IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Case No. 201400373
Darin G. LOPEZ, Intelligence Specialist Second Class (E-5) U.S. Navy Appellant	)	Tried at Naval Station Norfolk, Virginia on May 12, June 12, 24, and 25, 2014 by a general court-martial convened by Commander, Navy Region Mid-Atlantic.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

STATUTES, RULES, BRIEFS, OTHER SOURCES

Errors Assigned

I.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR SEXUAL ASSAULT DUE TO INTOXICATION WHERE E.H. CONSUMED ONLY THREE DRINKS AND THERE IS NO EVIDENCE E.H. CONSUMED ANY OTHER INTOXICANT.

II.

APPELLANT WAS DENIED HIS RIGHT UNDER THE 6TH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO INVESTIGATE AND PRESENT EVIDENCE THAT E.H. EXPERIENCED MEMORY BLACKOUTS PRIOR TO, DURING, AND AFTER THE ALLEGED SEXUAL ASSAULT.

III.

APPELLANT IS ENTITLED TO A NEW POST-TRIAL REVIEW AND ACTION BECAUSE DETAILED DEFENSE COUNSEL PROVIDED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, INEFFECTIVE ASSISTANCE OF COUNSEL IN THE POST-TRIAL PHASE WHEN HE FAILED TO CONSULT WITH APPELLANT PRIOR TO SUBMITTING MATTERS AND BECAUSE APPELLANT IS ENTITLED TO CONFLICT FREE COUNSEL.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge and more than one year of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, contrary his plea, of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Military Judge sentenced Appellant to three years confinement and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

Statement of Facts

A. Appellant sexually assaulted LCpl EH while she was incapable of consenting due to impairment by an intoxicant.

1. LCpl EH and Appellant met and then went to dinner together.

In December 2011, LCpl EH joined the Marine Corps. (R. 122.) In June 2012, she began training at her Military Occupational Specialty (MOS) school in Fort Huachuca, Arizona. (R. 123.)

In November 2012, while at her MOS school, LCpl EH was at a mall awaiting a taxicab to take her back to her barracks aboard Fort Huachuca. (R. 124.) While waiting, Appellant approached her and asked her "if [she] needed a ride." (R. 124.) Although the two had never met, LCpl EH accepted the ride back to her barracks. (R. 124.) The two also exchanged phone numbers and sent text messages to each other. (R. 124-25.)

Later that evening, the two went to dinner at Applebee's, a restaurant. (R. 125.) When LCpl EH provided a statement to investigators days after the sexual assault, she remembered going to Applebee's with Appellant. (R. 125, 145.) But at trial, nineteen months after the dinner, LCpl EH could not remember going to Applebee's, what she had for dinner, or "anything that [they] talked about." (R. 125, 145.)

2. LCpl EH went to a party at a nightclub, invited Appellant to join her, became intoxicated, and Appellant took her back to his condo and sexually assaulted her.

On November 24, 2012, in the evening, LCpl EH planned to meet her "fellow Marines and friends" at a "nightclub in Sierra Vista" called "the Peacock Lounge" to celebrate a birthday. (R. 126, 156.) But her friends "did not show up." (R. 126.) LCpl EH then called Appellant to "come out with [her]." (R. 126.)

Appellant met LCpl EH at the nightclub and they began "[s]ocializing." (R. 127.) LCpl EH did not know anybody else at the nightclub. (R. 127.)

Prior to that evening, LCpl EH did not drink alcohol often, "maybe once or twice a month." (R. 129.) That evening, LCpl EH drank two mixed drinks of "pineapple juice and Coconut Rum," and "one shot of Goldschlager." (R. 127; Appellate Ex. XX at 2.)

LCpl EH began to feel the effects of the alcohol——intense "[d]izziness"——beyond anything that she had ever felt before.

(R. 129.) Her level of intoxication that night "was more intense, different almost" than other times she had been drinking." (R. 129.)

The last thing she remembered from that evening was "[j]ust standing there" at the nightclub. (R. 129.) She did not remember leaving the nightclub or going to Appellant's condo. (R. 130, 153.)

The next thing LCpl EH remembered was "[w]aking up" and not knowing where she was, with Appellant "on top of [her]" with Appellant's penis inside her vagina. (R. 130-31.) She was unable to move or say anything. (R. 131.) Appellant then stated, "don't worry, I used a condom." (R. 131.) And then LCpl EH passed out again. (R. 132.)

3. LCpl EH awoke the next morning covered in her own vomit and urine, showered with her dress on, saw bite marks on her breasts and felt scratches on her back, dried her dress, then left Appellant's condo.

Later, LCpl EH awoke in the same room as before with nobody else around. (R. 132.) Appellant was not present. (R. 137.)

LCpl EH felt "[c]onfused, like it wasn't real," and sick, "[l]ike [her] head was spinning." (R. 132.) She felt pain in her head. (R. 132.) And her dress was "bunched up across [her] waist." (R. 133.)

LCpl EH was also covered in her vomit; she "had vomit in [her] hair and on the sheets." (R. 133, 147.) The bed that she

was lying on was also wet with her urine. (R. 133, 161-62; Appellate Ex. XVIII.)

LCpl EH "immediately got into the shower" with her dress on "[b]ecause [she] was wet and sticky." (R. 133.) In the bathroom, she noticed she "had bite marks" on her breasts that were not there before the previous evening. (R. 133-34, 141.) She also had "[s]cratches on [her] lower back" that were not present before the previous evening. (R. 134-35, 142.) She did not know how she was injured. (R. 134.)

In the bathroom, LCpl EH wrote on the "fogged up" mirror, "I'm in hell, help me." (R. 135.) After showering, LCpl EH wrapped herself in a towel, put her dress in the dryer, and sat on the couch to wait for it to dry. (R. 135.) After the dress partially dried, LCpl EH left Appellant's condo without seeing or speaking to Appellant. (R. 137, 149.)

At trial, nineteen months after the sexual assault, LCpl EH could not remember small details such as if she had her shoes on when she left Appellant's condo. (R. 151.) She testified that she vaguely remembered leaving his condo. (R. 151.)

4. LCpl EH got into a taxicab and spoke with the driver, Ms. Ruiz.

Outside Appellant's condo, LCpl EH saw a taxicab. (R. 137-38.) She got into the taxicab and spoke with the taxicab driver. (R. 137-38.) Although at trial LCpl EH could not remember many

of the details about her time with the taxicab driver, the taxicab driver, Ms. Ruiz, provided the details at trial. (R. 104, 138.)

Ms. Ruiz had been "dispatched to pick somebody up," a male, at Appellant's condo complex. (R. 105.) After arriving, and after driving "around the apartments looking for the person," she "saw a male on the second story waiving [sic] to [her] . . . to wait." (R. 106.)

After waiting, LCpl EH came out. (R. 110.) Ms. Ruiz "noticed something was wrong with [LCpl EH]," and it appeared that she had been crying. (R. 106, 110.) LCpl EH was "very confused and something was wrong." (R. 107.) As LCpl EH approached the taxicab, she asked Ms. Ruiz if she could talk with her. (R. 107.) LCpl EH then told Ms. Ruiz that "[s]he thought she had been drugged and raped." (R. 118-19.)

LCpl EH and Ms. Ruiz spoke with each other for "about an hour." (R. 107.) Ms. Ruiz attempted to comfort LCpl EH. (R. 108.) LCpl EH appeared desperate——"grabb[ing] onto [Ms. Ruiz] and saying, 'Please let me stay with you, I'll pay you for your time. I need to talk to somebody, I need somebody with me.'" (R. 108.)

At some point during the conversation, Ms. Ruiz drove LCpl EH to the 7-Eleven to buy a soda and cigarettes for Ms. Ruiz. (R. 112.) At trial, LCpl EH could not remember the conversation

she had with Ms. Ruiz, and did not remember going to the 7-Eleven. (R. 143-44.)

Eventually, Ms. Ruiz took LCpl EH back to the barracks. (R. 108, 138.) After arriving at her room, LCpl EH slept. (R. 138.)

5. LCpl EH reported the sexual assault to her command's Uniformed Victim Advocate and went to Medical because she felt sick.

LCpl EH reported the sexual assault to her command's Uniformed Victim Advocate. (R. 138-39.) She then spoke with Special Agent (SA) Hallett with the Criminal Investigation Command (CID). (R. 166-68.)

Two days after the sexual assault, LCpl EH went to Medical "[b]ecause [she] was feeling sick." (R. 139, 154.) At trial, nineteen months after going to Medical, LCpl EH could not remember what she specifically told Medical. (R. 154.)

6. After a lawful search of Appellant's condo, Investigators discovered two condoms which contained the DNA of both Appellant and LCpl EH.

LCpl EH identified the condo where Appellant sexually assaulted her which was located on the third floor. (R. 139, 168, 173; Prosecution (Pros.) Ex. 4.)

On December 21, 2012, SA Hallett then searched Appellant's recently-vacated condo. (R. 169-70; Pros. Ex. 4 at 1.) He seized "two condoms." (R. 169-70, 172.)

On January 1, 2013, pursuant to a Permissive Authorization for Search and Seizure, LCpl EH provided buccal DNA swabs to

Investigators. (Pros. Ex. 4 at 1.) On February 26, 2013, pursuant to a lawful[1] Search Authorization, Investigators "collected a buccal DNA swab from [Appellant] to compare to the DNA found on the two condoms." (Pros. Ex. 4 at 1.)

At trial, Appellant stipulated that both Appellant's and LCpl EH's DNA matched the DNA found on the seized condoms. (Pros. Ex. 4 at 2; Pros. Ex. 6.)

B. Appellant was charged with sexually assaulting LCpl EH.

Appellant was charged with sexual assault in violation Article 120, UCMJ:

> In that [Appellant] . . . did, at or near Sierra Vista, Arizona, on or about 24 November 2012, commit a sexual act upon [LCpl EH], to wit: penetration of her vulva with his penis, when [she] was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by [Appellant].

(Charge Sheet, Jan. 11, 2014.)

C. The Military Judge made special findings, specifically that LCpl EH's testimony was "highly credible."

After announcing general findings, the Military Judge made special findings. (Appellate Ex. XX.)

Based on the "observations of the testimony and demeanor of LCpl [EH] and [Ms. Ruiz]," the Military Judge found their testimony "highly credible." (Appellate Ex. XX at 1.)

[1] Appellant stipulated the lawfulness of the search. (Pros. Ex. 4 at 1.)

After providing findings of fact on preliminary and background matters, the Military Judge found the following:

> e. While together at the Peacock Lounge, both LCpl [EH] and [Appellant] consumed alcohol. LCpl [EH] remembers having two mixed drinks containing coconut rum and pineapple juice and one shot of goldschlager. LCpl [EH] had eaten earlier in the evening and had not had any other alcohol prior to arriving at the Peacock Lounge. It is unclear how much alcohol [Appellant] consumed. LCpl [EH] and [Appellant] mutually ordered their drinks together directly from the bar. LCpl [EH] remembers going to the restroom on one occasion and then returning to the bar where she continued to drink. . . .
>
> g. After drinking alcohol . . . LCpl [EH] began to feel dizzy and experienced a level of intoxication more intense than she had upon drinking in the past. Her last memory of the Peacock Lounge was "just standing there." LCpl [EH] does not remember leaving the bar or going to any other location. . . .
>
> i. LCpl [EH]'s next memory is of waking up with [Appellant] on top of her. She was unable to move and unable to say anything. [Appellant]'s penis was inside her vagina. [Appellant] said to LCpl [EH]: "don't worry, I used a condom." LCpl [EH] again passed out.
>
> j. Sometime thereafter, LCpl [EH] again woke up. She was alone in bed in the same place she remembers [Appellant] being on top of her. LCpl [EH] was sick to her head and her stomach. Her head hurt and was spinning. She was laying in her own vomit and urine. . . .
>
> k. LCpl [EH] got out of bed, found a shower, and climbed in with her dress still on. While in the shower, she discovered a bite mark on her breast and scratch marks on her lower back. These marks were not there prior to meeting [Appellant] at the Peacock Lounge. LCpl [EH] did not know when or how she got these marks. At some point LCpl EH wrote "I'm in hell, help me" on the steamed up mirror in the bathroom. After showering, LCpl EH wrapped herself in

a towel and put her dress in a clothes dryer. She did not wait for the dress to completely dry, put the dress on, and left the apartment. It was daylight the next day. . . .

m. Ms. Ruiz had been dispatched to [Appellant]'s apartment complex to pick up a male. She did not see anyone waiting for a taxi when she first arrived, but after confirming the call with her dispatch and driving around the complex, she spotted a male waiving [sic] her down from the second floor of the complex. LCpl [EH] c[a]me down and got in Ms. Ruiz' cab.

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

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

(Appellate Ex. XX at 2-4.)

Based on the credible testimony of LCpl EH and the other evidence, the Military Judge found each element of the offense beyond a reasonable doubt. (Appellate Ex. XX at 4.) He stated:

> (1) In finding a sexual act had taken place, the Court relies upon the credible testimony of LCpl [EH] where she said [Appellant]'s penis was in her vagina, coupled with the corroborating physical and forensic evidence found during a search of [Appellant]'s apartment, that is, the two condoms and the DNA contained on those condoms matching both [Appellant] and LCpl [EH].
>
> (2) In finding LCpl [EH] was incapable of consenting to the sexual act due to her impairment by an intoxicant and that this condition was known or reasonably should have been known to [Appellant], the Court relie[s] upon the credible testimony of LCpl [EH] and Ms. Ruiz supporting the facts outlined above. Critically significant here is the statement made by [Appellant] to LCpl [EH] when she became conscious and discovered [Appellant] on top of her with his penis inside her vagina. The statement "don't worry, I used a condom," not only corroborates the finding a sexual act took place, but is also key in establishing the following pivotal facts:
>
> > (A) LCpl [EH] was not aware the sexual act was taking place when it began because she was unconscious due to her state of intoxication. Therefore, she was unable to consent to the act; and
> >
> > (B) By attempting to 'comfort' her anticipated fears upon discovering he was performing sexual intercourse on her, [Appellant]'s statement, including the word "used" in the past tense, illustrates [Appellant] was aware LCpl [EH] was not able to consent, and in fact did not consent, to the sexual act from its outset.

(Appellate Ex. XX at 4.)

D. At trial, Trial Defense Counsel cross-examined LCpl EH about her blackout during the night of the sexual assault, called two character witnesses, and effectively kept out Appellant's incriminating statement.

In a post-trial affidavit, Appellant stated that Trial Defense Counsel discussed that "he would argue at trial that [EH] had a memory blackout on the night" they had sex. (Appellant's Aff., April 20, 2015.) Appellant also stated that they discussed the possibility that EH's "prescription for hydrocodone . . . or another drug mixed with alcohol could explain" the loss of memory. (Appellant's Aff.)

LCpl EH medical record shows, however, that she was prescribed hydrocodone on December 5, 2012, two weeks after the sexual assault, and again on January 14, 2013. (Investigation Officer Ex. 7 at 3.)

At trial, on cross-examination, Trial Defense Counsel challenged LCpl EH's loss of memory at and after leaving the nightclub. (R. 151-53.)

Trial Defense Counsel also challenged LCpl EH's inability to recall certain facts at trial, including going to Applebee's with Appellant prior to the sexual assault, whether she was wearing her shoes when she left Appellant's condo, buying a soda and a pack of cigarettes the day after the sexual assault, what she discussed with Ms. Ruiz, and what she told Medical during

her visit two days after the sexual assault. (R. 144-45, 151, 153-56.)

Trial Defense Counsel also asked LCpl EH if she was "on any medications that could affect [her] memory at that time," to which LCpl EH responded, "No, sir." (R. 157.) LCpl EH's response was consistent with her medical record. (Investigation Officer Ex. 7 at 3.)

During the Defense's case-in-chief, Trial Defense Counsel called two character witnesses, both of whom provided good military character evidence for Appellant. (R. 177, 182.)

Trial Defense Counsel also succeeded in suppressing Appellant's prior statement for failing to provide him with Article 31(b) rights warnings, wherein Appellant denied "any sexual contact between [him and LCpl EH] . . . no kissing, fondling, or any sort of physical contact like that at all." (R. 46; Appellate Ex. V at 40, 42.)

During argument, Trial Defense Counsel emphasized LCpl EH's inability to remember anything from that night, and her inability to recall important facts prior to and after that evening. (R. 199-201.)

E. Post-trial, Trial Defense Counsel submitted a clemency request.

On June 25, 2014, Appellant was found guilty of the sexual assault offense and sentenced to three years confinement and a

bad-conduct discharge. (R. 238; Convening Authority's Action, Oct. 9, 2014.)

After sentencing, Appellant "requested that both a copy of [his] record of trial and copy of the Staff Judge Advocate Recommendation be delivered to [his] counsel," Trial Defense Counsel. (R. 239; Appellate Ex. XIX.)

On September 22, 2014, Trial Defense Counsel submitted a six-page clemency request wherein he argued that the conviction was legally and factually insufficient, emphasized LCpl EH's loss of memory, and attached LCpl EH's trial testimony. (Clemency, Sept. 22, 2014; Convening Authority's Action at 2.)

In his post-trial affidavit, Appellant stated that when Trial Defense Counsel contacted him regarding clemency, Appellant told him to contact his attorney, Carl Parker, because "he was going to review the submission." (Appellant's Aff., April 20, 2015.)

Appellant alleges that as of June 28, 2014, Trial Defense Counsel knew that Appellant's civilian attorney would handle the post-trial matters, but also alleges that he "provided numerous letters of support and records of accomplishment to the brig" that Trial Defense Counsel was supposed to, but did not obtain to include with the clemency request. (Appellant's Aff.)

Appellant also stated that on July 16, 2014, he "requested to contact [Trial Defense Counsel] so [he] could tell him again

that [he] wanted to suspend his ability to make any decisions in regard to [his] case." (Appellant's Aff.)

Summary of Argument

I.

Appellant's sexual assault conviction is legally and factually sufficient because LCpl EH's credible testimony, as found by the Military Judge, and the corroborating DNA evidence and testimony of Ms. Ruiz, establish each element——that LCpl EH was incapable of consenting to the sexual act due to impairment by an intoxicant and Appellant knew or reasonably should have known. Viewed in a light most favorable to the prosecution, a reasonable factfinder could find all elements beyond a reasonable doubt. This Court should likewise be convinced of Appellant's guilt.

II.

Appellant failed to establish that deficiencies exist in Trial Defense Counsel's representation because Appellant's assertions are based on speculation that LCpl EH's medication caused her to have a blackout. Regardless, Trial Defense Counsel did challenge LCpl EH regarding her memory blackout the night of the sexual assault and her inability to recall information at trial. Moreover, Appellant failed to show that but for the alleged errors, there would have been a different result.

III.

Under the second prong of *Strickland*, Appellant failed to make a colorable showing that he was prejudiced by Trial Defense Counsel's post-trial representation where Appellant admits that Trial Defense Counsel consulted with him about clemency, and submitted clemency on Appellant's behalf. Appellant alleges, however, that he wanted to submit letters of support with his clemency, but he failed to attach those hypothetical documents for this Court's consideration. Therefore, he failed to make a colorable showing of prejudice under *Strickland*.

Argument

I.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT OF LCPL EH IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE LCPL EH'S CREDIBLE TESTIMONY, AS FOUND BY THE MILITARY JUDGE, AND THE CORROBORATING DNA EVIDENCE AND TESTIMONY OF THE TAXIDRIVER, ESTABLISH THAT LCPL EH WAS INCAPABLE OF CONSENTING TO THE SEXUAL ACT DUE TO IMPAIRMENT BY AN INTOXICANT, AND APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN HER CONDITION.

A. The Military Judge made special findings, including that LCpl EH was a credible witness; all his findings are supported by the Record of Trial.

A military judge is "presumed to know the law and to follow it, absent clear evidence to the contrary." *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (citing *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994)); *United States v.*

Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007); *see United States v. Washington*, 57 M.J. 394, 403 (C.A.A.F. 2002) (stating that "[t]he law necessarily incorporates presumptive constructs. Judges are presumed to know the law, until demonstrated otherwise") (citation omitted).

Here, after observing LCpl EH's testimony and demeanor, the Military Judge, in his special findings, found her testimony "highly credible." (Appellate Ex. XX at 1;) *see United States v. Torres*, No. 201300396, 2014 CCA LEXIS 641 (N-M. Ct. Crim. App. Aug. 28, 2014) (court relied on military judge's determination of victim's credibility and believability because he saw and heard the witness).

The Military Judge found that (1) "LCpl [EH] remember[ed] having two mixed drinks" and "one shot of goldschlager" while at the nightclub (2) after drinking the alcohol, LCpl EH felt "dizzy and experienced a level intoxication more intense than she had upon drinking in the past," (3) LCpl EH experienced a memory blackout that lasted until she awoke "with [Appellant] on top of her" with his "penis inside her vagina," (4) LCpl EH "was unable to move and unable to say anything," (5) Appellant said to LCpl EH, "don't worry, I used a condom," (6) "LCpl [EH] again passed out," (7) when LCpl EH awoke later, she "was sick" and "[h]er head hurt and was spinning," (8) LCpl EH "was laying in her own vomit and urine," and (9) LCpl EH had a "bite mark on

her breast and scratch marks on her lower back" that were not there prior to meeting with Appellant the previous night. (Appellate Ex. XX at 2-4.)

All of the Military Judge's findings are supported by the Record and Appellant fails to allege otherwise. Therefore, this Court should adopt the facts in analyzing both the legal and factual sufficiency of Appellant's conviction.

Appellant points to a single finding of fact——a finding that LCpl EH went to the bathroom while she was at the nightclub——to accuse the Military Judge of relying on "inadmissible and irrelevant speculation" in finding that LCpl EH was incapable of consenting to the sexual act due to intoxication. (Appellant's Br. at 9-10.) But the Military Judge did not rely on the two statements with which Appellant takes issue——LCpl EH's statement that she believed she was drugged and raped, and a waitress's statement asking LCpl EH if she needed to get away.[2] (Appellant's Br. at 9-10; R. 118-19, 128; Appellate Ex. XX.) Appellant's argument is a red herring which completely avoids the Military Judge's actual findings and is not relevant to this Court's analysis here.

[2] The United States does not, however, concede that the statements were irrelevant speculation. Considering that the Military Judge did not rely on them to find Appellant guilty, and as Appellant does not raise the admission of the statements as error, the United States does not address their admissibility.

In addition to the findings *supra*, the Military Judge emphasized Appellant's past-tense statement——"don't worry, I used a condom"——to corroborate that (1) the sexual act took place, (2) "LCpl [EH] was not aware the sexual act was taking place when it began," and (3) "[Appellant] was aware LCpl [EH] was not able to consent, and in fact did not consent, to the sexual act from its outset." (Appellate Ex. XX at 4.)

Based on LCpl EH's credible testimony, and the other evidence stated *supra*, the Military Judge properly found each element beyond a reasonable doubt. (Appellate Ex. XX at 4.)

B. Viewed in a light most favorable to the prosecution, a reasonable factfinder could find all essential elements beyond a reasonable doubt, including LCpl EH's inability to consent due to impairment by an intoxicant and that Appellant knew or should have known of her condition.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable factfinder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court's assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in

favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The elements of the charged sexual assault here are: (1) Appellant committed a sexual act upon LCpl EH; (2) LCpl EH was incapable of consenting to the sexual act due to impairment by an intoxicant; and (3) LCpl EH's condition was known or reasonably should have been known by Appellant. (Charge Sheet;) Manual for Courts-Martial (MCM), United States (2012 ed.), IV-68, ¶ 45.a.(b)(3).

Appellant here concedes the sexual act, but challenges the other elements. (R. 100; Appellant's Br. at 9.) But the testimony of LCpl EH and Ms. Ruiz, as well as the corroborating evidence of the condoms, establish each element beyond a reasonable doubt.

1. Appellant's conviction is legally sufficient as to LCpl EH's inability to consent due to impairment by an intoxicant based on the evidence of LCpl EH's intoxication——vomiting and urinating on herself, dizziness, and a memory blackout——and Appellant's statement assuring LCpl EH that he "used" a condom.

After LCpl EH's friends stood her up at the nightclub, and after Appellant arrived at the nightclub to socialize, LCpl EH consumed three alcoholic beverages——two mixed drinks of "pineapple juice and Coconut Rum" and "one shot of Goldschlager." (R. 126-27, 156.)

Appellant mistakenly asserts that the only evidence of LCpl EH's intoxication was the three alcoholic beverages. (Appellant's Br. at 9.) But that assertion overlooks the other evidence of her level of intoxication and her incapability of consenting to the sexual act. First, LCpl EH vomited and urinated herself due to her intoxication. (R. 133.) She "had vomit in [her] hair and on the sheets" of Appellant's bed. (R. 133.) The bed was also soaked with her urine; she had been lying in her urine when she awoke in the morning, after the sexual assault. (R. 133, 161-62; Appellate Ex. XVIII.)

Second, LCpl EH remembered the initial effects of the alcohol——intense "[d]izziness"——that went beyond anything that she had ever felt before. (R. 129.) Although she drank alcohol "maybe once or twice a month," the effects that evening were "more intense, different almost" than other times she had been drinking. (R. 129.)

Third, LCpl EH experienced a loss of memory. (R. 129.) The last thing she remembered from that evening was "[j]ust standing there" at the nightclub. (R. 129.) She had no memory of leaving the nightclub or going back to Appellant's condo.[3]

[3] Appellant alleges that LCpl EH's inability to provide information as to how she traveled from the nightclub to Appellant's apartment is somehow proof that she could consent. (Appellant's Br. at 11.) But her loss of memory and inability to consent are not mutually exclusive. Appellant's argument overlooks that LCpl EH was both (1) incapable of consenting *and*

(R. 130, 153.) LCpl EH's next memory was "[w]aking up" and not knowing where she was, with appellant "on top of [her]," with his penis inside of her vagina. (R. 130-31.)

Although a loss of memory, by itself, may not be sufficient to show her inability to consent, it does support her level of intoxication. And together with the other evidence, the memory "blackout" established that LCpl EH was incapable of consenting. Moreover, as much as Appellant wants to blame LCpl EH's medication for the blackout, (Appellant's Br. at 15,) there is no evidence to support that assertion. *See supra* at 26.

Fourth, when LCpl EH awoke to Appellant sexually assaulting her, her intoxication was such that she could not move or say anything. (R. 131.)

Fifth, after awaking to the sexual assault, LCpl EH again passed out due to her level of intoxication. (R. 132.)

Sixth, LCpl EH "had bite marks on [her] chest" that were not there before the previous evening with Appellant. (R. 133-34, 141.) Moreover, she had "[s]cratches on [her] lower back" that, again, were not previously present. (R. 134-35.)

Finally, in an attempt to put LCpl EH at ease after she awoke to Appellant penetrating her, Appellant stated, "don't worry, I *used* a condom," something that LCpl EH would have known

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(2) experiencing a loss of memory due to intoxication. In fact, her loss of memory lends proof to her level of intoxication.

had she consented to the sexual act. (R. 131.) The past tense of the statement's verb, "used," together with the other evidence *supra* established that LCpl EH was unaware and did not consent to the sexual assault when it began.

2. Appellant's conviction is legally sufficient because Appellant knew or reasonably should have known of LCpl EH's inability to consent based on the evidence of LCpl EH's intoxication and Appellant's statement assuring LCpl EH that he "used" a condom.

Appellant's past-tense statement also established that he knew LCpl EH was unaware of the sexual act at the time of the penetration——he knew LCpl EH was not able to consent.

Regardless of his actual knowledge, a reasonable sober person under these circumstances——witnessing an intoxicated woman vomiting, passing out, and urinating herself——would have known of LCpl EH's condition: that she was incapable of consenting to the sexual act due to an intoxicant.

C. This Court should likewise be convinced of Appellant's guilt.

Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the Record of Trial, it is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id*. This is not a *pro forma* legal requirement. Rather, it

takes into account the legal rule that the trier of fact is best situated to assess a witness's credibility while testifying. *See, e.g., United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *rev. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation").

Weighing the evidence here——the credible testimony of LCpl EH, and the corroborating evidence from Ms. Ruiz and the two seized condoms——and making allowances for not having observed the witnesses, these facts should convince this Court beyond a reasonable doubt that Appellant's conviction for sexual assault is factually sufficient.

II.

TRIAL DEFENSE COUNSEL WAS NOT INEFFECTIVE BECAUSE (1) LCPL EH WAS NOT PRESCRIBED HYDROCODONE AT THE TIME OF THE SEXUAL ASSAULT, (2) TRIAL DEFENSE COUNSEL CHALLENGED LCPL EH ON THE SOLE MEMORY BLACKOUT, AND (3) TRIAL DEFENSE COUNSEL CHALLENGED LCPL EH'S INABILITY TO RECALL CERTAIN INFORMATION AT TRIAL, NINETEEN MONTHS AFTER THE SEXUAL ASSAULT; APPELLANT FAILED TO MEET HIS BURDEN UNDER *STRICKLAND*.

A. Standard of review.

Claims of ineffective assistance of counsel are reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

B. Trial Defense Counsel was not ineffective in his representation.

All service members are guaranteed the right to effective assistance of counsel at their court-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). In order to prevail on a claim of ineffective assistance of counsel, Appellant "must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance." *Strickland*, 466 U.S. at 698.

Under the *Strickland* two-prong test, the burden is on Appellant to prove (1) that a deficiency in representation existed and (2) that this deficiency by counsel resulted in prejudice to Appellant. *Id.* Appellant also has the burden of establishing the truth of factual matters associated with the claim of ineffective assistance. *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991).

1. Trial Defense Counsel was not deficient because LCpl EH was not prescribed hydrocodone at the time of the sexual assault, she experienced only a single blackout, and Trial Defense Counsel challenged LCpl EH's memory at trial.

Trial defense counsel is presumed to have provided effective assistance throughout the trial. *Strickland*, 466 U.S. at 687; *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004). This presumption may only be rebutted when there exists a showing of specific errors made by defense counsel that were

unreasonable under prevailing professional norms. *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). The evidence in the record must establish that counsel made errors that were so serious that they were no longer functioning as "counsel" guaranteed to the accused by the Sixth Amendment. *Strickland*, 466 U.S. at 687.

Appellant's argument here is based on inaccurate hypotheticals——that LCpl EH experienced frequent blackouts due to her prescription medication. (Appellant's Br. at 15.) But Appellant's entire premise is unsupported and meritless.

First, contrary to Appellant's assertion, at the time of the sexual assault, the Record shows that LCpl EH had not been prescribed hydrocodone. (Investigation Officer Ex. 7 at 3.) In fact, the Record establishes that LCpl EH was prescribed hydrocodone on December 5, 2012, two weeks after the sexual assault, and again on January 13, 2014. (Investigation Officer Ex. 7 at 3.)

Second, LCpl EH experienced a single blackout beginning some time at the nightclub and ending when she awoke at Appellant's condo with Appellant penetrating her. (R. 129-31, 153.) LCpl EH's inability to recall other events prior to and after that evening was not a result of a "blackout" but rather an inability to recall the information at trial, nineteen months after the event. (R. 125, 145, 151.) Simply because she did

not remember information at trial, does not mean she was in a blackout state every time she did not remember. As an example, at some point LCpl EH did remember going to Applebee's with Appellant because she told investigators that she had. (R. 125, 145.) But at trial, she could not remember going there, nor could she remember what she ate. (R. 125, 145.)

Further, she could recall large events like leaving Appellant's condo and getting in the taxicab, but not some of the details of those events such as (1) whether she was wearing or carrying her shoes when she left Appellant's condo after the sexual assault, (2) whether she bought a soda and cigarettes, and (3) what she discussed with Ms. Ruiz and then Medical. (R. 144-45, 151, 153-56.)

Third, Trial Defense Counsel actively challenged LCpl EH regarding her lack of memory, including the memory blackout. (R. 144-45, 151, 153-56.) Trial Defense Counsel also asked LCpl EH if she was "on any medications that could affect [her] memory at that time." (R. 157.) She responded that she was not, which is supported by the Record. (R. 157.)

Fourth, Appellant argues that Trial Defense Counsel was ineffective for not capitalizing on LCpl EH's memory gaps because those "blackouts" make the conviction legally and factually insufficient. (Appellant's Br. at 9-11, 16-18.) But at trial, Trial Defense Counsel vigorously argued the same

theory——that LCpl EH's memory gaps left the Military Judge with many "unanswered questions" that did not support a conviction. (R. 199-202.) Although the Military Judge rejected the argument, by arguing the same theory now on appeal, Appellant is implicitly conceding that Trial Defense Counsel's strategy was sound at trial.

As Trial Defense Counsel's representation was not unreasonable under prevailing professional norms, Appellant fails to establish the first prong of the *Strickland* test.

2. No prejudice exists here because (1) Appellant's argument is based on inaccurate information, and (2) the factfinder was aware of LCpl EH's memory blackout because Trial Defense Counsel challenged her on cross-examination.

This Court "is not required to apply [the *Strickland*] tests in any particular order." *United States v. Gutierrez*, 66 M.J. 329 (C.A.A.F. 2008). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

Under the second prong of *Strickland*, the errors in counsel's performance must be so prejudicial as to indicate a denial of a fair trial or a trial whose result is unreliable. *Davis*, 60 M.J. at 473 (citing *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001)). Appellant must demonstrate "a reasonable probability that, but for counsel's error, there

would have been a different result." *United States v. Quick*, 59 M.J. 383, 386-87 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 694); *see United States v. Gutierrez*, 66 M.J. 329, 331-32 (C.A.A.F. 2008) (no reasonable probability because it was "just as likely that the members would have convicted as it is that they would have acquitted").

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Loving v. United States*, 68 M.J. 1, 6 (C.A.A.F. 2009) (citing *Strickland*, 466 U.S. at 694). Moreover, second-guessing and hindsight are not sufficient to overcome this presumption. *Davis*, 60 M.J. at 473.

Even assuming an unreasonable deficiency by either not presenting evidence that LCpl EH's prescription medication may have contributed to the memory blackout or not calling an expert to talk about memory blackouts, the outcome would have been the same. First, the Military Judge was aware of LCpl EH's lack of memory of the events of the evening through cross-examination by Trial Defense Counsel. (R. 151-53.) Therefore, the proffered evidence would have been cumulative at best.

Second, the Military Judge relied on LCpl EH's credibility in his special findings, and as the proffered evidence of LCpl EH's blackout would not have impeached her testimony, the outcome would have been the same.

As stated *supra* at 26-27, Appellant's sole argument is based on hypotheticals——hypothetical evidence of frequent blackouts based on hypothetical prescription medication. But Appellant failed to show how the proffered evidence would have had a reasonable probability of changing the outcome of the trial. Therefore, Appellant fails the second prong of the *Strickland* test.

C. Appellant's assertion of ineffective assistance of counsel is incomplete and can be decided on the appellate Record of Trial.

1. This Court should decide and grant no relief to Appellant pursuant to the factors in *Ginn* because Appellant's affidavit contains no new facts that warrant relief.

Where an appellant raises a post-trial claim of ineffective assistance of counsel based on a post-trial affidavit, this Court must apply the *Ginn* test to determine whether this Court may resolve the claim on the basis of the record alone. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

The only evidence before this Court of ineffective assistance of counsel is contained within Appellant's affidavit. In *Ginn*, the court articulated a multi-factor test this court should consider before ordering a post-trial evidentiary hearing when an appellant makes a claim of ineffective assistance of counsel through an affidavit after a guilty plea. *Id.* at 248. The first and second factors are applicable here. First, "if

the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Id.* Second, "if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *Id.*

Here, Appellant states that Trial Defense Counsel discussed the possibility of arguing that LCpl EH experienced a memory blackout due to her prescription medication. (Appellant's Aff.) Even if they discussed that theory, there would be no relief granted under these circumstances and a *DuBay* hearing is unnecessary because the Record establishes that LCpl EH was not on prescription medication at the time of the sexual assault and Trial Defense Counsel did, in fact, argue that LCpl EH was only experiencing a loss of memory and not incapable of consenting.

2. <u>If this Court finds the presumption of competent representation is overcome, the United States must have an opportunity to submit affidavits from Trial Defense Counsel</u>.

Trial defense counsel are "not compelled to justify their actions until a court of competent jurisdiction reviews the allegation of ineffectiveness and the government response, examines the record, and determines that the allegation and the record contain evidence which, if unrebutted, would overcome the presumption of competence." *United States v. Lewis*, 42 M.J. 1,

6 (C.A.A.F. 1995); *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008). Once the presumption of competence has been overcome, the court must provide the United States an opportunity to submit a statement or affidavit from trial defense counsel to rebut the allegations prior to granting relief. *Melson,* 66 M.J. at 347.

Therefore, if this Court finds that the presumption of competence has been overcome, this Court should allow Trial Defense Counsel the opportunity to respond by submitting a statement or affidavit to rebut the allegations prior to granting relief.

III.

APPELLANT WAS COMPETENTLY REPRESENTED DURING THE POST-TRIAL PHASE AND FAILS TO MAKE A COLORABLE SHOWING OF PREJUDICE.

A. Standard of review.

Claims of ineffective assistance of counsel are reviewed *de novo*. *Strickland*, 466 U.S. at 698.

B. Appellant failed to meet his burden under both prongs of *Strickland* because Trial Defense Counsel submitted clemency after consulting with Appellant, and Appellant failed to identify specific information of what he would have submitted.

"The right of a military accused to effective assistance of counsel after his trial is a fundamental right." *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000). In order to prevail on a claim of ineffective assistance of counsel,

Appellant "must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance." *Strickland*, 466 U.S. at 689. Under the *Strickland* two-prong test, the burden is on Appellant to prove: (1) that a deficiency in representation existed; and, (2) that this deficiency by counsel resulted in prejudice to Appellant. *Id.* at 698.

For errors in post-trial processing involving clemency, because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant only where there is error and the appellant "makes some colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)).

Appellant also has the burden of establishing the truth of factual matters associated with the claim of ineffective assistance. *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The sole persuasion to show prejudice, even in post-trial processing error cases, also rests with Appellant. S*ee United States v. Ellis*, 47 M.J. 20 (C.A.A.F. 1997) (the burden is on appellant to establish why he would be entitled to post-trial relief); *Wheelus*, 49 M.J. at 287.

1. No deficiency exists in Trial Defense Counsel's representation because, as Appellant admitted, Trial Defense Counsel consulted with him about clemency and later submitted clemency on his behalf.

Trial defense counsel is presumed to have provided effective assistance throughout the trial. *Strickland*, 466 U.S. at 687; *Garcia*, 59 M.J. at 447. This presumption may only be rebutted when there exists a showing of *specific errors* made by defense counsel that were unreasonable under prevailing professional norms. *Davis*, 60 M.J. at 473 (citing *McConnell*, 55 M.J. at 482. The evidence in the record must establish that counsel made errors that were so serious that they were no longer functioning as "counsel" guaranteed to the accused by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Counsel's performance is judged upon the reasonableness of the counsel's perspective at the time of the alleged deficiency. *See United States v. Lowe,* 50 M.J. 654, 656 (N-M. Ct. Crim. App. 1999).

In his Affidavit and Brief, Appellant contradicts himself by first implying that he informed Trial Defense Counsel that he was fired, and then later alleging that he had letters and other documents that Trial Defense Counsel was supposed to submit with clemency, but did not. (Appellant's Aff.; Appellant's Br. at 20, 24.) Appellant's main argument seems to be the latter——that there were "letters" and "accomplishments" that were not

submitted as part of the clemency request. (Appellant's Br. at 23-24.)

In *United States v. Starling*, 58 M.J. 620, 621-22 (N-M. Ct. Crim. App. 2003), involving a failure to submit clemency, the appellant alleged that trial defense counsel was ineffective but failed to reference any *specific evidence* that he would have submitted as clemency. As a result, the court found no deficiency in representation. *Id*. at 623.

Appellant's argument here is likewise based on hypotheticals——hypothetical letters and hypothetical accomplishments. (Appellant's Aff.) Appellant failed to meet his burden because he did not identify or reference any specific evidence that he would have submitted, nor did he attach those hypothetical letters and accomplishments to the Record.

Moreover, contrary to Appellant's assertions, he received conflict free representation. After sentencing, Appellant requested that all post-trial matters be submitted to Trial Defense Counsel. (R. 239; Appellate Ex. XIX.) He also admits that he consulted with Trial Defense Counsel regarding clemency. (Appellant's Aff.)

Appellant alleges that he identified a Civilian Counsel, Carl Parker, to represent him post-trial. (Appellant's Aff.) But, if true, Civilian Counsel then failed to submit clemency on Appellant's behalf; the only clemency submitted was by Trial

Defense Counsel. And assuming Appellant wanted Civilian Counsel to submit clemency, the more appropriate allegation here would be Civilian Counsel's ineffectiveness.

Although the Convening Authority did not grant clemency, Trial Defense Counsel's clemency submission was a thorough six pages wherein he argued that the conviction was legally and factually insufficient. (Clemency.) The clemency submission was not a bare bones form clemency request as Appellant implies. Similar to Appellant's argument here on appeal, in the clemency request, Trial Defense Counsel emphasized LCpl EH's loss of memory. (Clemency.) He also attached LCpl EH's trial testimony for the Convening Authority to consider. (Clemency.)

As Appellant's contention rests on hypothetical letters and accomplishments, and based on Trial Defense Counsel's actions in consulting and then submitting clemency, Appellant failed to meet his burden to show a deprivation of effective counsel within the meaning of *Strickland*.

2. Appellant fails to make any colorable showing of prejudice.

This Court requires an appellant who makes a claim of post-trial ineffective assistance of counsel to demonstrate how the actions were contrary to his wishes and what he would have submitted in support of clemency. *Starling*, 58 M.J. at 613. An appellant will not demonstrate that he has been prejudiced

without specific information of what matters he would have submitted as clemency. *Id.*; see also *United States v. Perez*, 64 M.J. 239 (C.A.A.F. 2006); *see also United States v. Moulton*, 47 M.J. 227, 230 (C.A.A.F. 1997).

Appellant cites to *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). But *Johnston* is easily distinguished here because in *Johnston*, the appellant's detailed defense counsel "had been released from active duty" and no substitute counsel was detailed. *Id*. at 228. The staff judge advocate prepared a new recommendation, but the appellant was unaware of it and did not have the opportunity to submit matters on his behalf. *Id*. at 228. The court found that the appellant suffered harm because of his inability to submit additional clemency. *Id*. at 229.

Unlike *Johnston*, Appellant here was represented by counsel. Per Appellant's wishes, the staff judge advocate's recommendation was served on Trial Defense Counsel, Appellant admitted that Trial Defense Counsel consulted with him about clemency, and then Trial Defense Counsel submitted clemency on his behalf. (R. 239; Appellate Ex. XIX; Appellant's Aff.) Appellant's only attempt at meeting his burden of showing prejudice is his assertion that he had letters and accomplishments that he wanted, but was unable, to submit. (Appellant's Aff.)

In *Starling*, in addition to finding no deprivation of counsel under the first prong of *Strickland*, the court further found that the appellant did not meet his burden of establishing prejudice because there was nothing to submit to the convening authority for his consideration. 58 M.J. at 623.

In *United States v. Hood*, 47 M.J. 95, 96 (C.A.A.F. 1997), cited by Appellant, the appellant agreed at trial to have a new detailed defense counsel represent him post-trial. After the new detailed defense counsel received the staff judge advocate's post-trial recommendation, he submitted a clemency request without first consulting with the appellant. *Id*. After finding a deficient performance, the *Hood* court found no prejudice under *Strickland* because the appellant did "not identif[y] any matters that he would have submitted." *Id*. at 98.

Similarly, Appellant here has failed to meet his burden because although Appellant submitted an affidavit alleging that he wanted to submit "numerous letters" and "records of accomplishment," as stated *supra* at 36, he failed to identify the letters, attach those hypothetical letters and accomplishments to the Record, or describe what those letters would have stated. As such, Appellant failed to meet his burden under the second prong of *Strickland*.

C. This Court should decide and grant no relief to Appellant pursuant to the factors in *Ginn* because Appellant's affidavit contains only speculative and conclusory observations .

The first and second *Ginn* factors apply here. *Ginn*, 47 M.J. at 236; *see supra* at 30-31. First, "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Id.* Second, "if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *Id.*

Here, Appellant states in his affidavit that he wanted Trial Defense Counsel to submit "letters of support" and "letters of accomplishment" to the Convening Authority, but failed to identify the letters, describe them, or attach them to the Record. Therefore, the Affidavit does not set forth specific facts under which this Court should grant relief

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

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Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing were delivered to the Court and a copy was served upon opposing counsel and electronically filed with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on August 18, 2015.

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