get back in the car, undercut his contention that he reasonably believed he was at risk of physical harm or that he actually believed he needed to hit RD, JA, or VG in order to protect himself or EC. There was also no evidence other than Appellant's own testimony that a group of six to eight people charged at him. We acknowledge Appellant's potential justification for hitting RD the second time when she raised her hand to retaliate,[6] as well as Appellant's position of being under verbal attack first by JA while she was held back by AM and then by VG after JA was hit. Nonetheless, we find Appellant's theory of self-defense failed.

Considering the evidence in the light most favorable to the prosecution, particularly the straightforward and consistent testimony about the assaults, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt and been convinced both that the Government proved beyond a reasonable doubt that the defense of self-defense did not exist and that Appellant was guilty beyond a reasonable doubt. After weighing the evidence in the record and making allowances for not having personally observed the witnesses, we are so convinced.

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[6] *But see United States v. Wilhelm*, 36 M.J. 891, 893 (A.F. Ct. Crim. App. 1993) (quoting *United States v. O'Neal*, 36 C.M.R. 189, 193 (C.M.A. 1966)) ("Both parties to a mutual combat are wrongdoers, and the law of self-defense cannot be invoked by either, so long as he continues in the combat.").

B. Legal and Factual Sufficiency: Fraternization

Appellant next claims that his conviction of fraternization is not legally and factually sufficient and bases his claim on the Government's failure to prove beyond a reasonable doubt three elements of the offense.[7] We agree with regard to two elements, conclude the conviction is legally and factually insufficient, and set it aside.

1. Additional Background

The fraternization charge for violation of Article 134, UCMJ, read as follows:

> In that [Appellant] did, at or near Tucson, Arizona, on or about 19 March 2016, knowingly fraternize with Airman First Class [EC], an enlisted person, on terms of military equality, to wit: socializing in an off-duty setting, in violation of the custom of the United States Air Force that officers shall not fraternize with enlisted persons on terms of military equality, such conduct being to the prejudice of good order and discipline in the armed forces.

At Appellant's trial, AM testified that, in the parking lot on the night of 18–19 March 2016, Appellant and EC appeared "drunk." However, there was no evidence that either engaged in criminal conduct or inappropriate behavior while socializing in the hours before trying to drive out of the parking lot.

The Government requested judicial notice of the definition of fraternization in Air Force Guidance Memorandum 2017–01 to Air Force Instruction (AFI) 36–2909, *Professional and Unprofessional Relationships*, ¶ 2.2.1 (13 Mar. 2017). The civilian defense counsel and Appellant stated they had no concerns with such notice, which the military judge decided to take.

During the Government's case-in-chief, it called no witness specifically to address the fraternization charge or any of its elements. After the Government rested, the Defense moved to dismiss the charge pursuant to R.C.M. 917 and cited the lack of evidence of EC's enlisted status, custom of the Air Force, and conduct prejudicial to good order and discipline. The military judge ruled that there was "some evidence" of EC's enlisted status and denied the motion without addressing the issues of Air Force custom and prejudicial conduct.

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[7] We do not address Appellant's contention regarding a "recklessness" *mens rea* for fraternization as we need not do so in order to resolve the assignment of error.

EC testified during the Defense's case-in-chief that Appellant and EC had been friends since high school when they took classes, worked out, and generally spent a lot of time together. EC described Appellant's mother as a second mother and Appellant as a brother. Appellant's mother in turn described EC as "a son to me . . . and my husband." Appellant testified that he was closer to EC than to his actual brother and sister. He and EC remained friends after Appellant, who was a grade ahead of EC, went to college. EC attended Appellant's college graduation and Air Force commissioning ceremony, and Appellant inspired EC to enlist in the Air Force. EC was assigned to Davis-Monthan Air Force Base, Arizona, three or four months before Appellant was assigned to the base in 2013. The assignment was Appellant's first non-training or operational assignment. He and EC were not in the same squadron or rating chain and had no contact with each other at work.

In accordance with the military judge's decision on judicial notice, he instructed the court members as follows:

> The "custom of the Air Force" with respect to fraternization as it existed at the time of the alleged offense is discussed in paragraph 2.2.1 of Air Force Instruction (AFI) 36-2909, Professional and Unprofessional Relationships, dated 1 May 1999. I have taken judicial notice of that particular provision, which includes the following definition of fraternization:
>
> Fraternization, as defined by the Manual for Courts-Martial, is a personal relationship between an officer and an enlisted member that violates the customary bounds of acceptable behavior in the Air Force and prejudices good order and discipline, discredits the armed services, or operates to the personal disgrace or dishonor of the officer involved. The custom recognizes that officers will not form personal relationships with enlisted members on terms of military equality, whether on or off-duty.
>
> Although the custom originated in an all-male military, it is gender neutral. Fraternization can occur between males, between females and between males and females. Because of the potential damage fraternization can do to morale, good order, discipline, and unit cohesion, the President specifically provided for the offense of fraternization in the Manual for Courts-Martial.

2. Law

The standard of review for legal and factual sufficiency is as stated above.

In order for Appellant to be found guilty of fraternization under Article 134, UCMJ, the Government was required to prove beyond a reasonable doubt that (1) Appellant was a commissioned officer; (2) on or about 19 March 2016, Appellant fraternized on terms of military equality with Airman First Class (A1C) EC by socializing in an off-duty setting; (3) Appellant knew A1C EC to be an enlisted member; (4) such fraternization violated the custom of the Air Force that officers shall not fraternize with enlisted members on terms of military equality; and (5) under the circumstances, Appellant's conduct was to the prejudice of good order and discipline in the armed forces. *See MCM*, pt. IV, ¶ 83.b.

> Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

Id. ¶ 83.c.(1).

3. Analysis

The military judge instructed the court members on the five elements of fraternization and the general explanation of fraternization we cite above. Appellant challenges on appeal whether the Government proved beyond a reasonable doubt elements (2), (4), and (5). We conclude that Appellant's conviction is legally and factually insufficient with respect to elements (2) and (4), that is, on 19 March 2016, Appellant fraternized by socializing with A1C EC in an off-duty setting and such fraternization violated a custom of the Air Force.

We begin our analysis by noting the dearth of cases dealing with officer-enlisted relationships that pre-date both members' military service; that do not implicate a superior-subordinate connection; or that do not involve sexual activity. *See, e.g., United States v. Wales*, 31 M.J. 301, 302 (C.M.A. 1990) ("Once again, we must review an officer's conviction for fraternizing with an enlisted person. Once again, the gravamen of the fraternization charge is that there was sexual intercourse between the two." (footnote omitted)). As a result, we are left to apply the "law" of fraternization to the singular facts of the fraternal relationship between Appellant and A1C EC, which pre-dated by more than five years their military service; did not implicate official duty,

much less a superior-subordinate connection; and certainly did not involve any sexual activity or even a hint of a romantic inclination.

We next turn to the charge the Government decided to prosecute and note its two most glaring weaknesses: (1) the charge was very specific to the night of 19 March 2016 and A1C EC[8] and (2) the charge was very general about the criminal conduct at issue being "socializing in an off-duty setting."[9] We also note that the Government requested and the military judge agreed to take judicial notice of AFI 36–2909 for the very limited purpose of a definition of fraternization. We paraphrase that definition—a personal relationship is fraternization if it violates a custom of the Air Force and it violates a custom of the Air Force if it is fraternization—and find it to be singularly uninstructive.[10]

In *Wales*, the Court of Military Appeals (CMA), the predecessor to the United States Court of Appeals for the Armed Forces, was "troubled that a 'custom' which is the basis for trying appellant for a crime authorizing the punishment of dismissal and 2 years' confinement was to be proved at trial by nothing more than a general statement in a nonpunitive regulation." 31 M.J. at 309. The CMA went on to question whether judicial notice of such a statement was proper and concluded:

> [I]f the Government wishes to prosecute fraternization on the basis of a custom in the military service, testimony must be offered by a knowledgeable witness—subject to cross-examination—about that custom. To require less is to allow the factfinder to make a determination that the custom exists without any indication on the record as to what that custom is.

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[8] A1C EC indicated that a second enlisted member participated in the initial social activity the night of 18–19 March 2016, but that member was never identified, did not go to Playground with A1C EC and Appellant, and was not present in the parking lot for the confrontation.

[9] In motions practice during the presentencing proceeding, the Government made clear that the conduct "underlying the fraternization is socializing. . . . [T]he fraternization charge does not include any language that might suggest [the court members] were to use the assault of the three young women that night to [convict Appellant of fraternization]. It was merely socializing."

[10] We recognize that AFI 36–2909 is, in part, a punitive regulation, but the military judge did not take notice of its punitive provisions, and Appellant was not charged with a violation of the regulation under Article 92, UCMJ, 10 U.S.C. § 892.

Id.; *see also United States v. Appel*, 31 M.J. 314, 320 (C.M.A. 1990) ("[A] custom is not a subject for judicial notice . . . . With respect to the Air Force custom against fraternization . . . no one can say . . . that the extent of this custom is so clear as to dispense with the requirement of proof.").

Both Appellant and the Government in their respective briefs discussed *United States v. Fox*, 34 M.J. 99 (C.M.A. 1992). While our reading of the case does not strictly align with that of either party, we apply *Fox* to determine the factual and legal insufficiency of Appellant's fraternization conviction. In particular, we find applicable the CMA's continuation in *Fox* of its reasoning in *Wales*: "The Manual lists violation of 'custom' as an element of the offense. Likewise, a violation of 'custom' is alleged in the specification. The failure of the Government to prove adequately what the Air Force 'custom' was precludes us from upholding the findings of guilty as to fraternization." *Fox*, 34 M.J. at 103.

During Appellant's trial, the Government, in the entirety of its findings case-in-chief, called no military witness. Unsurprisingly, none of its civilian witnesses addressed any of the elements of the uniquely military offense of fraternization. As noted by Appellant in his brief, the Defense brought to the attention of the military judge the absence of evidence, including of custom of the Air Force, by moving for dismissal of the fraternization charge pursuant to R.C.M. 917. While the military judge addressed the evidence of A1C EC's enlisted status, the military judge did not address the evidence—or lack thereof—of Air Force custom or prejudicial conduct. We do here: the Government presented no evidence of custom of the Air Force, particularly with respect to officers and enlisted members socializing in an off-duty setting. *Cf. United States v. McCreight*, 43 M.J. 483, 485 (C.A.A.F. 1996) (noting "[t]here are appropriate circumstances for officers and their enlisted subordinates to socialize" but affirming first lieutenant's conviction for fraternization with a senior airman where the lieutenant was the airman's supervisor; the lieutenant "showed partiality and preferential treatment" to the airman at work; the two often socialized together in private and public settings while off-duty; and three government witnesses testified about the custom of the Air Force). *See also* AFI 36–2909, ¶ 3.4 ("It is often the frequency of [shared] activities . . . which causes them to become, or to be perceived to be, unprofessional. While an occasional . . . activity between a supervisor and a subordinate could remain professional, daily or weekly activities could result at a minimum in the perception of an unprofessional relationship.").

As the CMA found in *Wales*, we find in Appellant's case that the Government "did not adequately discharge its burden of proving the nature of the custom on which it relied to convict" Appellant for fraternization under Article 134, UCMJ. *See Wales*, 31 M.J. at 309. The Government failed to intro-

duce evidence that would enable a reasonable factfinder to have found all the essential elements of the offense as it was charged, and we are not convinced of Appellant's guilt. Therefore, we conclude Appellant's conviction for fraternization is legally and factually insufficient, and we set it aside.

4. Sentence Rehearing

Because we set aside the findings of guilty of fraternization, or Specification 2 of Charge III and Charge III, we consider whether we can reassess the sentence. We have "broad discretion" first to decide whether to reassess a sentence and then to arrive at a reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). To determine whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances, including the following illustrative, non-exhaustive factors: (1) "Dramatic changes in the penalty landscape and exposure;" (2) "Whether an appellant chose sentencing by members or a military judge alone;" (3) "Whether the nature of the remaining offenses capture[s] the gravamen of criminal conduct included within the original offenses and . . . whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses;" and (4) "Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." *Id.* at 15–16 (citations omitted).

Noting Appellant's request for the specific relief of sentence reassessment, we have considered the totality of the circumstances and decide to authorize a sentence rehearing. By setting aside the fraternization conviction, we are setting aside the more serious charge of which Appellant was convicted and thereby reducing his penalty exposure from 42 months of confinement to 18. In addition, Appellant chose trial and sentencing by members, a factor of forum selection made "more relevant" because the charge we set aside involves custom of the Air Force and conduct prejudicial to good order and discipline. *See id.* at 16. We also considered that the remaining assault offenses do not capture the gravamen of criminal conduct originally charged.[11] Although the

[11] Because the gravamen of the original charges is not entirely captured in the assault offenses, the third *Winckelmann* factor weighs in favor of rehearing. While we do not determine "whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses," *see Winckelmann*, 73 M.J. at 16, we note the concerns raised by Appellant regarding the admission of the Personal Data Sheet, nonjudicial punishment action under Article 15, UCMJ, 10 U.S.C. § 815, letter of reprimand, and unfavorable information file as prosecution exhibits for sentencing.

remaining offenses of assault consummated by a battery are of the type with which we are experienced and familiar, the other *Winckelmann* factors prevent us from reliably determining in Appellant's case "what sentence would have been imposed at trial." *See id.* Therefore, we authorize a rehearing.

C. 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 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 (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 26 October 2017. The delay in rendering this decision by 26 April 2019 is presumptively unreasonable. However, we determine no violation of Appellant's right to due process and a speedy post-trial review and appeal.

The delay in this case exceeded the *Moreno* standard by two weeks. The reasons for the delay include the time required for Appellant to file his brief on 22 August 2018 and the Government to file its answer on 21 September 2018. Appellant has not asserted his right to speedy appellate review. Appellant began his eight months of confinement on 24 June 2017 and was released at least six months before his brief was filed. Appellant makes no claim of prejudice—whether oppressive incarceration, anxiety and concern, or impaired appeal or defenses, *see id.* at 138–39—as a result of the delay for the court to complete appellate review of his case. We find none.

Finding no *Barker* prejudice, we also find the delay is not so egregious that it "adversely affects the public's perception of the fairness and integrity of the military justice system." *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). As a result, there is no due process violation. *See id.* In addition, we determine that relief is not warranted in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 223–24 (C.A.A.F. 2002); *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).

III. CONCLUSION

The findings of guilt of Specification 2 of Charge III and Charge III are **SET ASIDE** and Specification 2 of Charge III and Charge III are **DIS-**

MISSED WITH PREJUDICE. The sentence is **SET ASIDE**. The case is returned to The Judge Advocate General for further processing consistent with this opinion. A rehearing on sentence is authorized. Article 66(e), UCMJ, 10 U.S.C. § 866(e).

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39352 (reh)

UNITED STATES
Appellee

v.

Milford C. SCOTT
Captain (O-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 18 November 2021

Military Judge: Andrew R. Norton.

Approved sentence: Dismissal, confinement for 2 months, and a reprimand. Sentence adjudged on 28 January 2020 by GCM convened at Davis-Monthan Air Force Base, Arizona.

For Appellant: Major David A. Schiavone, USAF; Captain Ryan S. Crnkovich, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Kelsey B. Shust, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, POSCH, and MEGINLEY, *Appellate Military Judges*.

Senior Judge POSCH delivered the opinion of the court, in which Chief Judge JOHNSON and Judge MEGINLEY joined. Judge MEGINLEY filed a separate concurring opinion.

POSCH, Senior Judge:

Appellant's case is before this court a second time. At Appellant's trial in June 2017, a general court-martial composed of officer members convicted Appellant, contrary to his pleas, of three specifications of assault consummated by a battery and one specification of fraternization in violation of Articles 128 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 934, respectively.[1] The adjudged and approved sentence consisted of a dismissal and confinement for eight months.

Upon initial review, this court found the assault consummated by a battery convictions both legally and factually sufficient. *United States v. Scott*, No. ACM 39352, 2019 CCA LEXIS 232, at *5–11 (A.F. Ct. Crim. App. 10 May 2019) (unpub. op.). At trial, those offenses were enumerated as Specifications 1, 2, and 3 of Charge I.[2] At the same time, this court set aside the fraternization conviction and the sentence, and dismissed the fraternization charge and specification with prejudice. *Id*. at *2, *24. In the exercise of this court's authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d), we authorized a rehearing on sentence. *Scott*, unpub. op. at *24–25 (citing Article 66(e), UCMJ, 10 U.S.C. § 866(e)). At the rehearing that was held in January 2020, a military judge sentenced Appellant to a dismissal, confinement for two months, and a reprimand. The convening authority approved the sentence that was adjudged at the rehearing.[3]

After the rehearing and in this appeal, Appellant raises ten issues, seven of which are assignments of error raised through appellate counsel: (1) whether Appellant is entitled to new post-trial processing because the staff judge advocate's recommendation (SJAR) failed to advise that the convening authority was empowered to set aside Appellant's reprimand; (2) whether Appellant was prejudiced during post-trial processing when the convening authority was provided a personal data sheet containing evidence of nonjudicial punishment

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[1] Except where indicated, all references in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] For each of the three specifications of assault consummated by a battery, Appellant was found not guilty of the excepted word "fist" (as in "strike in the face with his fist"), but guilty of the substituted word "hand." *United States v. Scott*, No. ACM 39352, 2019 CCA LEXIS 232, at *1 n.1 (A.F. Ct. Crim. App. 10 May 2019) (unpub. op.).

[3] The military judge ordered one day of pretrial confinement credit against the term of confinement. At action, the convening authority directed Appellant to "be credited with confinement served under the sentence adjudged at the former trial against the current sentence to confinement."

(NJP) that was ruled inadmissible, and Appellant was not notified of the convening authority's intent to consider adverse matters not admitted at trial as required by Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 13.21 (18 Jan. 2018); (3) in the event that this court does not remand for new post-trial processing, whether the reprimand should be set aside consistent with Articles 63 and 66, UCMJ, 10 U.S.C. §§ 863, 866; (4) whether Appellant is entitled to relief under Article 66, UCMJ, 10 U.S.C. § 866, because he was an undisputed victim of a crime committed by an active duty security forces confinement guard; (5) whether, and in addition to other reasons raised on appeal, Appellant should be granted Article 66, UCMJ, relief because he has served eight months of confinement pursuant to his initially-approved sentence, but was subsequently resentenced to just two months of confinement at the rehearing and no clemency was granted; (6) whether trial counsel improperly commented on Appellant's rights under the Constitution[4] and statute by arguing Appellant lacked rehabilitative potential because he would not take accountability for his actions; and (7) whether the military judge abused his discretion in allowing the Government's lone sentencing witness to testify remotely, over Appellant's objection, because the witness decided to attend a non-mission-essential temporary duty on the date of the rehearing.

In addition, Appellant personally raises three issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982): (8) whether the military judge abused his discretion in allowing Colonel PA to testify as to Appellant's rehabilitative potential in light of Colonel PA lacking any substantial interactions with Appellant in six years; (9) whether Appellant is entitled to sentence relief pursuant to Article 66, UCMJ, because he was subject to an arbitrary and capricious debarment while on appellate leave; and (10) whether Appellant was denied effective assistance of counsel when, upon learning for the first time in the midst of his rehearing that he could have sought to litigate the denial of his request for a military counsel of his own selection pursuant to Article 38(b)(3)(B), UCMJ, 10 U.S.C. § 838(b)(3)(B), he was forced to make a hasty decision regarding his choice of counsel on the spot. We have carefully considered issues (8) and (10) and determine they are without merit and warrant no discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

After considering Appellant's assignments of error and issues he personally

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[4] Appellant's assignment of error brief explains, "Trial counsel's improper commentary [in sentencing argument] implicated Appellant's constitutional rights because it served as an attack upon his previous plea of not guilty and right to remain silent. . . ."

raises on appeal, we affirm the findings and sentence as set forth in our decree.[5]

I. BACKGROUND

This court described the facts of the case in our initial decision that found Appellant's three assault consummated by a battery convictions legally and factually sufficient. *Scott*, unpub. op. at *2–11. It will suffice to state here that the findings of guilty are founded upon an incident in March 2016 after Appellant initiated a verbal confrontation in a parking lot outside a nightclub in Tucson, Arizona. At the time, Appellant was riding in the front passenger seat of a friend's car. He began by rolling down a car window and shouting obscenities at three women who stood in the way. When the women were unmoved by Appellant's demands, Appellant approached the women, and the driver followed Appellant to try to convince him to return to the car.

The incident rapidly escalated to a heated exchange of words and physical contact. Appellant struck one woman in the face with his hand, knocking her down. After Appellant hit the same woman a second time, he struck the other women in quick succession. As bystanders approached, Appellant and his friend got back into the car and drove off. The first woman Appellant struck left before police arrived, but the other two provided statements to the police and had their injuries photographed. Each of the women's faces had a reddened mark where she was struck. Almost one month later at the same nightclub, one of the women recognized Appellant as her assailant. After police were contacted and responded, Appellant was arrested when he walked out of the club.

At the rehearing, the Prosecution admitted the prior testimony of the three victims and other evidence from Appellant's trial.

II. DISCUSSION

A. Challenges to the SJAR

The proper completion of post-trial processing is a question of law the court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) (citing *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998)). Failure to comment in a timely manner on matters in the SJAR or matters attached to the SJAR "waives in the absence of plain error, or forfeits, any later claim of error."

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[5] Appellant requested speedy appellate review in his timely opposition to the Government's 18 March 2021 motion for enlargement of time. This opinion is being issued before the 18-month standard for a presumptively unreasonable delay in appellate review set in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). We find no prejudice to Appellant and relief is not warranted for the time it took to complete review.

United States v. Zegarrundo, 77 M.J. 612, 614 (A.F. Ct. Crim. App. 2018) (citing Rule for Courts-Martial (R.C.M.) 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)).

When analyzing for plain error, an appellate court will assess whether "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). "To meet this burden in the context of a post-trial recommendation error . . . an appellant must make 'some colorable showing of possible prejudice.'" *Id.* at 436–37 (quoting *Kho*, 54 M.J. at 65). "The threshold is low, but there must be some colorable showing of possible prejudice. . . . in terms of how the [error] potentially affected an appellant's opportunity for clemency." *Id.* at 437 (citation omitted).

1. The Reprimand

Appellant claims error in that the SJAR failed to advise the convening authority that he was empowered to set aside Appellant's reprimand adjudged at the rehearing. Appellant asks this court to set aside the approved sentence and remand for new post-trial processing with a corrected SJAR.

a. Additional Background

During post-trial processing, the SJAR correctly advised the convening authority of his power to disapprove, commute or suspend, in whole or in part, the confinement component of the adjudged sentence. The SJAR did not similarly advise the convening authority that he could disapprove the reprimand. Appellant did not address this apparent discrepancy in clemency. At the same time, Appellant did not seek relief that the convening authority had the power to grant under Article 60, UCMJ, 10 U.S.C. § 860.[6] Instead, trial defense counsel asked the convening authority to urge this court to both disapprove the dismissal under Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to recommend that the Secretary of the Air Force (SECAF) substitute an administrative discharge in accordance with Article 74(b), UCMJ, 10 U.S.C. § 874(b). Recognizing the convening authority's limited clemency power under the law, trial defense counsel nonetheless looked to the convening authority to "fully account for each of the six months that [Appellant] spent in confinement for a crime he did not commit." He urged that "[i]n light of the full context of the situation, a dismissal is an unnecessarily severe punishment."

[6] The convening authority had the power to disapprove, commute, or suspend, in whole or in part, Appellant's adjudged confinement and reprimand, but not the dismissal. *See* Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A); *see also* R.C.M. 1107(d)(1).

b. Analysis

Because Appellant did not object to the contents of the SJAR upon receipt of it, we review for plain error. The SJAR must include a "concise recommendation." R.C.M. 1106(d)(3). The Discussion to the rule explains that recommendation "*may* include a summary of clemency actions" that the convening authority has the power to take. *Id*., Discussion (emphasis added). Thus, it is not plain and obvious error for the SJAR to exclude advice on the convening authority's power to disapprove Appellant's adjudged reprimand. At the same time, and under the particular facts of this case, we find that Appellant has failed to make a colorable showing of possible prejudice even if there was error.[7] Appellant neither sought clemency for the reprimand nor other relief that the convening authority had the power to grant under the UCMJ. Thus, we find the complained-of omission in the SJAR was not shown to be plain error. *See Scalo*, 60 M.J. at 436.

2. Incorrect Personal Data Sheet Attached to the SJAR

Appellant also alleges error because the Personal Data Sheet (PDS) that was attached to the SJAR included adverse personnel information. This information was ruled on by the military judge and excluded from the PDS that the Prosecution admitted in its sentencing case. Appellant asks this court to set aside the approved sentence and remand for new post-trial processing with a corrected SJAR.

a. Additional Background

Appellant had undergone an NJP proceeding under Article 15, UCMJ, 10 U.S.C. § 815, as a cadet at the United States Air Force Academy Preparatory School in 2006. After that proceeding concluded, the record of NJP became part of Appellant's personnel record. During presentencing proceedings at the rehearing, the Prosecution offered evidence of Appellant's service from his personnel records. Included was a PDS that summarized his service and identified "1" record of NJP reflecting the 2006 NJP proceedings. Appellant objected to the PDS because the NJP exceeded the five-year limit prescribed by AFI 51-

[7] This court attached to the appellate record a declaration by the convening authority that refutes Appellant's claim that the convening authority's decision may have changed had the SJAR advised him in the manner in which Appellant claims he should have been advised. We gave no weight to this declaration in reaching our decision.

201, ¶ 12.26.2.[8] The military judge sustained the objection and the PDS admitted for sentencing identified "0" NJP actions.

Following the rehearing, the PDS that the staff judge advocate attached to the SJAR identified the "1" NJP action Appellant had objected to at the sentencing hearing and that the military judge had sustained. The PDS also showed Appellant had no prior service before 10 May 2010.[9] At the same time, the PDS noted that Appellant had been recognized with the Air Force Longevity Service Award with two devices, indicating that Appellant had at least 12 years' honorable active or reserve military service with any branch of the United States Armed Forces.[10]

Before advising the convening authority, on 12 March 2020 the SJA served a copy of the SJAR on trial defense counsel, and a copy was served on Appellant as well. The memorandum to trial defense counsel encouraged Appellant's counsel to review the SJAR for error before it was presented to the convening authority:

> The recommendation has not been presented to the convening authority pending an opportunity for you to review it and reply should you desire. Pursuant to Rule for Courts-Martial (R.C.M.) 1106(f) and AFI 51-201, paragraph A11.19[, (18 Jan. 2019)], you are invited to make comments, including corrections or rebuttal, to any matter in the recommendation you believe to be erroneous, inadequate or misleading, within 10 days of receipt of this copy. Failure to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error.

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[8] R.C.M. 1001(b)(2) limits "[p]ersonal data" and "personnel records" that trial counsel may introduce in sentencing to information as prescribed "[u]nder regulations of the Secretary concerned." In the Air Force, records of NJP under Article 15, UCMJ, 10 U.S.C. § 815, may be admitted if not over five years old on the date the charges were referred. AFI 51-201, ¶ 12.26.2.

[9] The PDS showed, "Initial Date of Current Service: 10 May 2010." It also showed, "Prior Service: None."

[10] The Air Force Longevity Service Award is authorized based on an aggregate of four years of honorable active federal military service with any branch of the U.S. Armed Forces or Reserve components. An oak leaf cluster is worn as an authorized device for each additional four years of creditable service. Air Force Manual 36-2806, *Awards and Memorialization Program*, ¶¶ 3.37.1.3.2, A14.27 (10 Jun. 2019).

The memorandum to Appellant similarly encouraged Appellant to review the SJAR and to make comments, including corrections or rebuttal, to any matter in the recommendation Appellant believed to be erroneous, inadequate or misleading.

Trial defense counsel and Appellant separately receipted for the SJAR on 18 March 2020. No written matters were submitted objecting to the "1" NJP that was identified on the post-sentencing PDS.

b. Law and Analysis

Appellant claims the Government erred by attaching the erroneous PDS to the SJAR instead of the PDS that was admitted at trial. On appeal, the Government concedes the PDS attached to the SJAR did not comply with paragraph A11.15 of the AFI because it should have been the same as the one admitted at the rehearing.[11] Appellant also claims error in that the Government failed to comply with the provisions of paragraph 13.21 of AFI 51-201 (18 Jan. 2019). That paragraph details procedures for the Government to follow "[i]f the convening authority wishes to consider any matters adverse to the accused that were not admitted at trial." Among those procedures, the SJA is required to notify the accused, in writing, of such matters, that the accused has a right to rebut the matters, and that the convening authority may consider them.

We agree with Appellant that the Government did not comply with paragraph 13.21 of the AFI. Nonetheless, we find such noncompliance does not entitle Appellant to relief under the circumstances here. Because Appellant did not object to the SJAR, we review for plain error. Assuming error that was plain or obvious for purposes of our analysis, Appellant has not made a colorable showing of possible prejudice.

As noted earlier, trial defense counsel's submission to the convening authority urged this court to disapprove the dismissal, and to recommend that the SECAF substitute an administrative discharge in lieu of the adjudged dismissal. It bears repeating that the relief Appellant sought is not among the clemency options available to the convening authority under the UCMJ. *See* Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A); *see also* R.C.M. 1107(d)(1). Similarly challenging to Appellant's burden to establish prejudice, Appellant has not shown that the relief he wanted from the SECAF was likely without a thorough examination of his personnel records, including the record of NJP

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[11] AFI 51-201, ¶ A11.15 (18 Jan. 2019) ("The SJA or designee ensures copies of the Report of Result of Trial memorandum and the accused's personal data sheet admitted at trial, or at a post-trial hearing (whichever is current), are attached to the SJAR.").

referenced in the PDS. Given the limited options available to the convening authority, Appellant has not made a colorable showing that if the PDS that was attached to the SJAR was the same as the PDS admitted at the rehearing, the convening authority might have taken some action favorable to Appellant that was within his statutory power to grant as clemency.[12]

Accordingly, although the SJAR included an attached PDS that referenced a prior record of NJP, Appellant has not made a colorable showing of possible prejudice warranting remand for new post-trial processing with a corrected SJAR that complies with the AFI.

B. Article 66(c), UCMJ, Review of the Sentence

In three assignments of error, and in an issue raised pursuant to *Grostefon*,[13] Appellant urges this court to reduce his sentence. Appellant calls upon the court to exercise its statutory responsibility to affirm "the sentence or such part or amount of the sentence, as" this court "finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ.

1. Law

"We review sentence appropriateness de novo." *United States v. Datavs*, 70 M.J. 595, 604 (A.F. Ct. Crim. App. 2011) (citing *United States v. Baier*, 60 M.J. 382, 383–84 (C.A.A.F. 2005)), *aff'd*, 71 M.J. 420 (C.A.A.F. 2012). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam) (citations omitted). While we have great discretion in determining whether a sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

2. Analysis

Appellant raises five issues on appeal with respect to this court's Article 66(c), UCMJ, responsibility to review sentence appropriateness. First, Appel-

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[12] This court attached to the appellate record a declaration by the convening authority stating that "[g]iven the severity of [Appellant's] misconduct for which he was convicted, the information regarding prior nonjudicial punishment contained within the personal data sheet did not influence my clemency determination." We gave no weight to this declaration in reaching our decision.

[13] We address assignments of error (3), (4), and (5), in addition to issue (9) raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

lant asks that we set aside the reprimand as excessive. Second, Appellant argues he is entitled to relief in the nature of setting aside the dismissal because, while confined, he was a victim of a financial crime committed by an active duty security forces guard. Third, Appellant asks us to set aside the dismissal because he served eight months of confinement under his original sentence, but was subsequently sentenced to two months of confinement at the rehearing. Fourth, Appellant asks us to set aside the dismissal because he was debarred from Davis-Monthan Air Force Base (AFB) following release from confinement. At the same time, Appellant asks that we consider the debarment "in conjunction with all other wrongs he has suffered that are identified in [ ] his brief (e.g., excessive confinement without remedy, [and] the larceny committed by a confinement guard) in fashioning appropriate relief" from the sentence adjudged at the rehearing. Accordingly, we consider as a fifth issue whether Appellant's sentence is inappropriately severe giving individualized consideration to Appellant, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial, to include all the matters Appellant raises on appeal.

We consider each issue in turn.

a. Reprimand Adjudged at the Rehearing

After the sentencing rehearing, the convening authority approved the adjudged reprimand, which he stated as follows in the action:

> You are hereby reprimanded! As an officer in the United States Air Force, you are expected to maintain high standards of integrity, responsibility, and leadership. Your actions, which include assaulting three female civilians, are despicable. Your acts displayed a momentous departure from the Air Force Core Values. I am extremely disappointed with your inexcusable conduct, which has brought discredit and disgrace upon you, your unit, and the United States Air Force.

Appellant does not take issue with this language, but argues a reprimand is too severe of a penalty given that he was not originally sentenced to a reprimand and had already served the eight-month term of confinement at the time of the rehearing. We find no merit to Appellant's claims that we should exercise our Article 66(c), UCMJ, authority and find the reprimand is excessive on grounds that it is a more severe penalty than what he originally received.[14]

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[14] At the same time, Appellant argues his sentence violates Article 63, UCMJ, 10 U.S.C. § 863, because his original sentence did not include a reprimand. We disagree.

We also find the reprimand is not an inappropriately severe penalty, and it would be the unusual case in which we would so find. Reprimands are among the sentencing penalties that are "qualitatively different from other punishments." *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003). Unlike traditional criminal punishment such as confinement, reprimands "affect military personnel administration," *id.* at 106–07, and "have no direct monetary consequences." *Id.* at 108. We decline to exercise our Article 66(c), UCMJ, authority to grant relief on the basis that the reprimand is an inappropriately severe penalty.

b. Theft of Appellant's Money

Appellant unsuccessfully sought relief from the convening authority after an active duty security forces guard stole $2,100.00 that belonged to Appellant when Appellant was confined. The Addendum to the SJAR confirms "[t]his report is true, the guard's conduct was criminal, and administrative action was taken against the guard. The security forces member was subsequently discharged from the Air Force." In a declaration attached to the appellate record, Appellant explains he had given permission to the guard to use Appellant's debit card to purchase toiletries for Appellant. The guard subsequently used it to make cash withdrawals from Appellant's bank account. In its answer to this assignment of error, the Government notes that Appellant does not claim he was permanently deprived of the money, and Appellant does not contest this point in his reply brief.

On appeal, and citing *United States v. Kelly*, Appellant urges this court to set aside the dismissal on grounds that he was a financial crime victim. 77 M.J. 404, 406 (C.A.A.F. 2018) (describing Courts of Criminal Appeals "as having a '*carte blanche* to do justice'" (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991))). Appellant explains the fact that the prison guard had a culpable state of mind weighs in favor of granting Article 66, UCMJ, relief. Additionally, Appellant describes his own anxiety and depression that was exacerbated by the guard's conduct.

A Court of Criminal Appeals (CCA) is "empowered to grant sentence relief based on post-trial confinement conditions." *United States v. Guinn*, 81 M.J. 195, 200 (C.A.A.F. 2021). Our authority arises when we find "a legal deficiency

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Article 63, UCMJ, states that upon a sentencing rehearing "no sentence in excess of or more severe than the original sentence may be approved . . . ." *See also* R.C.M. 810(d)(1). Objectively, Appellant's dismissal, two months of confinement, and a reprimand is less severe than a sentence of a dismissal, eight months of confinement, and no reprimand. *See United States v. Altier*, 71 M.J. 427, 428–29 (C.A.A.F. 2012) (per curiam) (finding a sentence containing types of punishment that could be imposed under Article 15, UCMJ, is neither excessive nor more severe under Article 63, UCMJ).

in the post-trial process." *United States v. Gay*, 75 M.J. 264, 268 (C.A.A.F. 2015). That is, the genesis for relief must be "sparked by a legal error." *Id.* One such legal error is when an appellant demonstrates his treatment in confinement is unlawful, and, thus, no longer appropriate. *Guinn*, 81 M.J. at 200–01. Under these circumstances, a CCA "not only has the authority but also *the duty* to ensure that the severity of an adjudged and approved sentence has not been *unlawfully increased by prison officials*." *Id.* at 200.

Even if we were to agree with Appellant that there was a legal deficiency in the implementation of his punishment, we disagree that setting aside the dismissal or granting other relief is an appropriate remedy. To be sure, Appellant was a member of a vulnerable population of prison inmates and the victim of a confinement guard who took advantage of him. However, we determine Appellant's convictions warrant a sentence that includes the approved confinement, dismissal, and a reprimand even when we factor into our review of the record that Appellant was the victim of a financial crime perpetrated by a guard. We decline to exercise our sentence appropriateness authority by setting aside Appellant's sentence in whole or in part.

c. Uncredited Confinement

At the rehearing held in January 2020, Appellant was sentenced to six months less confinement than was originally adjudged and approved by the convening authority in 2017. Characterizing these six months he was confined as an injustice because it was not applied against the dismissal, Appellant requests we set aside the dismissal using this court's Article 66(c), UCMJ, authority. Appellant allows he "may not be entitled to have the excessive six months he spent in confinement credited against his dismissal as a matter of law." Even so, he argues the six months he spent in confinement for a legally erroneous conviction—along with the other issues he raises on appeal—warrant relief. Appellant asks this court to base its authority to grant the requested relief on a CCA's Article 66(c), UCMJ, responsibility "to affirm only so much of Appellant's sentence that it deems to be correct in law *and fact*" and that it determines "should be approved."

The Government answers with the contention that this court may grant sentence appropriateness relief only if we find a legal deficiency in the findings and sentence as approved by the convening authority. For support, the Government cites *Gay*, 75 M.J. 264 (C.A.A.F. 2015), discussed *supra*, a case in which the United States Court of Appeals for the Armed Forces (CAAF) predicated a CCA's exercise of its sentence appropriateness authority on finding "a legal deficiency in the post-trial process." *Id.* at 269. In reply, Appellant characterizes the additional six months he was confined as both "excessive" and the product of legal error. Appellant explains the genesis for relief is this court finding the fraternization conviction legally insufficient, which resulted in six

fewer months of confinement adjudged at the rehearing. In asking us to apply our sentence appropriateness authority, Appellant urges us to determine if Appellant's sentence is "appropriate as a matter of fact."

As an initial matter, and citing *Josey*, Appellant observes his sentence may be correct in law because he is not legally entitled to have his previous sentence of served confinement applied against the dismissal. 58 M.J. at 108 ("R.C.M. 305(k) provide[s] an appropriate measure for crediting various types of punishment for purposes of former jeopardy, including confinement, hard labor without confinement, restriction, forfeitures, and fines."). On this point, we agree with Appellant. "[R]eprimands, reductions in rank, and punitive separations are so qualitatively different from other punishments that conversion [for confinement served as a result of the initial proceedings] is not required as a matter of law." *Id.*; *see also United States v. Rosendahl*, 53 M.J. 344, 347–48 (C.A.A.F. 2000).

However, we assume for purposes of this appeal only that the scope of this court's "highly discretionary power," *United States v. Lacy*, 50 M.J. 286, 287–88 (C.A.A.F. 1999), might reach the six months Appellant was confined that was not credited against his dismissal, and thereby allow this court to set aside the dismissal. We make this assumption because the points of law addressed by the CAAF's decisions in *Josey* and *Rosendahl* do not directly address a CCA's Article 66(c), UCMJ, authority with respect to uncredited confinement after a conviction is found legally insufficient.

Nonetheless, we decline to set aside the dismissal or grant other relief here even if Article 66(c), UCMJ, would empower us to do so. We find persuasive the CAAF's reasoning in *Josey* that "[t]he issue of whether a member of the armed forces should or should not receive a punitive discharge reflects a highly individualized judgment as to the nature of the offense as well as the person's past record and future potential . . . ." 58 M.J. at 108. In the exercise of this court's Article 66(c) responsibility to review the approved sentence, our determination whether the dismissal is appropriate is made "in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial." *Datavs*, 70 M.J. at 604–05 (citing *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)). Considering the entire record, including the six months of confinement that was not applied against another component of the sentence as a matter of law, we find the sentence approved after the rehearing is warranted by the evidence and is not an inappropriately severe penalty.

d. Debarment from Davis-Monthan AFB

After the rehearing, Appellant unsuccessfully sought relief from the convening authority, complaining that "after being released from wrongful con-

finement, [he] faced an arbitrary and capricious 5-year debarment[15] from Davis-Monthan [AFB], which served no purpose other than to perpetuate an already illegal punishment." Appellant requests that we exercise our authority to set aside the dismissal pursuant to Article 66(c), UCMJ, to redress that debarment.

A CCA has considerable discretion when carrying out its Article 66(c), UCMJ, responsibility to review the appropriateness of a sentence. However, that discretion is not unlimited. This court has jurisdiction to "act only with respect to the findings and sentence as approved by the convening authority." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We find the complained-of debarment is outside our authority to review, as explained next.

In determining the scope of this court's statutory responsibility, we find *Clinton v. Goldsmith*, 526 U.S. 529, 533 (1999), instructive. In that case, the respondent sought relief under the All Writs Act[16] after the Air Force notified the respondent of its intent to drop him from the rolls. *Id.* at 531. That notice was founded on a statute that authorized such action for any officer who had served at least six months confinement under a court-martial sentence. *Id.* at 532. After the CAAF enjoined the President and other Executive Branch officials from taking action, the Supreme Court reversed. *Id.* at 532–33. The Court reasoned that "action to drop respondent from the rolls was an executive action, [and was] not a 'finding' or 'sentence.'" *Id.* at 535 (citing 10 U.S.C. § 867(c)). Thus, that action was "outside of the CAAF's express statutory jurisdiction" to review. *Id.* at 540. In reaching this result, the Court rejected the claim that the CAAF had "merely preserved" the petitioner's court-martial sentence "by precluding additional punishment." *Id.* at 536. Concluding the action was beyond the CAAF's jurisdiction to review, the Court made no distinction between the CAAF's "narrowly circumscribed," though "independent[,] statutory jurisdiction" to "review the record," *id.* at 535 (citing 10 U.S.C. §§ 867(a)(2), (3)), on the one hand, and a CCA's "jurisdiction to 'review court-martial cases,'" *id.* (citing 10 U.S.C. § 866(a)), on the other.

In *United States v. Buford*, this court similarly observed that Article 66(c), UCMJ, does not extend a CCA's reach to all matters "that may have some link to a court-martial sentence." 77 M.J. 562, 565 (A.F. Ct. Crim. App. 2017). We further explained that Article 66(c), UCMJ, does not confer unlimited author-

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[15] *See* 32 C.F.R. § 809a.5 (2018) ("Under the authority of 50 U.S.C. [§] 797, installation commanders may deny access to the installation through the use of a barment order.").

[16] 28 U.S.C. § 1651(a).

ity to "grant relief for an administrative matter unrelated to any legal deficiency and unconnected to the legality or appropriateness of a court-martial sentence."

In the case under review, the debarment is analogous to the action of Air Force officials in *Goldsmith* who notified the respondent of their intent to drop him from the rolls. Both actions were founded in a statute and predicated on the results of a court-martial conviction. Appellant has not established the debarment was anything more than an administrative action or presented evidence that military officials directed the debarment in order to increase the severity of his sentence and thereby impose illegal post-trial punishment. We find Appellant's debarment is beyond this court's statutory jurisdiction to review.

e. Sentence Severity

After considering all the matters Appellant has raised on appeal, and recognizing the attendant consequences of a dismissal,[17] we determine the sentence adjudged at the rehearing is appropriate. We reach this determination after giving individualized consideration to Appellant, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial. Understanding we have a statutory responsibility to affirm only so much of the sentence that is correct and should be approved, Article 66(c), UCMJ, we affirm the sentence approved by the convening authority after the rehearing.

C. Appellant's Rebuttal to his Officer Performance Report

On appeal, Appellant claims trial counsel improperly commented on Appellant's rights by arguing that Appellant lacked rehabilitative potential because he would not take accountability for his actions. Appellant requests that we set aside the sentence. We find no error to correct on appeal considering that Appellant waived a claim of error in the admissibility of the evidence that trial counsel relied on in argument.

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[17] "A dismissal is a punitive discharge . . . [that will] affect[ ] the accused's future with regard to legal rights, economic opportunities, and social acceptability and will deny the accused other advantages which are enjoyed by one whose discharge indicates that he has served honorably." *United States v. Boyd*, 55 M.J. 217, 219 (C.A.A.F. 2001) (quoting military judge's sentencing instructions on the impact of a dismissal).

1. Additional Background

Appellant's duty performance and other matters that described and characterized his military service were documented in his officer performance reports (OPR). At the rehearing, the Prosecution offered Appellant's OPRs from his personnel record as Prosecution Exhibit 21.[18] Among the OPRs was a post-conviction OPR from 2017 that was required to be referred because Appellant had been convicted at trial by court-martial.[19] Included in the exhibit was Appellant's written rebuttal comments to the referral OPR,[20] which trial counsel would later reference in the Prosecution's sentencing argument. In that rebuttal, Appellant stated,

> Even though I have been convicted of the charges I am innocent of all of them. I will be submitting my case through the Air Force Court of Criminal Appeals (AFCCA) in hopes of all my charges being dropped and I will be allowed to re-enter the military and complete my career.

At trial, the Defense raised no objection to Prosecution Exhibit 21. After trial counsel individually offered the exhibit and four others, the military judge identified all five exhibits as a group and asked trial defense counsel if he had "any objection." Trial defense counsel objected to three exhibits, but not the OPRs. The military judge acknowledged the objections, and then asked the Defense, "And you do not have an objection to Prosecution Exhibit 21, which are the officer performance reports of [Appellant]?" Trial defense counsel replied, "Correct, sir." Even so, and after the military judge "note[d] that there is no defense objection to Prosecution Exhibit 21," the military judge asked counsel for both parties to assure him that no OPRs were missing from the exhibit. Trial defense counsel explained Appellant had received training reports but no OPRs during the period when the military judge thought at least one more OPR may have been accomplished for Appellant. Apparently satisfied with this answer, the military judge asked one last time, "And again, Defense Counsel,

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[18] *See* R.C.M. 1001(b)(2) ("Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of . . . character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions . . . .").

[19] *See* AFI 36-2406, *Officer and Enlisted Evaluation Systems*, ¶ 1.10.3.1 (8 Nov. 2016) ("conviction by courts-martial" must result in a referral OPR).

[20] Rebuttal comments are attached to the referral OPR and become a matter of record. AFI 36-2406, ¶¶ 1.4.3, 1.4.4, 1.10.5.2 (8 Nov. 2016).

any objection to Prosecution Exhibit 21 for identification, which are the officer performance reports?" Trial defense counsel answered, "No, Your Honor."

During sentencing argument, trial counsel related Appellant's rehabilitative potential to the rebuttal comments he provided to the referral OPR. Trial counsel began by recounting the testimony that was given by one of Appellant's former squadron commanders who described Appellant's rehabilitative potential as "mediocre at best." Trial counsel then addressed Appellant's rebuttal comments, arguing to the military judge,

> And, sir, you also received [Appellant]'s officer performance reports. And in those performance reports, his last one that he received after being convicted at the general court-martial, he provided a response. And in that response he said he was innocent of everything. So let's consider what the first step in rehabilitative potential is, and that's taking accountability for your actions.

The Defense did not object to trial counsel's argument. When trial defense counsel delivered Appellant's sentencing argument, he expressed doubt that Appellant's OPR "should be used against him . . . [b]ecause the fact is that he was wrongfully convicted, and that's why we are here."

2. Law

Ordinarily, a military judge's admission of evidence is reviewed for an abuse of discretion. *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018) (citation omitted). However, claims of error with respect to the admission of evidence are preserved only if a party timely objects to the evidence and states a specific ground for the objection. Mil. R. Evid. 103(a)(1). When an appellant fails to make a timely objection to the admission of evidence at trial, that error is forfeited in the absence of plain error. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (*citing United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)) (additional citations omitted). In contrast, under the ordinary rules of waiver, when an appellant affirmatively states he has no objection to the admission of evidence, the issue is waived and his right to complain about its admission on appeal is waived. *United States v. Ahern*, 76 M.J. 194, 198 (C.A.A.F. 2017) (*citing United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009)) (additional citation omitted).

In accordance with Article 66(c), UCMJ, a CCA has the unique statutory responsibility to affirm only such findings of guilty and so much of the sentence that is correct and "should be approved." Thus, this court retains the authority to address errors raised for the first time on appeal despite waiver of those errors at trial that would preclude further review on appeal. *See, e.g., United States v. Hardy*, 77 M.J. 438, 442–43 (C.A.A.F. 2018).

Whether argument is improper is a question of law that this court reviews de novo. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citation omitted). When trial defense counsel fails to object, an appellant forfeits the objection on appeal, and we review for plain error. R.C.M. 1001(g); *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). Appellant must show (1) error; (2) that was plain or obvious; and (3) the error materially prejudiced a substantial right. *Erickson*, 65 M.J. at 223 (citations omitted).

3. Analysis

As an initial matter, Appellant waived any error with respect to the admission of his rebuttal comments to the referral OPR that was admitted as Prosecution Exhibit 21. Appellant was aware of this evidence in advance of trial, as the rebuttal comments bear his signature. When offered into evidence during sentencing, trial defense counsel unequivocally stated he had no objection.

Not only did trial defense counsel acquiesce to the admission of Appellant's written rebuttal comments that were in response to his OPR, there was no objection to trial counsel's sentencing argument that referenced those comments. There is no error, much less clear and obvious error, for trial counsel to argue evidence that is admitted without objection. Once Appellant's OPRs were admitted in evidence, trial counsel was permitted to argue the evidence adduced, as well as any "fair inferences as may be drawn therefrom." *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (citation omitted). This included arguments drawn from Appellant's rebuttal comments in which he advanced his unreserved innocence of all charges and specifications.

We have considered whether we should grant relief under our Article 66(c), UCMJ, authority in spite of this waiver, and decline to do so. We perceive no unfair prejudice to Appellant by the admission of the rebuttal comments he made to the referral OPR. More to the point, we find no reason to pierce waiver on grounds that trial counsel relied on evidence that was before the factfinder in arguing for the sentence that should be adjudged.

D. Remote Live Testimony of Colonel PA

Before the rehearing and on appeal, Appellant objected to the military judge allowing the Prosecution's sole sentencing witness to testify by answering questions posed to him though live remote video. Appellant asks this court to set aside his sentence. We find the military judge did not err.

1. Additional Background

Well in advance of the rehearing, the Prosecution notified the Defense that it planned to call Colonel PA to give his opinion of Appellant's rehabilitative potential. At the time of the rehearing, Colonel PA was assigned to Davis-Monthan AFB where the rehearing was held. However, during the time that the

rehearing was scheduled to convene, Colonel PA had scheduled permissive temporary duty (PTDY) to attend an executive Transition Assistance Program (TAP) at an installation in San Antonio, Texas, in preparation for retirement. In lieu of in-person testimony, the Prosecution notified the Defense that it would present Colonel PA's live testimony by remote means.

The Defense objected, explaining that the Prosecution sought remote testimony "not for any sort of military necessity, but purely due to the convenience of both the witness and the [G]overnment." The Defense argued Colonel PA's PTDY was not a military necessity because he had "chosen to drive" to the elective program, which interfered with his availability to testify in person. Trial defense counsel articulated that "[t]he [G]overnment has known about the date of this [rehearing] since approximately October 2019" and Colonel PA's decision to drive to a TAP course at a different base did not amount to "extenuating circumstances that justify anything other than in[-]person testimony for him."

2. Ruling

Ruling from the bench, the military judge applied the criteria for production of a sentencing witness in R.C.M. 1001(e). Finding Colonel PA's testimony, as proffered, was "certainly significant," the military judge found this factor did not "weigh[ ] heavily in favor of personal appearance." In this regard, the military judge concluded the testimony "is not anticipated to resolve any alleged inaccuracy or dispute as to a material fact." Next, the military judge observed,

> the weight or credibility of a witness, in this case, Colonel [PA], will likely be of significance, but the court is not convinced that testimony by video teleconference is such that it would render the court unable to appropriately weigh the credibility of testimony. . . . or give the testimony it's [sic] appropriate weight.

The military judge found the timing of the request for production of the witness weighed in favor of the Defense, as there was an objection timely made before Colonel PA traveled. The military judge also found the cost of producing Colonel PA was minimal if he were present at the base, but having the witness returned or having the witness prevented from attending the PTDY would be significant. The military judge weighed these considerations and overruled the objection, concluding that Colonel PA's testimony delivered though live remote video did not violate Appellant's due process rights.

After Colonel PA testified, the military judge reaffirmed his ruling,

> finding that the balancing test found in [R.C.M.] 1001(e), as well as that articulated in *United States v. McDonald*, [55 M.J. 173

> (C.A.A.F. 2001),] that the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, does not favor the live production of the witness. And furthermore, the VTC [video teleconferencing] testimony of the witness satisfies the reliability standards required by due process.

3. Law

We review a military judge's denial of a request to produce a presentencing witness for an abuse of discretion. *United States v. Briscoe*, 56 M.J. 903, 906 (A.F. Ct. Crim. App. 2002) (citing *United States v. Combs*, 20 M.J. 441, 443 (C.M.A. 1985); *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978)). In *Combs*, the United States Court of Military Appeals listed the following non-exhaustive factors to be considered by the military judge:

> [W]hether the testimony relates to disputed matter; whether the Government is willing to stipulate to the testimony as fact; whether there is other live testimony available to appellant on the same subject; whether the testimony is cumulative of other evidence; whether there are practical difficulties in producing the witness; whether the credibility of the witness is significant; whether the request is timely; and whether another form of presenting the evidence (i.e., former testimony or deposition) is available and sufficient.

20 M.J. at 442–43 (citing R.C.M. 1001(e)(2) in the *Manual for Courts-Martial, United States* (1969 ed.)).

Although the Sixth Amendment[21] right of confrontation does not apply to sentencing proceedings in a non-capital court-martial, *United States v. McDonald*, 55 M.J. 173, 174 (C.A.A.F. 2001), fundamental due process under the Fifth Amendment[22] "requires that the evidence introduced in sentencing meet minimum standards of reliability." *Id.* at 177.

"During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." R.C.M. 1001(e)(1).

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[21] U.S. CONST. amend. VI.

[22] U.S. CONST. amend. V.

4. Analysis

The military judge acted within his discretion when he denied the defense request to produce Colonel PA. Central to this finding is the military judge's balancing of factors to reach the conclusion that live remote video testimony met minimum standards of due process and reliability. We decline to disturb the military judge's finding that the significance of Colonel PA's personal appearance to the determination of an appropriate sentence, when balanced against the practical difficulties of producing him, did not favor a personal appearance.

III. CONCLUSION

The findings of guilty to Specifications 1, 2, and 3 of Charge I and Charge I, and the sentence adjudged at the rehearing and approved by the convening authority, are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

MEGINLEY, Judge (concurring):

I join the opinion of the court. However, I write separately to specifically address dismissal of an officer. The instruction in pre-sentencing at Appellant's first court-martial that was given by the military judge to the members is that "a sentence to a dismissal of a commissioned officer is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer or an enlisted Airman." This appears to be a standard instruction given to members in an officer sentencing case.

Our superior court has acknowledged there is "practically no real difference between calling a sentence providing for separation under conditions of dishonor a dismissal, or describing it as a dishonorable discharge." *United States v. Briscoe*, 33 C.M.R. 42, 44 (C.M.A. 1963); *see also United States v. Bell*, 24 C.M.R. 3, 4 (C.M.A. 1957). Yet, given these particular set of facts, and based on my review of the record, if Appellant was not a commissioned officer, that is, if he were an enlisted Airman, these probably would not have been "dishonorable discharge" worthy offenses. However, an officer's conviction worthy of an adjudged "dismissal" should not be considered the equivalent of a dishonorable discharge, or even compared to a bad-conduct discharge; officer misconduct stands on its own.

In *United States v. Free*, the United States Navy Board of Review stated,

> It is not at all difficult for the reasonably prudent officer to discriminate between what circumstances justify a particular act and what render the act so curtailing of the dignity required by an officer's obligations as to make it an offense against good order and discipline. . . . [B]ut the nature of an officer's commission demonstrates that he has been selected from among the populace as a whole to hold a position of trust and honor and has been trained to exercise the nice discrimination required. It is likewise true that a degree of judgment is required of an officer which is not required of the enlisted member of the service or of a civilian. It follows that a different standard of conduct is required in law of an officer than is required of others. This, in effect, puts him in a different legal status than the enlisted man or the civilian.

14 C.M.R. 466, 471 (N.B.R. 1953). Further, in *United States v. Means*, the United States Court of Military Appeals stated,

> [T]he President has recognized the unique position of officers for purposes of military justice. . . . In short, the Armed Services comprise a hierarchical society, which is based on military rank. Within that society commissioned officers have for many purposes been set apart from other groups. Since officers have special privileges and hold special positions of honor, it is not unreasonable that they be held to a high standard of accountability.

10 M.J. 162, 165–66 (C.M.A. 1981); *see also United States v. Bailey,* No. ACM 37746, 2013 CCA LEXIS 241, at *5 (A.F. Ct. Crim. App. 19 Mar. 2013) (unpub. op.) (per curiam) (holding that "officers may be subjected to more stringent punishments for their violations of the UCMJ than might be appropriate for an enlisted member under the same circumstances" (citing *United States v. Moultak*, 24 M.J. 316, 318 (C.M.A. 1987))); *United States v. Tedder*, 18 M.J. 777, 781 (N.M.C.M.R. 1984) (per curiam) (stating "commissioned officers enjoy a unique, 'special position of trust and duty'" that allow them to be held to higher standards than others not similarly situated (quoting *Means*, 10 M.J. at 165)), *aff'd*, 24 M.J. 176 (C.M.A. 1987).

I am convinced that Appellant's sentence is legally correct. However, based on the language cited in *Free*, *Means*, and *Moultak*, a dismissal should not be viewed in the same manner as a dishonorable discharge, and trial judges should reconsider whether to charge members as such in their sentencing instructions. Appellant is an officer, and as such, the reality is that the cases cited indicate there is a lower threshold for tolerance for misconduct, and conversely, a much higher standard of accountability. Because of this, Appellant's

misconduct is viewed with more scrutiny. The caselaw cited may be dated, but the expectations for officers remain the same. Appellant was not a brand new officer, straight out of officer training school; he was a captain. He was a graduate of a military school (The Citadel), where I have little doubt he was taught about leadership, officership, and character. He was a much bigger human being than his victims; he stood 6'4" and was a football player at his university. Even though he may have been provoked or induced to react the way he did, the testimony clearly indicates that Appellant placed himself in a situation where he could have, and should have, walked away, and had several opportunities to withdraw from the situation. Instead, he assaulted three women, each in fairly rapid succession. Although a dismissal is a severe punishment in this case, prosecuted under the UCMJ, it is not *inappropriate* for the offenses committed.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

APPENDIX C

United States Army Trial Judiciary
Fifth Judicial Circuit, Kaiserslautern, Germany

U N I T E D S T A T E S	)	
	)	
v.	)	**FINDINGS AND CONCLUSIONS RE: DEFENSE MOTION FOR APPROPRIATE RELIEF (UNANIMOUS VERDICT)**
DIAL, Andrew J. **LTC, U.S. Army** **A Co., Allied Forces North Bn.** **United States Army NATO Bde.** **APO AE 09752**	)	**3 JANUARY 2022**

The Defense filed a motion requesting the Court to impose a requirement on the court-martial panel in this case to reach any guilty finding by unanimous vote. If the Court denies the request for a unanimous verdict, the Defense requests the Court require the president of the court-martial panel to announce whether the findings were unanimous or non-unanimous. The Government opposes the request. Neither party requested oral argument. The Court thereafter directed both parties to file briefs addressing specific issues identified by the Court. Both parties filed the directed briefs.

I. Issues Presented.

A. Does the Sixth Amendment jury trial right include the requirement for a unanimous verdict of guilty in a military court-martial in light of the Supreme Court's holding in Ramos v. Louisiana, 140 S. Ct. 1390 (2020)?

B. Does the Fifth Amendment Due Process clause require a unanimous verdict of guilty to meet the prosecution's burden of proving guilt beyond a reasonable doubt?

C. Does the Fifth Amendment Equal Protection guarantee require a unanimous verdict of guilty in a military court-martial given that every state and the Federal government (except for the U.S. military) requires a unanimous verdict to secure a criminal conviction?

II. Summary. This Court answers the first two issues in the negative and answers the third issue in the positive.

III. Facts.

The Court adopts the facts set forth in the Facts section of the Defense motion, to which the Government stipulated.

IV. Law.

A. Burden of Proof.

The burden of proof and persuasion rests with the Defense as the moving party. Rules for Courts-Martial (R.C.M.) 905(c)(1) and (c)(2)(A), Manual for Courts-Martial (2019).

"[J]udicial deference…is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Solorio v. United States, 483 U.S. 435, 447 (1987). This principle applies even when the constitutional rights of a service member are implicated by a statute enacted by Congress. Id. at 448. Accord United States v. Easton, 71 M.J. 168, 180 n.12 (C.A.A.F. 2012) (citing United States v. Weiss, 36 M.J. 224, 226 (C.M.A. 1992)).

With regard to Due Process challenges to Congressional enactments regulating the armed forces, the Supreme Court of the United States imposes upon the Defense the heavy burden to demonstrate that "the factors militating in favor of [the accused's interest] are so extraordinarily weighty as to overcome the balance struck by Congress." See Middendorf v. Henry, 425 U.S. 25, 44 (1976); Weiss v. United States, 510 U.S. 163, 177 (1994).

B. Constitutional Overview.

The Constitution gives Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8, cl. 14.

While Article III provides for the right to jury trials in the civilian system, the foundation of the military court-martial system arises in Article I, which grants Congress the authority to make rules for governing and regulating the land and naval forces. Compare U.S. Const., art. 1, § 8, with U.S. Const., art. 3, § 2.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

C. Military Courts-Martial.

In Dynes v. Hoover, the Supreme Court confirmed the constitutionality of military courts-martial. See 61 U.S. 65 (1857).

The Supreme Court has "long recognized that the military is, by necessity, a specialized society separate from civilian society…. The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" Parker v. Levy, 417 U.S. 733, 743 (1974) (citing United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

"[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." Quarles, 350 U.S. at 17.

Just as military society has been a society apart from civilian society, so 'military law … is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" Parker, 417 U.S. at 743 (citing Burns v. Wilson, 346 U.S. 137 (1953)). While the Parker Court said the UCMJ "cannot be equated to a civilian criminal code," id. at 749, the Supreme Court in Ortiz v. United States. 138 S. Ct. 2165 (2018), recognized how similar they are. Id. at 2174-75.

Under the "Military Deference Doctrine," courts defer to Congress' exercise of its powers under Article I, Section 8, Clause 14, to regulate the military justice system. The Courts have noted, "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." Solorio v. United

States, 483 U.S. 435, 447 (1987). In fact, the Supreme Court has described Congress' authority as "plenary" in this area. Chappell v. Wallace, 462 U.S. 296, 301 (1983).

Expounding on this deference, the Court in Parker stated, "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." 417 U.S. at 756; Loving v. United States, 517 U.S. 748, 759, 768 (1996).

D. Sixth Amendment.

In Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Supreme Court held the rules in Louisiana and Oregon that permit non-unanimous jury verdicts in criminal cases violate the Sixth Amendment as incorporated against the States through the Fourteenth Amendment.

In the armed forces, "there is no Sixth Amendment right to trial by jury in courts-martial." Easton, 71 M.J. at 175 (citing Ex Parte Quirin, 317 U.S. 1, 39 (1942)); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)). See also Reid v. Covert, 354 U.S. 1, 37 n.68 (1957) ("The exception in the Fifth Amendment…has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.").

In Quirin, the Supreme Court addressed the constitutional history behind the creation of military tribunals, addressing both the authority to try enemy combatants for law of war violations as well as the application of the Bills of Rights to military courts-martial. 317 U.S. 1 (1942). The Court held that military tribunals were exempted from the Sixth Amendment requirement for a jury trial and this deliberate exception, which dated back to the Continental Congress of 21 August 1776, was to extend that exception "to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law." Id. at 43.

E. Fifth Amendment Due Process.

In Weiss v. United States, 510 U.S. 163 (1994), the Supreme Court addressed the requirements of the Due Process Clause when Congress legislates in military affairs: "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings. But in determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8.' Weiss v. United States, 510 U.S. 163, 176-177 (1994). To evaluate a Due Process challenge, the Court evaluated "whether the factors militating in favor of" the claimed right "are so extraordinarily weighty as to overcome the balance struck by Congress." Id. at 177-78.

Military and civilian courts have repeatedly affirmed that the Weiss standard applies to courts-martial due process claims challenging Congress' exercise of its Article I authority. See e.g., United States v. Vazquez, 72 M.J. 13, 19 (C.A.A.F. 2013); United States v. Gray, 51 M.J. 1, 50 (C.A.A.F. 1999); see also, United States v. Easton, 71 M.J. 168, 174-76 (C.A.A.F. 2012) (holding Article 44(c), UCMJ, is constitutional as applied to trials by court members when Congress appropriately exercised its Article I power).

In Johnson v. Louisiana, 406 U.S. 356 (1972), the Supreme Court stated that a non-unanimous jury verdict of guilty does not indicate that the prosecution failed its burden to prove guilt beyond a reasonable doubt. Id. at 360.

In United States v. Bramel, 32 M.J. 3 (C.M.A. 1990), the Court of Military Appeals granted review of the issue whether the appellant was denied a fundamentally fair criminal trial as guaranteed by the Fifth and Sixth Amendments where the findings of guilty were announced by less than a unanimous verdict of eight members. The Court summarily affirmed the findings of guilt and published no opinion. Id.

R.C.M. 922(e) prohibits polling panel members; however, M.R.E. 606 allows the military judge to conduct an inquiry into the validity of the findings or sentence, so long as the deliberative process is not invaded.

F. Fifth Amendment Equal Protection. In court-martial jurisprudence, any right to equal protection is based on the Fifth Amendment Due Process clause. United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021). Under the Fifth Amendment, an "equal protection violation" is "discrimination that is so unjustifiable as to violate due process." United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015) (quoting United States v. Rodriguez-Amy, 19 M.J. 177, 178 (C.M.A. 1985)).

"This question of unjustifiable discrimination in violation of due process is not raised, however, unless the Government makes distinctions using 'constitutionally suspect classifications' such as 'race, religion, or national origin…or unless there is an encroachment on fundamental constitutional rights like freedom of speech or…assembly.'" Rodriguez-Amy, 19 M.J. at 178. Otherwise, a rational basis suffices for treating similarly situated people differently. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 80 (1981) (asking whether the disparate treatment is "not only sufficiently but also closely related" to Congress' purpose in legislating); Akbar, 74 M.J. at 406 ("equal protection is not denied when there is a reasonable basis for a difference in treatment") (internal citation omitted); but see United States v. Hennis, 77 M.J. 7, 10 (C.A.A.F. 2017) (suggesting that when there is interference with a fundamental constitutional right, something more than a rational basis for the disparate treatment is necessary). Under a rational basis test, the burden is on the appellant to demonstrate that there is

no rational basis for the rule he is challenging. The proponent of the classification "has no obligation to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320 (1993). "As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." Id.; United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).

The initial question is whether the groups are similarly situated, that is, are they "in all relevant respects alike." Begani, 81 M.J. at 280 (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

While civilians have a constitutional right to a jury trial, service members have a statutory right to its military equivalent. Article 25(c)(2), UCMJ; 10 U.S.C. § 825(c)(2). Service members also have a constitutional right to have a panel that is impartial: "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (emphasis added); United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020); United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000); United States v. Riesbeck, 77 M.J 154, 163 (C.A.A.F. 2018); see also, Rodriguez-Amy, 19 M.J. at 178 (stating that once Congress grants a statutory court-martial right to service members, that right "must be attended with safeguards of constitutional due process").

Prior to 2019, a two-thirds concurrence of court-martial panel members was required to convict and sentence an accused in a trial with members; if a sentence included confinement for more than 10 years, a three-fourths concurrence was required. A sentence of death required the unanimous concurrence of all members. 10 U.S.C. § 852 (Article 52, UCMJ) (2016). As a result of the Military Justice Act of 2016, a three-fourths concurrence of court-martial panel members is now required to convict and sentence an accused in a trial with members. A sentence of death requires the unanimous concurrence of all members. 10 U.S.C. § 852 (Article 52, UCMJ) (2019).

G. Stare Decisis.

Stare decisis encompasses two distinct concepts: (1) vertical *stare decisis* – the principal that courts "must strictly follow the decisions handed down by higher courts," and (2) horizontal *stare decisis* – the principal that "an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018).

Lower courts should not assume that a new higher court decision implicitly overrules precedent. Instead, lower courts should follow the precedent that directly controls, and leave overruling precedent to the higher court that created the precedent. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

V. Analysis and Conclusions.

A. Sixth Amendment.

Ramos v. Louisiana neither explicitly nor implicitly overruled prior Supreme Court precedent regarding the inapplicability of the Sixth Amendment jury trial right to courts-martial. The Defense acknowledges this Court is bound by precedent regarding the applicability of the Sixth Amendment right to a jury trial but argues prior court decisions are incorrect and should not be followed.

Under the doctrine of *stare decisis*, this Court is required to uphold the precedent established by its superior courts. Absent explicit holdings by CAAF and the Supreme Court regarding the scope of their own precedents, this Court cannot and will not depart from binding precedent holding the right to a jury trial inapplicable to military courts-martial.

B. The Fifth Amendment: Due Process. The Supreme Court squarely addressed the question whether the due process requirement of proving guilt beyond a reasonable doubt is satisfied by a non-unanimous guilty verdict in Johnson v. Louisiana in 1972. The Court concluded it was. Although the Ramos Court called the Johnson and Apodaca opinions "badly fractured,"[1] it only addressed the Sixth Amendment question resolved in Apodaca (and overruled it). It did not address the Fifth Amendment question resolved in Johnson which remains binding precedent.[2] Under the doctrine of *stare decisis*, this Court is required to uphold the precedent.

[1] 140 S. Ct. at 1397.

[2] In its response to the Court's Order to brief this issue, the Government stated that Ramos overruled this portion of the Johnson opinion. However, the Government offered no analysis or law to support its position. The Defense asserted that Ramos did not overrule this portion of the Johnson opinion. If the Government is correct and Ramos did overrule Johnson, this Court would find that the due process requirement of proving guilt beyond a reasonable doubt requires a unanimous guilty verdict and that this Fifth Amendment right is so extraordinarily weighty a right that it overcomes "the balance struck by Congress" in determining what constitutional rights service members would be permitted in light of countervailing interests of military necessity. Weiss v. United States, 510 U.S. 163 (1994). For the reasons set forth in section V.C.4., below, it is clear that Congress did not conduct such a balancing and that there is no plausible reason for Congress to authorize a non-unanimous guilty verdict in courts-martial. The Johnson analysis of the interplay between unanimity and the reasonable doubt standard was based on a logical fallacy (that a single vote of not guilty would automatically equate to a hung jury rather than an acquittal) and inconsistent with Supreme Court precedent regarding the nature of the jury (the Johnson Court treated the jury as a single, objective entity, but the Court in In re Winship, 397 U.S. 358 (1970), stated that the jury is subjective in nature, id. at 364). However, because of this Court's determination that Ramos did not overrule Johnson and the Government offered no law or analysis to support their position, a full analysis of the underlying Fifth Amendment due process/burden of proof/unanimity issue is omitted.

C. The Fifth Amendment: Equal Protection. There is no rational basis for Congress' different treatment of U.S. service members and civilians regarding voting requirements for convictions.

1. Congress treats U.S. service members and civilians differently with respect to this aspect of criminal trials. Civilians may only be convicted by a unanimous verdict. FED. R. CRIM. P. 31(a) (2021). Service members need only be convicted by a three-fourths vote. Art. 52(a)(3), UCMJ; 10 U.S.C. § 852(a)(3) (2019).

2. Service members and civilians are similarly situated groups for the purpose of criminal trials. They are "in all relevant aspects alike." Although the military is a "specialized society," there is very little difference between civilian criminal trials and military courts-martial—in subject matter jurisdiction, in procedure, in rights afforded the accused, and in the consequences of conviction.

a. Service members are subject to prosecution for a wider array of crimes than civilians. Not only do the punitive articles of the UCMJ include the typical gamut of civilian crimes, they also include military-specific crimes, all Federal crimes in Title 18 of the U.S. Code, and any state crime when committed on a Federal installation in that state (by virtue of Article 134, UCMJ, and 18 U.S.C. § 13). The Supreme Court recognized the expansive nature of court-martial subject matter jurisdiction in Ortiz v. United States. 138 S. Ct. 2165, 2170, 2174 (2018) (characterizing military subject matter jurisdiction as including "a vast swath of offenses, including garden-variety crimes unrelated to military service").

b. The Rules for Courts-Martial reflect criminal procedure almost identical to the Federal Rules of Criminal Procedure. They depart from the Federal Rules in those instances where the Constitution has exempted the military: grand jury indictment and trial by jury. Even where the rules diverge, Congress has narrowed that gap in almost every instance: the Article 32 preliminary hearing serves the same purpose as a grand jury[3]; and the court-martial panel serves the same purpose as a jury.[4] Even the court-martial panel and jury have similar characteristics: while the jury is selected from the state and district in which the accused resides, the panel is typically selected from the accused's unit (albeit from outside the accused's company-level unit) and normally from the accused's duty station; and while an accused's "peers" on a jury are randomly selected from eligible adults in the community, the court-martial panel is selected from the best qualified service members in the accused's military community. Article 25, UCMJ; 10 U.S.C. § 25 (2019). The only instance where Congress has not narrowed the

[3] Compare United States v. Mara, 410 U.S. 19, 48 (1973) ("the very purpose of the grand jury process is to ascertain probable cause") with Article 32(a)(2)(B), UCMJ, 10 U.S.C. § 832(a)(2)(B) (the purpose of the preliminary hearing includes determining whether probable cause exists).
[4] See section V.C.3., infra.

gap between civilian and military procedural protections is in the voting requirement for the court-martial panel's findings.

c. In all respects other than grand jury indictment and trial by jury, service members have the same constitutional rights as civilians, including the 5th Amendment rights to due process, to protection against self-incrimination, and to protection from double-jeopardy, and all 6th Amendment rights except jury trial—to speedy trial (United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014)); to a public trial (United States v. Hershey, 20 M.J. 433, 435 (CMA 1985)); to be informed of the nature and cause of the accusation (United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011)); to confrontation (United States v. Blazier, 69 M.J. 218, 222 (C.A.A.F. 2010)); to compulsory process (United States v. Bess, 75 M.J. 70, 75 (C.A.A.F. 2016)); and to counsel (United States v. Wattenbarger, 21 M.J. 41, 43 (CMA 1985)). While civilians have a right to a jury trial, service members have a statutory right to its military equivalent. Like the civilian right to a jury that is "impartial," service members have a constitutional right to a court-martial panel that is impartial. United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000); United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001). The Supreme Court has recognized the virtual parity between constitutional protections for service members and for civilians. Ortiz, 138 S. Ct. at 2174 ("The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal").

d. The consequences of conviction at a special or general court-martial are no less serious than for civilian criminal convictions. A convicted service member has a lifetime Federal conviction that results in the same loss of voting and gun rights that a civilian conviction brings. If the conviction is for a sex offense, a service member has the same sex offender registration requirements and restrictions that result from a civilian conviction. Convicted service members are subject to sentences that can include confinement for a term of years or for life, with or without parole, and death. In addition to those punishments that are similar in nature and severity to civilian punishments, service members can also lose their pay and lose their jobs with a punitive discharge that can stigmatize them for life and prevent them from attaining future employment or receiving any benefits from the Department of Veterans' Affairs for which they would otherwise have been eligible.

e. The only distinction between service members and civilians highlighted by the Government is in the purposes of the entities prosecuting both.[5] For civilians, a State or

[5] Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 3. The Government stated that "it is well established" that the military and civilian societies are different. This is no more than a Parker platitude that poorly masks a lack of analysis on the issue. To take the Government's apparent position to its logical conclusion, Congress could dispense entirely with the court-martial simply because the military is a specialized society. The question the Government did not answer is: "how are service members different than civilians for the purpose of voting

the Federal government has justice as its primary concern; for service members, the military has warfighting (and readiness and preparation for the same) as its primary function. The military must be able to conduct courts-martial anywhere in the world, including during military contingencies and war, in an expeditious manner that ensures it does not lose its ability to conduct its mission. But this is a distinction without a difference in the context of voting requirements on guilt; a non-unanimous verdict does not further the military mission and a unanimous verdict requirement would not hinder it. See para. V.C.4.(d)(2), infra.

2. U.S. service members are not a suspect classification.

3. Congress encroaches on service members' fundamental 5th Amendment due process right to an impartial panel by authorizing the panel to find guilt by a non-unanimous vote. While an accused's right to a court-martial panel is grounded in statute, an accused's right to have the panel be impartial is grounded in the Due Process clause of the Constitution. Rodriguez-Amy, 19 M.J. at 178. The Supreme Court said that the requirement for unanimity in voting is an essential feature of the jury. Ramos, 140 S. Ct. at 1396. The unanimity requirement is not merely a function of history or popularity[6]; rather, it was integrally woven into the function of the jury—that of "safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." Batson v. Kentucky, 476 U.S. 79, 86 (1986) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). In order for the jury to do this, every member of it must confirm the truth of every accusation. Ramos, 140 S. Ct. at 1395; Williams v. Florida, 399 U.S. 78, 100 (1970) (tying the unanimity requirement to the purpose of the jury in interposing "between the accused and his accuser … the commonsense judgment of a group of laymen"); see also, Winship, 397 U.S. at 364 (stating the jury makes a subjective determination of the facts). The court-martial panel serves the same purpose as a jury—to safeguard service members accused of crime against the arbitrary exercise of power by the commander.[7] In order for the court-martial

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requirements on guilt?" The Defense brief on this issue correctly narrows the focus to "relevant" differences and says that the differences between service members and civilians must be analyzed "at the relevant time" of rendering the verdict. This Court agrees with that analysis.

[6] The Ramos Court noted the historical underpinnings and wide acceptance of the unanimous verdict. 140 S. Ct. at 1395-96.

[7] In response to the Court's Order to brief this issue, the Government conceded that "the specific role of the panel and jury are the same between the two systems …." Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 7. However, the Government also asserted that the broader purposes of the military and civilian justice systems are distinct—the former promotes good order and discipline while the latter does not. Id. While true to an extent, the court-martial panel itself does not further good order and discipline in its role as a factfinder. As the Defense pointed out in its brief on this issue, "While deliberating on findings, the court members' sole purpose is justice, and maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not considerations…", but "during deliberations on the sentence, there is an additional purpose of promoting good order and discipline in the

panel to serve that same purpose, it must also be unanimous in voting for guilt.[8] Impartiality of the panel members means more than freedom from biases and prejudices for or against the counsel, the accused, the command, the witnesses, or the judge's instructions on the law. It must also mean the ability to independently decide free from the biases and prejudices (firmly fixed views and determinations) of other panel members. This is inherent in the subjective determination discussed by the Winship Court and is required for individual panel members to fulfill their purpose. Where a panel member votes not guilty but the accused is convicted by a non-unanimous verdict, that panel member necessarily submits to the biases and prejudices of other panel members and is, essentially, discarded as an independent, impartial member. That panel member continues to serve on the panel as a tool of the guilty-voting members and may be required to sentence an accused for a crime the panel member does not believe the Government proved beyond a reasonable doubt.

There is no equal protection precedent regarding this issue. The Supreme Court said in Johnson that Louisiana's different voting requirements (some unanimous, some non-unanimous) for offenses of differing severity did not violate the Equal Protection Clause of the Fourteenth Amendment. 406 U.S. at 363. The Court concluded that Louisiana had a rational basis for the different voting requirements: to "facilitate, expedite, and reduce expense in the administration of criminal justice…" Id. at 364. However, the Court focused not on unanimity as a critical aspect of the jury but on reasonable doubt; it said that whether the verdict is unanimous or not, a guilty verdict still meets the beyond a reasonable doubt standard. Id. Johnson is not precedential on the issue before this Court for three reasons. First, the question presented in Johnson was different than the one presented here—whether unanimity is tied to the purpose of the jury and the court-martial panel. Second, the decision was based on Louisiana's specific rationale for the statutory scheme, so the decision was limited to the facts of that case. Third, the reasoning has been mooted by the Ramos Court's decision that unanimity is a constitutional function of the jury.

The Court of Appeals for the Armed Forces rejected a Fifth Amendment challenge to non-unanimous verdicts in courts-martial. Bramel, 32 M.J. at 3. However, the Court issued no opinion, so there is no development of the law or reasoning from which this

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armed forces." Defense Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 8. In other words, the court-martial itself is one of a commander's disciplinary tools to achieve good order and discipline, but the court-martial panel as factfinder does not further that end; in fact, a faster way to discipline would be to dispense with the panel.

[8] In response to the Court's Order to brief this issue, the Government acknowledged that impartiality and unanimity are complementary requisites for a jury verdict but stated impartiality does not require unanimity for a court-martial verdict simply because the Supreme Court discussed impartiality in the context of the Sixth Amendment jury trial which does not apply to the military. The Government provided no reason why court-martial panel impartiality should mean anything different than jury impartiality. Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, pp. 8-9.

Court can take guidance. It is not clear why that Court reached the result it did or upon what legal basis. Consequently, Bramel cannot be controlling law. See, e.g., United States v. Clifton, 35 M.J. 79, 81-82, 89, (C.M.A. 1992) (referring to several internal rules of other courts indicating that decisions without opinion have no precedential value).

4. There is no apparent or logical reason for the disparate treatment. The Government, in its response to the Defense motion seeking a unanimous verdict, offered no reason why Congress would have chosen to implement a non-unanimous verdict requirement. However, in its response to the Court's Order to brief this issue, the Government offered two reasons: finality of verdicts, and unlawful command influence (UCI). The Government, however, did not assert that Congress actually considered either of those reasons when authorizing or re-authorizing the non-unanimous verdict in the military. That is likely because Congress never provided a reason for doing so.

(a) It appears that the non-unanimous verdict in courts-martial simply slipped into congressional legislation pertaining to military justice without much thought. The original Articles of War were adopted from the British articles by George Washington. Hearing before the Committee on the Armed Forces, House of Representatives, 62d Congress, 2d Session, on H.R. 23638, Being a Project for the Revision of the Articles of War, p. 4 (1912) [hereafter 1912 Hearing], available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearing_comm.pdf; see also A Study of the Proposed Legislation to Amend the Articles of War (H. R. 2575) and to Amend the Articles for the Government of the Navy (H. R. 3687; S. 1338), p. 2 (January 20, 1948) available at https://www.loc.gov/rr/frd/Military_Law/pdf/CM-Legislation.pdf. The non-unanimous court-martial verdict was one of the features borrowed from the British. 1912 Hearing at 46. When Congress considered revising the Articles of War in 1912, the Judge Advocate General, Major General Enoch H. Crowder, recommended increasing the required majority vote to a two-thirds vote in order to convict on a death-eligible offense. Representative Kahn asked MG Crowder, "Is it not your experience in the examination of the laws of the States for the infliction of the death penalty, that the jury must bring in a unanimous verdict?" Major General Crowder responded, "Yes, sir; but that has never been a characteristic of our military law." Id. at 46. He said further that a unanimous verdict requirement would "[impair] the success of the field operations of an army", but he did not explain why that was the case. Id. at 47. This purported "impairment" was apparently unfounded, because Congress has since required a unanimous guilty verdict in capital courts-martial. Art. 52(b)(2), UCMJ; 10 U.S.C. § 852(b)(2) (2019). No further explanation was apparently needed, however, for Congress to justify continuation of the non-unanimous verdict in courts-martial. This adoption of past practice without addressing a specific military need or balancing that need against the due process rights of service members has apparently continued to the present day.

(b) When Congress was contemplating the proposed Uniform Code of Military Justice in 1949, a report to the House Armed Services Committee gave the following explanation for the proposed Article 52 regarding number of votes required: "This article is derived from [Article of War] 43." H.R. Rept. No. 491, p. 26 (April 28, 1949), available at https://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf. The Senate Armed Services Committee Report said the same thing. S. Rpt. No. 486, p. 23 (June 10, 1949) available at https://www.loc.gov/rr/frd/Military_Law/pdf/report_02.pdf. Between 1912 and 1948, Article of War 43 required a majority vote for conviction for all offenses except death-eligible ones (which required a two-thirds vote). H.R. Rept. No. 491, p. 49. Congress amended Article of War 43 in the 1948 Elston Act to require a two-thirds vote for all offenses other than death-eligible ones, but the Articles for the Government of the Navy maintained a majority vote. Compare H.R. Rept. No. 1034, p. 18 (July 22, 1947), available at https://www.loc.gov/rr/frd/Military_Law/pdf/amend_articles.pdf, with H.R. Rept. No. 491, p. 74. In the Elston Act hearings, Brigadier General Hubert Hoover, Assistant Judge Advocate General, testified that, "An appeal was taken to the United States Circuit Court of Appeals, where it was decided that the article [43] provided that any finding of guilty, except for an offense for which the death penalty is made mandatory, might be reached by a two-thirds vote." He followed that by saying, "The changes that are now proposed in the article [43] are intended to clarify the wording of the article, but not to change the sense of it." Hearings before the Committee on the Armed Services on Sundry Legislation Affecting the Naval and Military Establishment, Eightieth Congress, First Session, Vol. I, p. 2056 (1947), available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No125.pdf. The proposed Article 52 of the UCMJ equalized the Articles of War and the Articles for the Government of the Navy at the higher, two-thirds vote requirement. H.R. Rept. No. 491, p. 93. In the Congressional hearings on the proposed UCMJ, Professor Edmund Morgan, the Chair of the Special Committee to Draft the UCMJ, made the following comment on the proposed Article 52: "In article 52, you will notice that the number of votes required for both conviction and sentence have been made uniform for all the services." Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-First Congress, First Session, On H. R. 2498, p. 43 (March 7 – April 4, 1949), available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf. He said the same thing in the Senate hearings. Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, Eighty-First Congress, First Session, on S. 857 and H. R. 4080, pp. 36, 50 (April 27 – May 27, 1949).

(c) Although Congress revisited the voting requirements for findings in the Military Justice Act of 2016 and increased the votes required in non-capital cases from two-thirds to three-fourths, the only apparent reason it did so was to "eliminate inconsistencies and uncertainties in court-martial voting requirements by standardizing the requirements for each type of court-martial." Report of the Military Justice Review Group, p. 457 (Dec. 22, 2015), available at https://ogc.osd.mil/Links/Military-Justice-Review-Group/. The Department of Defense General Counsel tasked the Military

Justice Review Group to analyze the UCMJ and make recommendations for legislative changes to Congress, and the Group made the vote-change recommendation. It said the change would eliminate the "anomaly [of the] varying … percentage required for a conviction based upon the happenstance of the number of members who remain on the panel after challenges and excusals." Id. at p. 220. Congress said little on the subject. The House Report on the proposed bill merely said, "this would standardize the percentage of votes required." House Report 114-537 (part 1), section 6613 (May 4, 2016). The Senate Report said nothing. See Senate Report 114-255, section 5235 (May 18, 2016). The historical public record indicates that Congress has never offered a reason for authorizing a non-unanimous vote for guilt. This is not a case where "[t]he issue was considered at great length, and Congress clearly expressed its purpose and intent"; rather, it seems to be "an accidental by-product of a traditional way of thinking." Rostker, 453 U.S. at 75.

(d) However, this Court's inquiry does not end there, because the Government is not required to produce evidence of Congress' reasoning and "[a]s long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." Heller, 509 U.S. at 320. The public record provides no reason for Congress' original enactment of the non-unanimous verdict in the military other than a military officer's assertion that that was just the way it had always been done and that to do otherwise would impair the military mission. The former is no reason at all, and the latter was unsupported and has been proven unfounded (as indicated by Congress later requiring a unanimous verdict in capital cases). Aside from the public record, this Court will consider all possible reasons including those offered by the Government, those identified by the Army Court of Criminal Appeals in United States v. Mayo, 2017 CCA LEXIS 239 (A.C.C.A. 2017) (unpub.), and others. None of the reasons are plausible.

(1) First, the Army Court said that a non-unanimous verdict protects against UCI by shrouding the individual votes in secrecy, thereby preventing external potential influencers from knowing a panel member's vote. Id. at 20.[9] The announcement of a unanimous guilty verdict surely reveals that every member of the panel voted for guilt. However, while there is a constitutional requirement for a unanimous guilty verdict, there is no countervailing constitutional requirement for a unanimous acquittal verdict. See, e.g., State v Ross, 367 Ore. 560, 573 (2021) (Oregon Supreme Court stated Ramos does not require unanimous not guilty verdicts). A non-unanimous acquittal verdict does not reveal the votes. Such a verdict could mean that one member, half the panel, or every member voted to acquit; the votes would not be revealed. Additionally, knowing that every member voted to convict does not present a concern of UCI. UCI is

[9] While the Court implied that Congress legislated non-unanimous verdicts because it was concerned about UCI, the public record provides no support for that implication. A connection between the two was never mentioned in any preserved Congressional report or hearing.

generally concerned with those who would manipulate the court-martial process to unlawfully obtain a guilty verdict.

Second, the Army Court said that a non-unanimous verdict permits freedom of expression through secret balloting and prevents a senior ranking member from pressuring a junior member to "get on board" for a unanimous vote. Id. A requirement for a unanimous vote for guilt is not inconsistent with secret balloting. Absent a statutory requirement for a unanimous vote for acquittal, there will be no hung jury or re-voting. If one member secretly votes for a not-guilty finding, the result the panel must announce is a not-guilty finding. Unless a member requests reconsideration of the vote, the decision is final when the votes are cast. This continues to mean that no member knows the vote of any other member (although they may have suspicions from the discussion before voting) and cannot pressure others to join a majority for a unanimous vote of guilty. Further, the military judge instructs the members that, "The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment." Dep't Army Pam. 27-9, Military Judges' Benchbook, para. 2-5-14 (10 January 2020 unofficial update).

The prohibition of UCI protects the court-martial process which protects the accused. To say that one protection for an accused service member is a reason to diminish another protection is a non-sequitur. In fact, the Court of Appeals for the Armed Forces said, "Where the vote is unanimous, [the] concerns about command influence would appear to be unfounded." United States v. Loving, 41 M.J. 213, 296 (C.A.A.F. 1994).

(2) Congress could have been concerned with speedy justice in contingency operating environments—the Government's "finality of verdicts" argument[10]. It could have believed that a non-unanimous guilty verdict requirement would prevent the re-voting and hung juries the Mayo Court highlighted in its reasoning; this expediency would allow commanders to dispose of a court-martial quickly and get back to warfighting. The problem with this speculation about Congress' intent is that re-voting and hung juries are only issues if either the Constitution or congressional legislation requires a unanimous vote to acquit. The former does not, and Congress need not choose to legislate the latter. In fact, it is highly unlikely that Congress entertained this as a reason for authorizing non-unanimous verdicts. Such reasoning would have to proceed thusly: we (Congress) are concerned about hung juries and concomitant retrials in the military; one way to prevent them is to authorize a unanimous guilty verdict but not a unanimous not-guilty verdict and ensure secrecy of voting; another way to prevent them is to authorize a non-unanimous guilty verdict; both choices achieve the objective and take the same amount of time; one choice ensures a more-certain verdict

[10] Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 9.

(unanimity) while the other choice ensures a less-certain verdict (non-unanimity); so we choose less-certain verdicts that provide less protection to service members. Such reasoning is illogical and certainly not plausible.

(3) Congress could also have been concerned that providing a military accused a right to a jury trial would unduly burden military justice by requiring the military to choose jurors from the accused's state of residence, randomly selecting them, and ensuring 12 jurors for every trial—that is, importing one aspect of the jury would require importing all aspects of the jury. The latter two aspects of the jury are not grounded in the Constitution.[11] The former aspect—a requirement to choose jurors from a service member's state of residence—would be unworkable, but it has nothing to do with the separate aspect of unanimity. Further, Congress legislated parity for accused service members on the "of peers" aspect of the jury by creating a panel of military peers from the accused's military community and giving the accused some power to shape that venire. Article 25, UCMJ; 10 U.S.C. § 825 (2019). That aspect of the court-martial panel is not at issue here and is not inextricably tied to the aspect of unanimity; each aspect serves a different purpose.

5. By permitting the accused to be convicted by a non-unanimous vote, Article 52(a)(3), UCMJ, violates the accused's constitutional due process rights by denying him equal protection of the law.

VI. Ruling. ACCORDINGLY, the Defense Motion is GRANTED. The Court will instruct the panel that any finding of guilty must be by unanimous vote, and the Court will ask the panel president before announcement of findings if each guilty finding was the result of a unanimous vote.

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CHARLES L. PRITCHARD, JR.
COL, JA
Military Judge

[11] "The due process clause does not itself guarantee a defendant a randomly selected jury, but simply a jury drawn from a fair cross section of the community." United States v. Kennedy, 548 F.2d 608, 614 (5th Cir. 1977). "In criminal cases due process of law is not denied by a state law which dispenses with … the necessity of a jury of twelve …." Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Johnson, 406 U.S. at 359; Williams v. Florida, 399 U.S. 78, 100 (1970) ("the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment").