

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

Private First Class (E-3)

WILLIS A. GRANT

United States Army

Appellant

**BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20200645

Tried at Fort Stewart, Georgia, on
19 March and 6 August 2019, and
14 January and 12-13 November 2020,
before a general court-martial
appointed by Commander,
Headquarters and Fort Stewart,
Colonels David H. Robertson and
Christopher Martin, and Lieutenant
Colonel Trevor Barna, military judges,
presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error¹

I.

**WHETHER THE MILITARY JUDGE PROPERLY
ADVISED APPELLANT OF HIS FORUM RIGHTS.**

II.

**WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION BY LIMITING APPELLANT'S
ABILITY TO PRESENT EVIDENCE OF KG'S
MOTIVE TO FABRICATE.**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider those matters set forth in Appendix B.

III.

WHETHER THE POST-TRIAL PROCESSING DELAY WARRANTS RELIEF.

Statement of the Case

On 19 March and 6 August 2019, and 14 January and 12-13 November 2020, a military judge, sitting as a general court-martial, convicted appellant, Private First Class (PFC) Willis A. Grant, contrary to his pleas, of one specification of sexual assault, three specifications of assault consummated by a battery, and one specification of communicating a threat, in violation of Articles 120, 128, and 134, Uniform Code of Military Justice [UCMJ], respectively. 10 U.S.C. §§ 920, 928, 934 (2012).² (R. at 331–32). The military judge sentenced appellant to be reduced to the grade of E-1, confined for three years, and dishonorably discharged from the service. (R. at 391). The convening authority approved the findings and sentence on 6 January 2021. (Action)³. The military judge entered judgment on 8 January 2021. (Entry of Judgment). This court received and docketed the case on 19 July 2021. (Referral Letter).

² The military judge acquitted appellant of two specifications of sexual assault and excepted certain language from Specification 1 of Charge II. (R. at 331; Charge Sheet).

³ The date on the official Action reads “2020”, but it is an obvious typo. (Action).

Statement of Facts⁴

Appellant and ■⁵ met while they both worked at a bar in Kansas City, Missouri in the fall of 2016. (R. at 155). Appellant enlisted in the military shortly after and went to basic training at Fort Benning, Georgia. (R. at 155–56, Pros. Ex. 3). While on holiday block leave on 1 January 2017, appellant and ■ were married. (R. at 156, 189).

After basic training, the Army assigned appellant to Fort Stewart, Georgia, and KG followed. (R. at 157). The couple lived in a hotel while they waited for on-post housing. (R. at 157, 189–90). They were social with several other young soldiers and their significant others. (R. at 157–58, 170, 177, 190, 250, 252, 253–55). However, their relationship was turbulent, and their friends witnessed the couple fight on numerous occasions. (R. at 158–59, 170–71, 267, 278–79, 292, 293–94). Appellant and ■ also spent significant time separated due to ■ returning to Missouri in July 2017 and appellant going on a rotational deployment to the Republic of Korea in February 2018. (R. at 170, 172–73, 175–76, 183).

When ■ returned to Missouri, despite still being married to appellant, she pursued other romantic relationships. (R. at 271). Later, when appellant returned

⁴ Additional relevant facts contained in their respective assignments of error.

⁵ Throughout the trial, parties referred to ■ by different names. Depending on the name used, the initials would be ■, ■, or ■. The name she stated officially for the record has the initials ■. (R. at 154).

from his deployment and visited Missouri, he attempted to retrieve the car he bought prior to the deployment. (R. at 174, 213). However, ■■■ “was mad...that [appellant] planned to leave [her] carless.” (R. at 213). At this point, ■■■ filed an inspector general complaint alleging a lack of spousal support. (R. at 308). When ■■■ later spoke with appellant’s company commander, she made allegations that appellant struck her. (R. at 310). In response, the commander referred the case to Family Advocacy. (R. at 310). Several weeks later, ■■■ made allegations to law enforcement that appellant sexually assaulted and threatened her. (R. at 310–11; Charge Sheet).

I.

WHETHER THE MILITARY JUDGE PROPERLY ADVISED APPELLANT OF HIS FORUM RIGHTS.

Additional Facts

The offenses alleged in this case all occurred prior to 1 January 2019. (Charge Sheet). The charges were preferred on 22 January 2019 and referred on 28 February 2019. (Charge Sheet). On 19 March 2019, the military judge advised appellant that if appellant elected to be tried by the members, he would be sentenced by those members. (R. at 5). Alternatively, the military judge also explained that appellant could be tried and sentenced by the military judge alone. (R. at 5). Ultimately, appellant chose to be tried by military judge alone. (MJAR; R. at 140). The military judge did not explain to appellant that he could be tried by

the members and, if the panel found him guilty of one or more offenses, sentenced by the members or the military judge alone. (R. at 5).

Standard of Review

This error presents a jurisdictional question, which this court reviews de novo. *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005).

Law

1. Article 25(d)(1), UCMJ applies to all courts-martial convened on or after 1 January 2019 regardless of the date of the alleged offense.

In the Military Justice Act of 2016 (MJA 16), Congress amended numerous provisions of the UCMJ and “gave the President the authority to designate the effective date of its provisions.” *United States v. Brubaker-Escobar*, ___ M.J. ___, slip op. at 5 (C.A.A.F. 7 September 2021). Additionally, MJA 16 imposed upon the President “the duty to ‘prescribe in regulations whether, and to what extent, the amendments made by this [act] shall apply to a case in which *a specification alleges the commission, before the effective date of such amendments, of one or more offenses* or to a case in which one or more actions under [the UCMJ] have been taken before the effective date of such amendments.’” *Id.* (emphasis in original) (citing MJA § 5542(c)(1), 130 Stat. at 2967, *as amended by* National Defense Authorization Act (NDAA) 2018 § 531(n)(1), 131 Stat. at 1387). The President designated 1 January 2019 as the effective date of MJA 16, except as

provided by Executive Order (EO) 13,825. *Id.*; EO 13,825, §10, 83 Fed. Reg. 9889 (1 March 2018).⁶

This EO “was a valid exercise of the President’s rulemaking authority,” and it established that Articles 16⁷, 25(d)(2) and (3)⁸, and 53⁹, among others, did not go into effect for courts-martial involving offenses alleged to have been committed prior to 1 January 2019. *Brubaker*, __ M.J. __, slip op. at 3; EO 13,825, §10(a). Conspicuously absent from EO 13,825, §10(a) is any reference to Article 25(d)(1), UCMJ (defined below). Therefore, a plain reading of the EO and the UCMJ suggests that both Congress and the President intended for Article 25(d)(1) to go into effect for courts-martial convened on or after 1 January 2019 without limitations.

As amended, Article 25(d)(1), UCMJ, provides the accused “may, after the findings are announced and before any matter is presented in the sentencing phase,

⁶ Attached to this brief as Appendix A.

⁷ Article 16, UCMJ, establishes that the accused, upon making a request “orally on the record or in writing” and receiving the military judge’s approval, may elect to be tried by a military judge alone. Although MJA 16 changed some aspects of Article 16, such as the minimum number of panel members required for general and special courts-martial, the fundamental right to elect trial by panel or military judge has remained largely unchanged.

⁸ Article 25(d)(2) and (3) govern sentencing in capital cases.

⁹ Article 53 provides that “if the accused is convicted of an offense in a trial the military judge *shall* sentence the accused,” unless, after a panel trial, the accused “elects sentencing by members under [Article 25, UCMJ].” Article 53(b)(1)(A)-(B), UCMJ (emphasis added).

request, orally on the record or in writing, sentencing by the members.” Therefore, any accused tried at a court-martial convened after 1 January 2019 has the option to be sentenced by the military judge or by the same panel that just convicted him. If the accused had no choice but to be sentenced by the members, Article 25(d)(1) would be rendered superfluous, void, or ineffective, which is contrary to the Supreme Court’s standards for statutory interpretation. *Corley v. United States*, 556 U.S. 303, 314 (2009).

2. The failure to advise an accused of his rights pursuant to Article 25(d)(1) is jurisdictional error.

Broadly speaking, the right addressed and protected in Article 25 is the right of an accused service member to select the forum by which he or she will be tried. *Alexander*, 61 M.J. at 270. When the election is made, but not recorded, it is ministerial. *Id.* However, when the accused does not make the election at all or does not make an informed election, it is jurisdictional. *See Alexander*, 61 M.J. at 269; *United States v. Morgan*, 57 M.J. 119, 121 (C.A.A.F. 2002) (Appellant’s case was not jurisdictional, and he suffered no prejudice because the record showed “appellant made an *informed*, personal choice of forum.” (emphasis added)); *United States v. Townes*, 52 M.J. 275, 277 (C.A.A.F. 2000). Though *Alexander*, *Morgan*, and *Townes* are all cases in which the Court of Appeals for the Armed Forces (C.A.A.F.) held there was substantial compliance with rule and tested for prejudice, the common thread through each case was the military judge properly

advised the accused of his forum rights, and there was no “allegation of coercion or that [the accused] was incompetent to making a knowing and intelligent decision” regarding his forum rights. *Townes*, 52 M.J. at 277 (citing *United States v. Turner*, 47 M.J. 348, 350 (C.A.A.F. 1997); *Alexander*, 61 M.J. at 269–70).

Article 16, UCMJ, which governs the request to be tried by military judge alone, further informs and supports the above-cited Article 25 precedent. Military appellate courts have held that violations of Article 16, UCMJ, are not jurisdictional when there is “substantial compliance” with its requirements. *United States v. Goodwin*, 60 M.J. 849, 850 (N.M.C.C.A. 2005) (citing *Turner*, 47 M.J. at 350; *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996)).

Substantial compliance may be when the record reflects that an appellant was informed of his rights, did not object to counsel’s selection for him, and was not coerced or otherwise incompetent to make a knowing and intelligent waiver. *Turner*, 47 M.J. at 350; *Goodwin*, 60 M.J. at 851 (“Conversely, we have not found any authority suggesting that substantial compliance with Article 16, UCMJ, can be achieved without a rights advisement on the record.”); *see also Patton v. United States*, 281 U.S. 276, 312 (1930) (There must be the “express and intelligent consent of the defendant” to trial by judge alone); *United States v. Hansen*, 59 M.J. 410, 412 (C.A.A.F. 2004) (“What is important . . . is that the accused is aware of the substance of his rights and voluntarily waives them.”).

Argument

Everything in this court-martial's process occurred after 1 January 2019. The government preferred charges on 22 January 2019 and referred the case to a general court-martial approximately one month later. (Charge Sheet). Therefore, pursuant to the version of Article 25(d)(1) that took effect on 1 January 2019, the military judge was required to instruct appellant on his right to elect trial by members, and sentencing by either the military judge alone or the members. *See* Article 25(d)(1); *Brubaker*, __ M.J. __, slip op. at 3, 5; EO 13,825, §10(a). However, the military judge never properly advised appellant of his forum rights pursuant to Article 25(d)(1). (R. at 5). Instead, the military judge simply advised appellant that if appellant elected to be tried by the members, he would be sentenced by those members. (R. at 5). Alternatively, the military judge explained, appellant could be tried and sentenced by the military judge alone. (R. at 5).

Although appellant ultimately elected to be tried by military judge alone, this does not cure the error because his choice of forum was uninformed, creating a jurisdictional defect. (R. at 140; MJAR); *Morgan*, 57 M.J. at 121. This court cannot treat appellant's forum selection as "an informed personal choice" when the military judge's forum rights advisement was defective. *Morgan*, 57 M.J. at 121. This case presents the inverse of *Turner*, *Townes*, *Morgan*, and *Alexander*, in

which the C.A.A.F. determined there was “substantial compliance” because the military judge properly informed the accused of his forum rights. *Townes*, 52 M.J. 275; *Turner*, 47 M.J. at 350; *Morgan*, 57 M.J. at 120; *Alexander*, 61 M.J. at 269–70. It logically follows that when the military judge does not properly inform the accused of his forum rights, there is no substantial compliance, and the error is jurisdictional. Any choice based on an erroneous forum rights advisement is the same as no choice at all. *See Morgan*, 57 M.J. at 121; *Turner*, 47 M.J. at 350; *Goodwin*, 60 M.J. at 851.

Therefore, due to this jurisdictional defect, appellant requests that this court set aside the findings and sentence.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY LIMITING APPELLANT’S ABILITY TO PRESENT EVIDENCE OF [REDACTED]’S MOTIVE TO FABRICATE.

Additional Facts

During their case in chief, defense counsel called [REDACTED], appellant and [REDACTED]’s friend. (R. at 287). His direct examination encompassed twelve pages of the trial transcript. (R. at 287–98). At one point, defense counsel asked, “did you ever have conversations with [KG] in which she expressed to you her - - that she was upset with [appellant]?” (R. at 296). Mr. [REDACTED] responded affirmatively. (R. at 296). Defense counsel then asked if there was “ever a time when she told

[Mr. █████], “Fuck him [referring to appellant], I’m going to take him for everything he’s got.” (R. at 296).¹⁰

The government objected, claiming they believed this statement was inadmissible hearsay. (R. at 296). Defense counsel immediately responded that they were not offering it for the truth of the matter asserted but for █████’s “state of mind” and “her motive to fabricate in making the claims that she did in this case.” (R. at 297). The government retorted, “She was never confronted with the statement.” (R. at 297). The military judge then sustained the objection. (R. at 297).

Despite the ruling, defense counsel countered that he did not have to confront the declarant with this statement in light of the aforementioned reasons he was offering the statement. (R. at 297). The government, rather than respond to that, stated their position was the statement was offered for the truth of the matter asserted. (R. at 297). Defense held its ground that it was not offered for the truth of the matter asserted but instead went to her “motive.” (R. at 297–98). The government finally restated that they believed it was for the truth of the matter asserted, and the military judge without further inquiry, deliberation, or explanation sustained the objection again. (R. at 298).

¹⁰ Though the fact-finder did not consider the answer due to the military judge erroneously sustaining the government’s objection, the witness answered, “She did, sir.” (R. at 296).

Standard of Review

A military judge's decision to exclude evidence pursuant to Military Rule of Evidence (Mil. R. Evid.) 608(c) is reviewed for an abuse of discretion. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006) (internal citations omitted). A military judge abuses his discretion "when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (internal citations omitted).

When the military judge excludes bias-type evidence, "the exclusion raises issues regarding an accused's Sixth Amendment right to confrontation." *Moss*, 63 M.J. at 236 (citing *United States v. Bins*, 43 M.J. 79, 84 (C.A.A.F. 1995)); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986). Therefore, this court tests the prejudice for harmlessness beyond a reasonable doubt. *Moss*, 63 M.J. at 236 (citing *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005); *United States v. Bahr*, 33 M.J. 228, 231 (C.M.A. 1991)).

Law

Mil. R. Evid. 608(c) "allows for evidence to show bias, prejudice, or any motive to misrepresent through the examination of witnesses or extrinsic evidence." *Moss*, 63 M.J. at 236 (citing *Bahr*, 33 M.J. at 232); *see also United*

States v. Saferite, 59 M.J. 270, 273 (C.A.A.F. 2004) (Evidence of bias may be elicited from the biased witness herself or “by evidence otherwise adduced.” (internal quotations omitted)). Military judges should liberally allow this type of evidence. *Moss*, 63 M.J. at 236 (citing *United States v. Williams*, 40 M.J. 216, 218 (C.M.A. 1994)). Because evidence of bias is so powerful, ““proof of bias is almost always relevant.”” *Saferite*, 59 M.J. at 273 (quoting *United States v. Abel*, 469 U.S. 45, 52 (1984)).¹¹

In evaluating whether the exclusion of admissible evidence was harmless beyond a reasonable doubt, this court considers: 1) the importance of the witness’s testimony in the prosecution’s case, 2) whether the testimony was cumulative, 3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, 4) the extent of cross-examination otherwise permitted, and 5) the overall strength of the prosecution’s case. *Van Arsdall*, 475 U.S. at 684. Notably, for violations of appellant’s constitutional rights under the Confrontation Clause, this court need not determine the entire case may have turned out differently, rather only that a reasonable fact-finder “might have received a significantly different impression of [the witness]’s credibility had

¹¹ The C.A.A.F. and Supreme Court stated “almost” because bias evidence is subject to a Mil. R. Evid. 403 balancing test. *Saferite*, 59 M.J. at 274.

[defense counsel] been permitted to pursue his proposed line” of questioning. *Id.* at 680.

Argument

1. The military judge abused his discretion because he had an erroneous view of the law.

In this case, the military judge clearly abused his discretion because he conflated multiple rules of evidence rather than assessing the evidence under defense counsel’s theory of admissibility, thus demonstrating an erroneous view of the law. *See United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). The defense’s theory was that the testimony regarding ■■■’s statement was admissible pursuant to Mil. R. Evid. 608(c). However, rather than analyze and rule on admissibility pursuant to that rule, he summarily sustained the government’s meritless hearsay objection and its follow-up argument related to Mil. R. Evid. 613(b).¹² (R. at 296–98).

The hearsay objection was meritless, and the military judge was wrong to sustain it because ■■■’s statement, “Fuck him, I’m going to take him for everything he’s got” was not hearsay because it was plainly not offered for the truth that she was, in fact, going to “take [appellant] for everything he’s got” but as proof that

¹² The military judge did not place his findings of fact and conclusions of law on the record, thus this court should afford him less deference in his ruling. *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).

she harbored significant bias and motive to misrepresent and fabricate facts and allegations against appellant. (R. at 296–98); *see* Mil. R. Evid. 801. Not only was this defense counsel’s theory at trial, but the non-hearsay reasons were the only relevant reasons to offer it. It was not relevant whether or not [REDACTED] was actually going to “take him for everything he’s got.” (R. at 296). It was relevant that her statement revealed her bias and motive to fabricate the allegations against appellant. *See* Mil. R. Evid. 401.

While [REDACTED]’s statement could also be relevant as a prior inconsistent statement, defense counsel made it clear they did not offer this statement as a prior inconsistent statement. (R. at 297–98). Therefore, the government arguing, and the military judge agreeing, that defense counsel was required to present this statement to [REDACTED] first before eliciting it through [REDACTED] is an erroneous view of the law. (R. at 297–98); *see* Mil. R. Evid. 608(c); *compare with* Mil. R. Evid. 613(b).

Confronting a declarant with a prior inconsistent statement before offering it through another witness is required by Mil. R. Evid. 613(b), but is wholly irrelevant to evaluating the evidence’s admissibility under Mil. R. Evid. 608(c). Precedent is also clear. Military Rule of Evidence 608(c) “allows for evidence to show bias, prejudice, or any motive to misrepresent through the examination of witnesses or extrinsic evidence.” *Moss*, 63 M.J. at 236; *see also Saferite*, 59 M.J.

at 273. There is no requirement, like in Mil. R. Evid. 613(b), that the declarant “be given an opportunity to explain or deny the statement” first. The trial counsel and the military judge conflating these two rules was a clear misunderstanding of the law, and the military judge abused his discretion in sustaining the government’s objection.

2. The evidence was admissible under Mil. R. Evid. 608(c).

█’s statement about her desire to “take [appellant] for everything he’s got” was also plainly admissible evidence of KG’s bias towards appellant. (R. at 296). Evidence of bias is “almost always relevant,” and it should be liberally allowed, subject to a Mil. R. Evid. 403 balancing test. *Moss*, 63 M.J. at 236; *Saferite*, 59 M.J. at 273, 274. This court has specifically held that divorce can be “highly probative” Mil. R. Evid. 608(c) evidence. *United States v. Solomon*, ARMY 20160456, 2019 CCA LEXIS 149, at *17, *18 (Army Ct. Crim. App. 2019) (mem. op.).¹³ Though █’s statement, “Fuck him, I’m going to take him for everything he’s got” is not clearly related to divorce, it is the most likely interpretation of her words.¹⁴ Alternatively, if not related to divorce, then █’s statement reveals a

¹³ Available at:

<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/237>

¹⁴ See also R. at 220–21 where defense counsel attempted to cross-examine KG on her motive to fabricate related to divorce. However, █ mostly deflected that line of questioning, making the statements defense counsel sought to elicit from █ █ that much more probative and important to evaluating █’s credibility. (R. at 220–21).

malicious intent to harm appellant in some other way. Either way, her statement was clearly relevant to the depth of her bias, especially in light of the preceding questions where Mr. █████ confirmed █████ had expressed that she was “upset with” appellant. (R. at 296). Therefore, this evidence was plainly admissible under Mil. R. Evid. 608(c).

3. Exclusion of the evidence prejudiced appellant because it prevented him from fully testing the credibility of the government’s lynchpin witness.

Finally, the exclusion of this evidence prejudiced appellant. Here, like in *Moss*, █████’s credibility “was at the heart of the [g]overnment’s proof of the charges.” 63 M.J. at 237; *see also United States v. Jasper*, 72 M.J. 276, 282 (C.A.A.F. 2013) (holding it was not harmless beyond a reasonable doubt when the military judge denied appellant the ability to present evidence of the “nefarious motivations” behind the alleged victim’s allegations). While the government offered limited supporting evidence for certain specifications, no reasonable fact-finder could convict appellant beyond a reasonable doubt without determining █████ was a credible witness.¹⁵ If the military judge allowed appellant to offer evidence showing the depth of █████’s bias and motive to fabricate, a reasonable fact-finder “might have reached a significantly different impression” of her credibility. *Moss*,

¹⁵ In fact, appellant was acquitted of two specifications of violations of Article 120, demonstrating there was some problem with KG’s credibility and an additional line of attack could have further damaged it beyond repair.

63 M.J. at 237. More importantly, the government cannot prove that the exclusion “played no role in the military judge’s” evaluation of [REDACTED]’s credibility and the evidence as a whole. *United States v. Long*, __ M.J. __, slip. op. at 13 (26 July 2021 C.A.A.F.).

After all, this court need not speculate on whether this additional evidence of her motive to fabricate would have flipped the entire case in appellant’s favor. In *Van Arsdall*, the Supreme Court held the focus of prejudice with regard to the Confrontation Clause is on the individual witness, not the overall outcome of the case. 475 U.S. at 680. Appellant’s Sixth Amendment right to confrontation is thus violated when he is prevented from pursuing questions that would “show a prototypical form of bias on the part of the witness.” *Id.* Appellant meets his burden if a reasonable fact-finder “might have received a significantly different impression of [a witness]’s credibility had [defense counsel] been permitted to pursue his proposed line” of questioning. *Id.*

While the military judge may limit “repetitive” or “confus[ing]” questions, the motive to fabricate excluded here does not fall into those categories. *United States v. James*, 61 M.J. 132, 136 (C.A.A.F. 2005). Even if defense counsel elicited other evidence of [REDACTED]’s motive to fabricate, no other witness testified to [REDACTED]’s statement, “Fuck him, I’m going to take him for everything he’s got.” (R. at

296).¹⁶ Nor is this statement confusing to the fact-finder or likely to take the testimony down a tangential path. *See James*, 61 M.J. at 136. The statement, on its face and without any additional context, makes it clear that ■ harbors significant resentment toward appellant beyond just their failed relationship. (R. at 296). Thus, the exclusion of ■'s statement prevented appellant from demonstrating the depth of ■'s motive to fabricate and the extent of the vindictiveness she harbored against appellant. This testimony may have tipped the scales against ■'s credibility, and the government cannot prove otherwise beyond a reasonable doubt.

Therefore, appellant requests that this court set aside the findings and the sentence.

III.

WHETHER THE POST-TRIAL PROCESSING DELAY WARRANTS RELIEF.¹⁷

Standard of Review

This court reviews de novo whether an appellant's due process right to a speedy post-trial review and appeal has been violated. *United States v. Moreno*, 63

¹⁶ Captain ■ did testify to speaking with ■ about spousal support, but the content and context of that conversation is not cumulative to the excluded statement in light of the intensity and exact content of the excluded statement. (R. at 309–10).

¹⁷ Additional relevant facts are contained within the Argument section below.

M.J. 129 (C.A.A.F. 2006). This court’s Article 66, UCMJ, sentence appropriateness review is also conducted de novo. *United States v. Roach*, 66 M.J. 410, 413 (C.A.A.F. 2008).

Law

1. The traditional *Moreno/Tardif* framework.

A convicted soldier’s right to due process includes a timely review and appeal of his conviction. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). “Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency.” *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38, at *3 (Army Ct. Crim. App 10 Feb. 2020) (summ. disp.) (quoting *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001)).¹⁸

In *Moreno*, the CAAF held there is a presumption of unreasonable delay if the convening authority does not take action within 120 days of the announcement of sentence. 63 M.J. at 142. A presumption of unreasonable delay also arises when it takes longer than thirty days to docket the case with this court once the convening authority takes initial action. *Id.*

¹⁸ Available at:
<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/3044>

When there is a presumptively unreasonable delay, this court conducts a due process review by analyzing the four factors set out in *Barker v. Wingo*, 407 U.S. 514 (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. No one factor is dispositive. *Id.* at 136.

Even if there is no due process violation, relief may be warranted under this court’s “broad authority of determining sentence appropriateness” under Article 66, UCMJ. *United States v. Pimental-Torres*, ARMY 20190044, 2020 CCA LEXIS 290, at *3 (Army Ct. Crim. App. 26 Aug. 2020) (summ. disp.)¹⁹ (citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)). Significant delays without explanation between key stages of post-trial processing are an appropriate basis for relief on this ground because they are “[i]ncidents of poor administration [that] reflect adversely on the United States Army and the military justice system.” *See United States v. Feeney-Clark*, ARMY 20180694, 2020 CCA LEXIS 256, at *2 (Army Ct. Crim. App. 29 Jul. 2020) (mem. op.)²⁰ (quoting *United States v. Carroll*, 40 M.J. 554, 557 n.8 (A.C.M.R. 1994)). Evidence of systematic or

¹⁹ Available at:

<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/2327>

²⁰ Available at:

<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/334>

widespread delays at a particular jurisdiction is another important consideration for granting *Tardif* relief. *See, e.g., Feeney-Clark*, 2020 CCA LEXIS 256 at *6-*7.

2. The post-MJA 16 framework.

The MJA 16 revised both the post-trial processing system and Article 66, UCMJ. Importantly, the order and timing of some of the major benchmarks of pre-MJA 16 post-trial processing established by *Moreno* have shifted. For example, whereas the convening authority's action used to be the final step in preparing the record for submission to this court, the action now precedes the transcription of the record. Since transcription is no longer required before action—and indeed, action is now discretionary—action under the new system occurs within days or weeks of sentencing, not months as under the old system.

Congress also amended Article 66(d), UCMJ. Article 66(d)(1) contains the statutory language about this court's mandate to affirm “only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.” This language is unchanged from the pre-MJA 16 version of the statute, indicating that this court retains its *de novo* power to “do justice” for an accused, even absent a due process violation. However, Congress added Article 66(d)(2), UCMJ, entitled “Error or Excessive Delay.” This new subsection permits this court to provide relief if the accused “demonstrates error or excessive delay in

the processing of the court-martial after the judgment was entered into the record.” By adding this additional subsection without changing any of the language of the pre-MJA 16 version of Article 66, Congress expanded this court’s discretion to grant relief for post-trial processing delay.

Following these changes, this court held in *United States v. Brown* that post-trial delay is presumed to be unreasonable “when more than 150 days elapse between final adjournment and docketing with this court.” 81 M.J. 507, 510 (Army Ct. Crim. App. 2021). This court reasoned that this “approach is faithful to the CAAF’s timelines established in *Moreno*.” *Id.*

Argument

Under any standard, this court should grant relief for the excessive post-trial delay in this case.

1. Appellant’s due process rights were violated.

The 248 days it took between action and docketing easily outstrips the 150-day standard in *Brown*. 81 M.J. at 510. Because the delay was presumptively unreasonable, this court should consider the remaining *Barker* factors, all of which weigh in appellant’s favor.

There is a post-trial chronology sheet in the record of trial, but the only explanation it offers for the delay is the nonsensical sentence, “Delay in courts-martial due to illness parties both government and defense for COVID-19 March

20 to September 20.” (Chronology Sheet). Even if this sentence is liberally interpreted as an explanation that both parties experienced delays due to illness as a result of COVID-19, this is an unsatisfactory explanation absent significantly more detail. Illness and quarantines may explain a slight delay, but not a 248-day delay.

Appellant also submitted a speedy post-trial demand on 23 November 2020. (Post-Trial Matters). Inexplicably, it still took another 238 days to get the record to this court. (Referral and Designation of Counsel). This means that more than 95% of the post-trial delay came after appellant demanded speedy post-trial processing of his 392-page record.

Finally, there is prejudice because appellant languished in confinement for a year while waiting for his opportunity to present his meritorious issues to this court. *See Moreno*, 63 M.J. at 139 (“[I]f an appellant’s substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive.”) (internal citation omitted). Particularly for someone sitting in confinement like appellant, justice delayed is justice denied.

2. Relief is warranted pursuant to Article 66(d)(2).

Article 66(d)(2) specifically authorizes this court to provide relief, without any additional showing, when there is “excessive delay in the processing of the court-martial after the judgement was entered into the record.” Here, the 192-day delay between entry of judgment and docketing at this court, by itself, surpasses

the 150-day standard outlined in *Brown*. 81 M.J. at 510; (Entry of Judgment; Referral Letter). Therefore, this court should grant appropriate relief pursuant to Article 66(d)(2).

3. Relief is warranted under *Tardif* because of the strain post-trial delay puts on the credibility of the military justice system and the systemic problems at this jurisdiction.

This court has Article 66, UCMJ, authority to “do justice” by approving only so much of the sentence that “should be approved.” Evidence of systemic delays in post-trial processing at a particular jurisdiction is grounds for relief, because “[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system.” *United States v. Reyes*, ARMY 20190261, 2020 CCA LEXIS 49, at *3 (Army Ct. Crim. App. 21 Feb. 2020) (summ. disp.) (quoting *United States v. Carroll*, 40 M.J. 554, 557 n. 8 (A.C.M.R. 1994)).²¹

This is not the first case out of Fort Stewart where there has been unreasonable post-trial delay. In *Reyes*, this court found relief was warranted because the 199 days that elapsed between sentencing and action, and the 91 days that elapsed between action and docketing at this court, were “patently unreasonable.” *Id.* at *1. More recently, this court granted similar relief in *Pimental-Torres*, another Fort Stewart case. 2020 CCA LEXIS 290, at *3.

²¹ Available at:
<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/319>

Granting relief would send a clear message that such delay is not tolerable, and would remind practitioners at Fort Stewart and beyond to “redouble their efforts to ensure that [post-trial] systems are in place to avert the creation of preventable appellate issues and litigation.” *United States v. Mack*, ARMY 20120247, 2013 CCA LEXIS 1016, at *7-*8 (Army Ct. Crim. App. 9 Dec. 2013) (summ. disp.)²² (Pede, C.J., concurring).²³

Therefore, appellant requests that this court reassess his sentence.

²² Available at:


<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/928>

²³ See also *United States v. Rock*, ARMY 20190738, 2021 CCA LEXIS 359 (Army Ct. Crim. App. 22 Jul. 2021) (Per Curiam) (Appellant raised the issue of post-trial delay out of Fort Stewart, but this court did not grant relief.)


<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/310>

Conclusion


For appellant's first two assignments of error, he requests this court set aside the findings and sentence. Alternatively, if this court holds that his first two assignments of error do not warrant the requested relief, he requests this court reassess his sentence due to the unreasonable post-trial delay.




THOMAS J. TRAVERS
CPT, JA
Appellate Defense Counsel
Defense Appellate Division



CHRISTIAN E. DELUKE
MAJ, JA
Branch Chief
Defense Appellate Division



DALE C. McFEATTERS
LTC, JA
Deputy Chief
Defense Appellate Division



MICHAEL C. FRIESS
COL, JA
Chief
Defense Appellate Division

APPENDIX A

**Executive Order 13825—2018 Amendments to the Manual for Courts-Martial,
United States**
March 1, 2018

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, Part III, and Part IV of the Manual for Courts-Martial, United States, are amended as described in Annex 1, which is attached to and made a part of this order.

Sec. 2. The amendments in Annex 1 shall take effect on the date of this order, subject to the following:

(a) Nothing in Annex 1 shall be construed to make punishable any act done or omitted prior to the date of this order that was not punishable when done or omitted.

(b) Nothing in Annex 1 shall be construed to invalidate the prosecution of any offense committed before the date of this order. The maximum punishment for an offense committed before the date of this order shall not exceed the maximum punishment in effect at the time of the commission of such offense.

(c) Nothing in Annex 1 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the date of this order, and any such nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action shall proceed in the same manner and with the same effect as if the amendments in Annex 1 had not been prescribed.

Sec. 3. (a) Pursuant to section 5542 of the Military Justice Act of 2016 (MJA), division E of the National Defense Authorization Act for Fiscal Year 2017, Public Law 114–328, 130 Stat. 2000, 2967 (2016), except as otherwise provided by the MJA or this order, the MJA shall take effect on January 1, 2019.

(b) Nothing in the MJA shall be construed to make punishable any act done or omitted prior to January 1, 2019, that was not punishable when done or omitted.

(c) Nothing in title LX of the MJA shall be construed to invalidate the prosecution of any offense committed before January 1, 2019. The maximum punishment for an offense committed before January 1, 2019, shall not exceed the maximum punishment in effect at the time of the commission of such offense.

(d) Nothing in the MJA shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to January 1, 2019. Except as otherwise provided in this order, the MJA shall not apply in any case in which charges are referred to trial by court-martial before January 1, 2019. Except as otherwise provided in this order, proceedings in any such case shall be held in the same manner and with the same effect as if the MJA had not been enacted.

Sec. 4. The Manual for Courts-Martial, United States, as amended by section 1 of this order, is amended as described in Annex 2, which is attached to and made a part of this order.

Sec. 5. The amendments in Annex 2, including Appendix 12A, shall take effect on January 1, 2019, subject to the following:

(a) Nothing in Annex 2 shall be construed to make punishable any act done or omitted prior to January 1, 2019, that was not punishable when done or omitted.

(b) Nothing in section 4 of Annex 2 shall be construed to invalidate the prosecution of any offense committed before January 1, 2019. The maximum punishment for an offense committed before January 1, 2019, shall not exceed the maximum punishment in effect at the time of the commission of such offense.

(c) Nothing in Annex 2 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to January 1, 2019. Except as otherwise provided in this order, the amendments in Annex 2 shall not apply in any case in which charges are referred to trial by court-martial before January 1, 2019. Except as otherwise provided in this order, proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been prescribed.

Sec. 6. (a) The amendments to Articles 2, 56(d), 58a, and 63 of the UCMJ enacted by sections 5102, 5301, 5303, and 5327 of the MJA apply only to cases in which all specifications allege offenses committed on or after January 1, 2019.

(b) If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority, in addition to the suspending authority in Article 60a(c) as enacted by the MJA, to the extent that Article 60:

(1) requires action by the convening authority on the sentence;

(2) permits action by the convening authority on findings;

(3) authorizes the convening authority to modify the findings and sentence of a court-martial, dismiss any charge or specification by setting aside a finding of guilty thereto, or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification;

(4) authorizes the convening authority to order a proceeding in revision or a rehearing; or

(5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

Sec. 7. The amendment to Article 15 of the UCMJ enacted by section 5141 of the MJA shall apply to any nonjudicial punishment imposed on or after January 1, 2019.

Sec. 8. The amendments to Articles 32 and 34 of the UCMJ enacted by sections 5203 and 5205 of the MJA apply with respect to preliminary hearings conducted and advice given on or after January 1, 2019.

Sec. 9. The amendments to Article 79 of the UCMJ enacted by section 5402 of the MJA and the amendments to Appendix 12A to the Manual for Courts-Martial, United States, made by this order apply only to offenses committed on or after January 1, 2019.

Sec. 10. Except as provided by Rule for Courts-Martial 902A, as promulgated by Annex 2, any change to sentencing procedures:

(a) made by Articles 16(c)(2), 19(b), 25(d)(2) and (3), 39(a)(4), 53, 53a, or 56(c) of the UCMJ, as enacted by sections 5161, 5163, 5182, 5222, 5236, 5237, and 5301 of the MJA; or

(b) included in Annex 2 in rules implementing those articles, applies only to cases in which all specifications allege offenses committed on or after January 1, 2019.

Sec. 11. The amendments to Article 146 of the UCMJ enacted by section 5521 of the MJA and the new Article 146a enacted by section 5522 of the MJA shall take effect on the day after the report for fiscal year 2017 required by Article 146(c) of the UCMJ (as in effect before the MJA's amendments) is submitted in accordance with Article 146(c)(1), but in no event later than December 1, 2018.

Sec. 12. In accordance with Article 33 of the UCMJ, as amended by section 5204 of the MJA, the Secretary of Defense, in consultation with the Secretary of Homeland Security, will issue nonbinding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to the disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34 of the UCMJ. That guidance will take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Federal Government with respect to the disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.

DONALD J. TRUMP

The White House,
March 1, 2018.

[Filed with the Office of the Federal Register, 11:15 a.m., March 7, 2018]

NOTE: This Executive order and its attached annex were published in the *Federal Register* on March 8.

Categories: Executive Orders : Courts-Martial, United States, Manual for, 2018 amendments.

Subjects: Armed Forces, U.S : Courts-Martial, United States, Manual for, amendments.

DCPD Number: DCPD201800129.

APPENDIX B

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, Private First Class (PFC) Willis A. Grant, through appellate defense counsel, personally requests this court consider the following matters:

- 1) Appellant's trial defense counsel were ineffective for repeatedly failing to object to inadmissible evidence and for recommending trial by military judge alone.**

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009); *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Law

The Sixth Amendment guarantees the right to effective assistance of counsel at trial. *United States v. Cronin*, 466 U.S. 648, 653-56 (1984). To prevail on a traditional claim of ineffective assistance of counsel, appellant must show both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *Strickland*, 466 U.S. at 687). In order to show deficiency in performance, an appellant must show that “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688–90; *see also United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2009) (Deficient performance requires appellant to show “specific defects in counsel’s performance that were unreasonable under prevailing professional norms.”). Even strategic, tactical, or

other deliberate decisions of counsel must be objectively reasonable based on counsel's perspective at the time of the conduct in question. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001) (citing *Strickland*, 466 U.S. at 688; *United States v. Marshall*, 45 M.J. 268, 270 (C.A.A.F. 1996)).

Under the prejudice prong, appellant must demonstrate “a reasonable probability that, but for counsel’s deficient performance the result of the proceeding would have been different.” *Datavs*, 71 M.J. at 420 (quoting *Strickland*, 466 U.S. at 694). Appellant need not “make an ‘outcome-determinative’ showing that ‘counsel’s deficient conduct more likely than not altered the outcome in the case.’” *United States v. Howard*, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 693). Rather, “the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694.

The ineffective assistance need not arise out of a single error, but the cumulative effect of numerous ones. *United States v. Loving*, 41 M.J. 213, 252 (C.A.A.F. 1994) (The C.A.A.F. analyzed “whether defense counsel’s conduct...might have been defective within the meaning of *Strickland*, even though individual oversights or mistakes standing alone might not satisfy *Strickland*.”)

Argument

a. Defense counsel failed to object to hearsay and improper bolstering.

The first occasion was during ■■■'s direct examination when, without objection, she testified about showing military officers her face and "told them what happened." (R. at 173). This is hearsay because it asks the panel to infer her words (an out of court statement offered for the truth of the matter asserted) to the military officers. More importantly, it was impermissibly bolstering her credibility with a prior consistent statement before an attack by defense counsel. *See* Mil. R. Evid. 801(d)(1)(B). This testimony came during her direct examination, and she was the first witness of the trial. Defense counsel not objecting allowed the government to smuggle in this improper credibility boost before the rules of evidence allow it.

Secondly, after the government introduced Pros. Ex. 1 (a text message conversation between appellant and ■■■) into evidence, the government smuggled in prejudicial hearsay statements through ■■■'s text messages. (R. at 186). The government is, of course, permitted to enter statements of the accused under Mil. R. Evid. 801. However, statements by ■■■ in the text conversation are only admissible if offered for a non-hearsay purpose such as being necessary to understand the words of the accused or if they meet another exception or exemption. The government exceeded this and began a line of questioning into

█'s words and what they meant. Defense counsel should have objected and asked the court to limit the extent to which █'s words could be considered in Pros. Ex. 1, but they did not do so. This prejudiced appellant by allowing the government to bolster █'s testimony with her words in real time that are not subject to any other hearsay exception or exemption.

b. Defense counsel failed to object to irrelevant aggravation evidence during the findings phase of trial.

Defense counsel was asleep at the wheel again during █'s testimony about her conversations with a retired MP. █, without objection, testified about her experience at a home for domestic violence victims and programs available to her. (R. at 183). This evidence is totally irrelevant for the findings phase of the trial. Defense counsel should have objected, but they did not. Instead, the fact-finder heard this prejudicial aggravation evidence, relevant under sentencing rules, but not for findings.

c. Defense counsel erred by recommending trial by military judge alone after the military judge's rulings on Mil. R. Evid. 412 and 413.

After the military's pro-government rulings related to Mil. R. Evid. 412 and 413, defense counsel should have been on notice that the military judge's objectivity was tainted, or, at least, he was not a sympathetic ear. (App. Ex. XXXIII-XXXIV (sealed)). Nevertheless, defense counsel still recommended

appellant be tried by military judge alone. (App. Ex. XLIII). This sort of advice is below an objective standard of reasonableness.

Therefore, this court should set aside the findings and sentence.

2) The military judge's findings are not factually sufficient.

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, [this Court is] convinced of [appellant’s] guilt beyond a reasonable doubt.” *Walters*, 58 M.J. at 395). Beyond those allowances, there is no deference to the trial court for factual sufficiency review. *United States v. Billings*, 58 M.J. 861, 867–68 (Army Ct. Crim. App. 2003). Rather, the evidence is given a “fresh, impartial look.” *Id.* at 867. This review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and subject to cross-examination. UCMJ, art. 66(c); *United States v. Bethea*, 46 C.M.R. 223, 224–25 (C.M.A. 1973); *see also United States v. Stokes*, 65 M.J. 651 (Army Ct. Crim. App. 2007) (discussing *Bethea*).

“In sum, to sustain appellant’s conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct.

Crim. App. 2005). The term “reasonable doubt” does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff’d*, 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean that the government must prove guilt of every element beyond “an honest, conscientious doubt” and beyond “mere conjecture.” R.C.M. 918c, Discussion.

Here, like in *Untied States v. Moss*, [REDACTED]’s credibility “was at the heart of the [g]overnment’s proof of the charges.” 63 M.J. 233, 237 (C.A.A.F. 2006). Defense counsel broke down and destroyed [REDACTED]’s credibility by eliciting testimony of her motive to fabricate, demonstrating she testified falsely on multiple occasions, and caller her on inconsistent statements.

a. [REDACTED] had a motive to fabricate and/or misrepresent.

[REDACTED] had a motive to misrepresent her allegations against appellant in light of her intent to divorce him. (R. at 220–21). Compounding this intent to divorce appellant was her complimentary desire to receive spousal support (of which transitional compensation is one form). (R. at 309). Finally, it is notable that the most serious allegations against appellant only arose after he retrieved his car from [REDACTED] on April 20, 2018 after he returned from Korea. (R. at 213, 288, 307, 308–11).

b. Defense counsel caught █████ in multiple lies.

i. KG lied about showing the photo that later became Pros. Ex. 2 to other people.

On cross-examination, █████ insisted she did not show the photo that later became Pros. Ex. 2 to anyone other than her mom, her grandparents, █████, “The people at Leavenworth,” and one girl at work. (R. at 217). She flatly denied showing other friends. (R. at 217). She even specifically denied showing it to █████. (R. at 218). However, during the defense’s case in chief, █████ testified that █████ showed him the photo that later became Pros. Ex. 2. (R. at 294).

ii. █████ lied about dating other people while separated from appellant.

On cross-examination, █████ claimed she did not see other people romantically while she and appellant were geographically separated. (R. at 212, 213). However, █████ testified that he witnessed █████ on dates with three individuals while separated from appellant. (R. at 271–72).

iii. █████ lied about when she reported her allegations to CID.

On cross-examination, █████ insisted that she never contacted the Army about spousal support, and it was months after appellant took back the car that she reported her allegations to the Army. (R. at 214–15). She could not have been more clear in her denial that it was not a week after appellant took the car. (R. at 215).

However, Captain [REDACTED], appellant's company commander, testified that he spoke with KG in early 2018, because she made an inspector general complaint against appellant about nonpayment of spousal support. (R. at 307–09). He also clearly testified that the investigation into the alleged sexual assaults and physical assaults began 27 April 2018, one week after appellant traveled home to retrieve his car from KG. (R. at 288–89; 310–11).

iv. KG lied about striking appellant.

On cross-examination, [REDACTED] was unequivocal that she did not strike appellant while he attempted to take back his car, and, in fact, had never stuck him period. (R. at 213–14). However, [REDACTED] testified that [REDACTED] struck appellant when he retrieved his car, and on more than one occasion prior to that. (R. at 293–94). [REDACTED] even testified that during the car incident, [REDACTED] struck appellant in the face and backed up the car into appellant. (R. at 278, 279). [REDACTED] also testified that he saw [REDACTED] “hitting Grant in the back” during a group trip to Jekyll Island. (R. at 254).

v. [REDACTED] lied about performing oral sex on appellant.

On cross-examination, [REDACTED] confirmed her accusation that appellant forced her to perform oral sex on him as charged in Specification 3 of Charge I. However, Pros. Ex. 1 is clear that she in fact refused to perform oral sex on appellant that night. (R. at 209–10; Pros. Ex. 1).

vi. ■■■ lied about getting drunk in Savannah.

On direct examination, ■■■ clearly stated she was not feeling the effects of alcohol on the night out with other couples in Savannah in the spring of 2017. (R. at 162). However, ■■■ testified that he observed ■■■ on that evening drinking alcohol, and she was visibly intoxicated. (R. at 250).

c. Defense counsel called ■■■ on inconsistent statements.

In a pre-trial interview, ■■■ first said, on one occasion, she laid down and allowed appellant to have sex with her out of fear. At trial, describing that same incident, she said that appellant held her down. (R. at 199). Finally, during trial, she did not testify to any “push” to prove up Charge II, Specification 3. (R. at 181).

The foregoing show that ■■■’s credibility was thoroughly decimated, and this court should exercise its powers pursuant to Article 66 and set aside the finding and sentence.

3) The military judge abused his discretion in multiple pre-trial rulings.

a. 412

This court reviews the military judge’s decision to exclude evidence under Mil. R. Evid. 412 or to admit evidence under Mil. R. Evid. 413, for an abuse of discretion. *United States v. Carpenter*, 77 M.J. 285, 288 (C.A.A.F. 2018); *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000). A military judge abuses his

discretion when his decision is “influenced by an erroneous view of the law.”

United States v. Kelly, 72 M.J. 237, 242 (C.A.A.F. 2013) (quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)).

Our highest legal authority, which cannot be contradicted or abridged by any statute or regulation, is the Constitution of the United States, which, in the Sixth Amendment, “guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The Sixth Amendment right to confrontation includes the right to cross-examine one’s accusers, even if that cross-examination might be unpleasant for the accuser. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011). The right to confrontation includes the right to impeach the accuser and to discredit her testimony. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

As the United States Court of Appeals for the Armed Forces noted in *United States v. Gaddis*, the constitutional right to present a defense always, necessarily, trumps any rule of evidence: “Although Congress has authorized the President to prescribe the rules of evidence for courts-martial, Article 36, UCMJ, 10 U.S.C. § 836 (2006), Mil. R. Evid. 412 cannot limit the introduction of evidence that is required to be admitted by the Constitution.” 70 M.J. 248, 253 (C.A.A.F. 2011).

When the military judge's evidentiary decision is a constitutional error, the burden is on the Government to show that the error was harmless beyond a reasonable doubt. *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016).

Military Rules of Evidence 412 and 413 have in common that they were enacted by the political branches of government to alter what evidence could and could not be admitted at criminal trials under the rules of evidence developed over time by the judicial branch in light of the constitutional rights of the accused.

In response to the proposed Mil. R. Evid. 413 and 414, which would change the rules applicable to trials depending on the nature of the accusation, the rules committee of the federal civilian judges noted in 1995:

[T]he new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.¹

Nevertheless, Congress enacted Fed. R. Evid. 413 and 414 as a part of the Violent Crime Control and Enforcement Act of 1994 (Pub. L. No. 103-322, §

¹ Judicial Conference of the United States, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 52 (1995), quoted in *United States v. Schroeder*, 65 M.J. 49, 55 (C.A.A.F. 2007).

320935(d)(2)), and the changes were formally enacted as military rules by Executive Order 13,086 in May 1998. *United States v. James*, 63 M.J. 217, 219 (C.A.A.F. 2006). With these changes, as the CAAF has stated, “the law of evidence entered uncharted territory” differing from the traditional understanding of the rights of the accused. *Id.*

In *Wright*, the CAAF noted that federal courts had upheld Rule 413 *because* Rule 403 balancing maintained the constitutional protection against being convicted on the basis of prejudicial evidence. 53 M.J. at 482. The balancing factors announced in *Wright* are constitutionally required, to protect the accused from admittance of evidence that would otherwise violate the Due Process clause of the Constitution. *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001).

In 2004, the CAAF decided *United States v. Banker*, 60 M.J. 216, a case in which the two issues on which the Court granted review focused on whether Mil. R. Evid. 412 applied to “consensual sexual misconduct.” 60 M.J. at 217. In the course of discussing the granted issues, the Court opinion distinguished between the balancing tests in Mil. R. Evid. 403 and the version of Mil. R. Evid. 412 in existence at that time. *Id.* at 223-24. The decision endorsed a balancing test for Mil. R. Evid. 412 in military trials that did not exist in criminal trials in federal civilian courts—and which the CAAF itself later realized was confusing and likely to cause

constitutional error. The CAAF in *Gaddis* said its analysis in *Banker* had been “simply wrong.” 70 M.J. at 256.

Tellingly, the Court of Appeals for the Armed Forces has not cited *Banker* even once, for any point of law, since it repudiated *Banker* in 2011. The service courts seem not to have noticed this scrupulous avoidance, and continue to cite *Banker* for various minor points of law for which other cases could be cited—and thus they dangerously keep in circulation a case that contains bad, outdated law on Mil. R. Evid. 412 balancing.

In *United States v. Ellerbrock*, in the same court term as *Gaddis*, the C.A.A.F. provided a three-part definition for the “constitutionally required” exception to Mil R. Evid. 412. 70 M.J. 314, 318 (C.A.A.F. 2011). If evidence is (1) relevant, (2) material, and (3) its probative value outweighs the dangers of unfair prejudice, then it is constitutionally required. *Id.* *Ellerbrock* provided additional clarity to these three parts to ensure that the balancing was properly conducted. First, “[r]elevant evidence is any evidence that has any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.” *Id.* (internal quotation omitted). Second, materiality is a “multi-factored test” which looks at “the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.” *Id.* (internal quotations

omitted). Third, the dangers of unfair prejudice “include concerns about harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Id.* at 319 (internal quotations omitted).

In this case, the military judge’s ruling on this question recited the correct *Gaddis* standard—but then the ruling concluded by reviving the error of *Banker*, thus showing that the *Gaddis* standard was not correctly applied. After citations to *Ellerbrock* and *Gaddis*, the military judge cited *Banker*. (App. Ex. XXXIII, pg. 2–3 (sealed)). This citation to an outdated case warrants this court setting aside the findings and sentence, at a minimum, as it relates to the Article 120 convictions. However, in light of it being impossible to tell how deeply this prejudicial ruling seeped in to the rest of the trial, this court should set aside the findings and sentence in total.

b. 413

Here, the military judge abused his discretion in evaluating the *Wright* factors. *See United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2007); (App. Ex. XXXIV (sealed)). The strength of the prior case was low, not high, as it was just a single witness’ word, and it occurred years prior when appellant was still in high school. (App. Ex. XXXIV, at 10–11). The judge couched the temporal gap as only six

years, but that is a huge amount of time in a young man's life. (App. Ex. XXXIV, at 11).

c. 701

The military judge abused his discretion by not ordering dismissal with prejudice in App. Ex. XXXV or otherwise denying the government from presenting evidence pursuant to Mil. R. Evid. 413. (App. Ex XXXV, at 1–3). The government should not be rewarded, and in fact, should have been sharply rebuked for their obstinacy, and the military judge erred by denying relief.

d. Expert witness

Here, the military judge erred by denying defense's expert witness because requiring defense counsel (lay people in the expert's field) to show why expert assistance would be helpful before the expert is even appointed is an impossible standard. *See* (App. Ex. IX, at 2–4).

In light of these abuses of discretion, this court should set aside the findings and sentence.

4) The threat appellant allegedly communicated was conditional and the finding of guilty was not legally sufficient.

The government elicited no evidence that would allow the factfinder to conclude appellant's conditional words would be objectively understood as a present determination or intent to injure ■■■ or her dogs. (Charge Sheet); *United States v. Shropshire*, 20 U.S.C.M.A. 374, 43 C.M.R. 214 (1971). Instead, the

government merely elicited testimony of ■■■'s subjective belief when appellant uttered the charged words. (R. at 172). KG even admitted appellant had never been violent toward ■■■'s animals irreparably undermining the credibility of the alleged threat. (R. at 172). She even admitted she did not see him with a weapon that day. (R. at 202). Therefore, this court should set aside the finding related to the Specification of Charge III.

5) Appellant was denied his right to a speedy trial.

Appellant's arraignment occurred on 19 March 2019. (R. at 1). However, the merits phase of his trial did not begin until 12 November 2020. This 20-month delay, mostly due to the government's obstinacy regarding production of his cell phone, caused appellant significant anxiety. (App. Ex. XXVI, at 2). Had the government simply complied with the military judge's order to make it available to the defense, the case would have gone to trial much sooner, and there would not have been so much turnover in the counsel and judges assigned to his case. (R. at 2, 10, 77, 135). Surely, a member of the public would look unfavorably on the revolving door of counsel and military judges assigned to this case, violating his due process rights, violating his right to a speedy trial, and harming the credibility of the military justice system as a whole.

Moreover, appellant spent this entire period restricted to the barracks without an escort, eroding his presumption of innocence and punishing him pre-

trial. This was on top of not being allowed to take leave from the moment he came under investigation, a full 2.5 years before trial. He also spent time in county jail for alleged offenses in Missouri, and the unit left him sitting there for 15 days because the jail would not release him without a unit representative.

Appellant also had eight months without pay before the finance discrepancy was resolved. Finally, appellant's medical condition caused him problems standing in formation, but the command did not appropriately weigh the severity of it. This ultimately resulted in appellant passing out in formation due to the command not taking his medical condition seriously.

Therefore, this court should set aside the findings and sentence and dismiss the charges and their specifications. Alternatively, this court should consider granting him confinement credit for the unreasonable and unreasonably lengthy restrictions prior to trial.

6) Appellant's confinement is being unlawfully increased because the alleged victim's statements are denying him parole.

The C.A.A.F. has held this court has the duty to resolve claims alleging legal error in post-trial confinement conditions. For example, in *United States v. White* and *United States v. Erby*, the C.A.A.F. rejected the Air Force Court's conclusion that it lacked jurisdiction to hear complaints about confinement conditions. 54 M.J. 469, 472 (C.A.A.F. 2001); 54 M.J. 476, 478 (C.A.A.F. 2001). Therefore, this court not only has jurisdiction to consider these types of errors, Article 66(c)

mandated that this court “ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials, and to ensure that the sentence is executed in a manner consistent with Article 55 and the Constitution.” *White*, 54 M.J. at 472; *see also Erby*, 54 M.J. at 478. And lest there be any further confusion about its holding, the C.A.A.F. “squarely held” that “the lower courts have the duty...to review whether the sentence imposed by a court-martial is being unlawfully increased by prison officials.” *White*, 54 M.J. at 475 (Sullivan, J., concurring); *Erby*, 54 M.J. at 478 (CCAs have “the *duty and the authority* under Article 66(c) to determine whether the sentence is ‘correct in law.’”)

In sum, this Court’s broad pronouncements surrounding the scope of Article 66(c) review, its cases dealing with matters personally raised by appellant, and its specific cases addressing post-trial confinement claims all suggests this court has the *duty* to consider appellant’s personal declaration that he has been denied parole, and the reason given to him was the content of the alleged victim’s statement. The fact that prison officials are allowing the alleged victim in this case to dictate the scope of his punishment, rather than a holistic view of his behavior in confinement is an unlawful increase of his punishment because it defers their power to the person most biased against appellant in the entire world. Therefore, this court

should do its own sentence reassessment to ensure appellant's confinement is not unlawfully increased any further.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on December 6, 2021.



MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736