

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20210322

Private First Class (E-3)

PHILIP D. SOLA

United States Army

Appellant

Tried at Fort Drum, New York, on
25 September 2020 and 8-9 April
2021, before a general court-martial
appointed by Commander,
Headquarters, Fort Drum, Colonel
James A. Barkei and Lieutenant
Colonel Troy Smith, military judges,
presiding.

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

THOMAS J. TRAVERS
MAJ, 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

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TO THE HONORABLE, THE JUDGES OF THE
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Assignments of Error¹

I.

**WHETHER THE MILITARY JUDGE ERRED IN
DENYING DEFENSE COUNSEL'S MISTRIAL
MOTION.**

II.

**WHETHER THE MILITARY JUDGE ERRED IN
FINDING PAGES 25 THROUGH 28 OF
PROSECUTION EXHIBIT 6 WERE
NONTTESTIMONIAL.**

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 A.

III.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING THE DOCTOR'S STATEMENTS IN PAGES 25 THROUGH 28 OF PROSECUTION EXHIBIT 6 PURSUANT TO MILITARY RULE OF EVIDENCE 803(4).

Statement of the Case

On 25 September 2020 and 8-9 April 2021, a military judge sitting as a general court-martial convicted appellant, Private First Class (PFC) Philip D. Sola, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 920 (2018). (R. at 301). The military judge sentenced appellant to be reduced to the grade of E-1, confined for twelve months, and dishonorably discharged from the service. (R. at 327). The convening authority approved the sentence on 15 June 2021. (Action). The military judge entered judgment on 22 June 2021. (Judgment of the Court). This court received and docketed the case on 18 October 2021. (Referral Letter).

Statement of Facts²

On 2 November 2018, [REDACTED]³ bought a bottle of tequila and posted a picture of it on Snapchat, a social media application. (R. at 29). After posting the picture, SPC [REDACTED], a fellow soldier and appellant's cousin

² Additional relevant facts are contained in their respective assignments of error.

³ [REDACTED] had left the Army by the time of trial so she is referred to as BH for the remainder of the brief.

and roommate, saw the post and suggested ■■■ should come over to their house for drinks. (R. at 29). ■■■ accepted his invitation and drove over to the house with her friend. (R. at 30). To that point on 2 November, ■■■ had not consumed any alcohol. (R. at 30).

When ■■■ arrived at the house, she and approximately five others, including appellant, began drinking. (R. at 31, 32). Appellant and ■■■ served in the same company and were acquaintances, but they had never socialized outside of work before this night. (R. at 29, 70). Shortly after they started drinking, ■■■ and appellant danced and kissed in the living room. (R. at 35). They both went upstairs to appellant's room and things progressed beyond kissing. (R. at 37). Eventually, they laid down on the bed, and ■■■ testified, "our pants came off." (R. at 37). ■■■ testified that she and appellant then began having consensual vaginal intercourse. (R. at 39).

After a short time, ■■■ testified that appellant penetrated her anus with his penis, in multiple sexual positions, even after she expressed her displeasure. (R. at 40, 42–43). Appellant disputes that he and ■■■ had anal sex at all. (Prosecution Exhibit (Pros. Ex.) 7–8). Pros. Ex. 12 only confirms male DNA found on ■■■'s anus, not in her rectum. (Pros. Ex. 12, p. 3–5, Pros. Ex. 13, p. 2).

After ■■■ and appellant stopped having sex, ■■■ left the bedroom, claimed appellant sexually assaulted her, and left the party. (R. at 50–51). That same

night, after her outcry to her friend JW, JW drove [REDACTED] to the military police station on Fort Drum. (R. at 6162). BH then went to Samaritan Hospital in Watertown, New York where she met with a New York State Police investigator and a doctor examined her. (R. at 62, 110, 156).

I.

WHETHER THE MILITARY JUDGE ERRED IN DENYING DEFENSE COUNSEL'S MISTRIAL MOTION.

Additional Facts

The military judge closed the court to deliberate on his finding at 1518 on 9 April 2021. (R. at 300). In addition to deliberating on the finding, he had numerous pieces of evidence to review, which had not been published during trial. The only exhibits published during the presentation of evidence were Pros. Ex. 1, a video lasting only a few seconds and Pros. Ex. 17, a demonstrative exhibit.⁴ (R. at 33, 219).⁵ Furthermore, the only exhibits published during the government's closing argument were Pros. Ex. 3, which is a single picture of [REDACTED]'s tampon in appellant's trash can (R. at 280); select excerpts from Pros. Ex. 7 and 8, which are

⁴ A photograph is substituted in the record for this demonstrative exhibit.

⁵ At one point, the government stated that they intended to publish Pros. Ex. 10, but only to the military judge and defense counsel due to the graphic nature of the photos, but the record does not reflect that the photos were officially published after the government actually admitted the exhibit. (R. at 211, 227, 228).

appellant's interviews with law enforcement (R. at 281–83); and Pros. Ex. 13, the forensic scientist's two-page stipulation of expected testimony (R. at 283).^{6 7}

The rest of the admitted evidence consisted of the following:

- (a) Pros. Ex. 2 is two pages of text message screen shots between [REDACTED] and another witness.
- (b) Pros. Ex. 6 is fifty-six pages of medical reports, of which fifty-one pages were admitted into evidence. (R. at 197–202).
- (c) Pros. Ex. 7–8 are appellant's complete interviews with law enforcement.
- (d) Pros. Ex. 9 is the government expert witness' two-page curriculum vitae.
- (e) Pros. Ex. 10 is a packet of twenty-three photos, of which twenty were admitted into evidence. (R. at 139–40).⁸
- (f) Pros. Ex. 11 is a packet of thirteen photos of [REDACTED]'s clothed body and face.
- (g) Pros. Ex. 12 is a stipulation of admissibility and seven pages of a lab report.

⁶ The record is unclear as to whether the judge reviewed the DNA report (Pros. Ex. 12) or the stipulation of expected testimony (Pros. Ex. 13) at this point because the military judge asked for the DNA report, but the record shows that the court reporter handed him Pros. Ex. 13. (R. at 283–84).

⁷ The government never read this stipulation into the record when they admitted it, and it appears it went to the deliberation room with the military judge in violation of R.C.M. 811(f). (R. at 270).

⁸ Notably, one of the photos excluded, photo twenty of twenty-three, is still in the packet of admitted photos in the hard copy of the record of trial. (Pros. Ex. 10).

The total run time of Pros. Ex. 7 and 8 is over three hours. Even excluding the recorded periods for introductions, biographical data, rapport building, the signing of consent forms, reading of rights, buccal swabbing, and when the interview room was completely empty or when the appellant sat in the interview room alone, there were still approximately seventy-four minutes and fifty-four seconds of recorded interview questions and appellant's answers about the incident in question.

Added together, this amounts to approximately seventy-five minutes of video, thirty-five pictures, and sixty-one pages of documents that the military judge had to review during his deliberations. Yet, after closing the court at 1518 on 9 April 2021 to begin deliberating, the military judge delivered his finding just sixty minutes later, at 1618.

Before the court-martial adjourned, trial defense counsel moved for a mistrial because Pros. Ex. 7 and 8 take at least an hour to view and "contain evidence favorable to defense." (R. at 327). The military judge denied the motion for mistrial stating that he had "adequate opportunity to deliberate" and that "the trial counsel had asked the Court to listen to specific portions of the video. The Court listened to those portions...[and] significantly more portions of the video that the Court deemed relevant." (R. at 328). The military judge went on to cite

the “downtime in the video,” “rapport building,” and “so on and so forth.” (R. at 329).

Despite the denial of the mistrial motion, defense counsel continued to argue that the videos comprising Pros. Ex. 7 and 8 were admitted in their entirety, and defense counsel referenced portions of the interviews in its closing as well, although without time hacks. (R. at 329). Defense counsel explained that because the military judge acknowledged he indeed did not view the admitted evidence in its entirety, there is “substantial doubt as to the fairness of the proceeding.” (R. at 330). Once again, the military judge denied the motion for mistrial, stating this time that he “considered everything requested by both parties.” (R. at 330).

Standard of Review

A military judge’s decision on whether to grant a motion for mistrial is reviewed for “clear evidence of abuse of discretion.” *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). “‘A military judge has discretion to ‘declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.’” *United States v. Commisso*, 76 M.J. 315, 320–21 (C.A.A.F. 2017) (quoting *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013) (quoting Rule for Courts-Martial (R.C.M.) 915(a)). A military judge abuses his discretion by “predicating his ruling on findings of fact that are not supported

by the evidence of record,” using “incorrect legal principles,” applying “correct legal principles to the facts in a way that is clearly unreasonable,” or failing “to consider important facts.” *Id.* at 321 (citing *United States v. Solomon*, 72 M.J. 176, 180–81 (C.A.A.F. 2013); *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010)).

Law

When the circumstances casting doubt upon the fairness of the proceedings are the military judge’s own actions or inaction, “the test is whether, taken as a whole in the context of this trial, a court-martial’s legality, fairness, and impartiality were put into doubt by the military judge’s actions.” *United States v. Martinez*, 70 M.J. 154, 157–58 (C.A.A.F. 2011) (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). “The appearance of impartiality is reviewed on appeal objectively and is tested under the standard set forth in *United States v. Kincheloe*, i.e., ‘any conduct that would lend a reasonable man knowing all the circumstances to the conclusion that the judge’s impartiality might reasonably be questioned is a basis for the judge’s disqualification.’” *Id.* at 158 (quoting 14 M.J. 40, 50 (C.M.A. 1982)); *see also* R.C.M. 902(a) (“a military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.”)

In addition to considering R.C.M. 902 and Article 59(a) of the UCMJ⁹, military courts have adopted the standards set forth in *Liljeberg v. Health Servs. Acquisition Corp.* to evaluate a military judge’s behavior. *United States v. Butcher*, 56 M.J. 87, 92 (C.A.A.F. 2001) (citing 586 U.S. 847, 864 (1988)); *United States v. Hannah*, ARMY 20190514, 2021 CCA LEXIS 192, at *35–*36 (Army Ct. Crim. App. 19 April 2021) (mem. op.)¹⁰. Importantly, reversal under *Liljeberg* does not require prejudice under Article 59(a). *Hannah*, 2021 CCA LEXIS at *35–*36 (citing *United States v. Black*, 80 M.J. 570, 574–75 (Army Ct. Crim. App. 2020)); *see also Martinez*, 70 M.J. at 158–59. In *Liljeberg*, the Supreme Court held it was “appropriate to consider [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public’s confidence in the judicial process.” 586 U.S. at 864.

“Allegations of partiality must be supported by facts or ‘some kind of probative evidence’ which would warrant a reasonable inference of lack of impartiality on the judge’s part.” *Hannah*, 2021 CCA LEXIS 192, at *35 (quoting

⁹ The law is unsettled whether this court must conduct an Article 59(a) analysis for military judge bias issues, but for the purposes of this brief, because the prejudice is so clear under any standard, appellant will proceed as if it is required. *See United States v. Uribe*, 80 M.J. 442, 449 (C.A.A.F. 2021); *see also United States v. Upshaw*, 81 M.J. 71, 79 (C.A.A.F. 2021) (J. Maggs, dissenting).

¹⁰ Available at <https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/234/>

Kincheloe, 14 M.J. at 50). Enforcing this standard “ensure[s] confidence in the fairness of the proceedings, ‘because in matters of bias, the line between appearance and reality is often barely discernible.’” *Id.* at *36 (quoting *Butcher*, 56 M.J. at 90). In *Hannah*, this court specifically held that the military judge’s harsh and disparate treatment of a defense counsel on the record created “an intolerable risk of undermining public confidence in the military justice system” and set aside the finding and sentence. *Id.* at *42–*43.

This court also overturned a string of cases for a judge’s inappropriate relationship with a trial counsel’s wife and his nondisclosure of that conduct, holding that the judge’s conduct “erodes public confidence in the judiciary and the military justice system.” *United States v. Springer*, 79 M.J. 756, 761 (Army Ct. Crim. App. 2020); *see also United States v. Rudometkin*, ARMY 20180058, 2021 CCA LEXIS 596, at *18–*19 (Army Ct. Crim. App. 9 Nov. 2021) (mem. op.)¹¹ (cert. of rev. filed 3 Feb. 2022); *United States v. Lopez*, ARMY 20170386, 2020 CCA LEXIS 161, at *13–*14 (Army Ct. Crim. App. 11 May 2020) (mem. op.).¹²

Finally, this court has held that the factfinder cannot “re-deliberate” once findings have been announced, thus limiting the remedies available when there is evidence of unfairness during deliberations. *United States v. Chandler*, 74 M.J.

¹¹ Available at <https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/387>

¹² Available at <https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/271>

674, 684 (Army Ct. Crim. App. 7 Apr. 2015) (“One cannot reasonably expect panel members to set aside their original findings and deliberate anew...it is far more likely that the panel would simply validate its earlier findings of guilt... Instead, we conclude the military judge erred in directing a proceeding in revision for the purposes of correcting erroneous instructions and directing the same panel to deliberate again.”); *see also United States v. Shahan*, ARMY 20160776, 2016 CCA LEXIS 740, at *16 (Army Ct. Crim. App. 23 Dec. 2016) (mem. op.)¹³ (Returning the case to the military judge to determine whether to declare a mistrial after this court held that the military judge is not permitted to correct an erroneous instruction and allow the panel to re-deliberate after issuing findings.); *United States v. Flores*, 80 M.J. 501, 508 (C.G. Ct. Crim. App. 1 Jun. 2020) (Holding the military judge did not abuse his discretion for declaring a mistrial after the “lid was blown off” the proceedings because the members received exhibits with inadmissible and highly prejudicial evidence that they had considered while starting to process evidence.)

¹³ Available at <https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/1814>

Argument

1. The military judge refused to review and weigh all the evidence, which materially prejudiced appellant's substantial right to a fair trial; therefore, the military judge erred by failing to grant defense counsel's motion for a mistrial.

a. The military judge erred by not granting a mistrial even after he admitted that he did not review all the evidence.

In this case, “the military judge’s impartiality might reasonably be questioned” because he conceded that he did not review all the evidence admitted in this case. R.C.M. 902(a); (R. at 328). The military judge had to review some unpublished evidence throughout the trial in order to rule on objections, so it is conceivable that he knew the exact portions of Pros. Ex. 2, 3, 6, 10, and 13 that were critical to his deliberations. However, in addition to those exhibits, to fully and fairly deliberate, he also had to consider the other unpublished exhibits: Pros. Ex. 7, 8, 9, 11, and 12. After all, deliberations “should include a full and free discussion of *all* the evidence that has been presented.” Department of the Army Pamphlet 27-9, Military Judge’s Benchbook (Benchbook), para. 2-5-14, p. 68–69 (29 February 2020) (emphasis added).

Prosecution Exhibits 7 and 8 loom particularly large. These exhibits were not published other than a few government-selected snippets presented in closing argument. Uncut, these exhibits are over three hours long and contain almost seventy-five minutes of appellant’s statements to law enforcement about the

alleged sexual assault. Even if the military judge reviewed the “relevant” portions, that would have taken at least seventy-five minutes because an impartial judge has to watch the entire interrogations to discern what portions are relevant. (R. at 328). Though the government provided specific time hacks for what it believed to be the most favorable portions for its case, even the trial counsel urged the military judge to watch the entire video, stating “you should be watching – obviously, watching the whole video.” (R. at 119, 289–92). Defense counsel also referenced the video interviews throughout her closing, but she did not provide specific time hacks believing the whole video was relevant to the defense’s case. (R. at 295–96, 330).

These two interviews were the sum and substance of the defense case, as the defense did not put on a case-in-chief and appellant did not testify. (R. at 272). The military judge could not possibly have fairly weighed the strength of the defense’s case against the government’s without watching the entire interviews. The defense relied on those exhibits just as much as the government, as discussed further below.

b. Compounding his failure to review all the admitted evidence, the military judge erred by not granting a mistrial because he could not have fairly deliberated in sixty minutes.

Aside from reviewing the evidence, the military judge still had to fully and fairly deliberate on the ultimate question of whether the government proved its case beyond a reasonable doubt or whether there was a “reasonable hypothesis

other than that of guilt.” *United States v. Hanabarger*, 2020 CCA LEXIS 252, at *34 (N-M.C.C.A. 30 July 2020)¹⁴; R.C.M. 918(c) Discussion. And, this was a close case. The military judge had to make tough credibility determinations, assess conflicting evidence on whether anal penetration even occurred, and resolve inconsistencies.

A complete review of the record in this case demonstrates both appellant’s and ■■■’s versions of the incident had inconsistencies. For ■■■’s part, she first testified she went upstairs with appellant specifically to have sex, but later testified she wanted to see “how far it would go.” (R. at 36, 88). She also said multiple times that “our pants came off,” minimizing her role in the interaction. (R. at 37, 88). She also left out details in her initial outcry that she testified to at trial. (R. at 79–83).

More importantly, some of ■■■’s story lacked credibility and made no sense whatsoever. To fully endorse ■■■’s credibility is to believe she had nothing to drink before she arrived at the party between 2200 and 2245 hours on 2 November

¹⁴ Available at <https://plus.lexis.com/document/teaserdocument/?pdmfid=1530671&crid=a9a188a6-388c-4688-a3fd-b549818c3b21&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A60G9-N9C1-JW09-M000-00000-00&pddocid=urn%3AcontentItem%3A60G9-N9C1-JW09-M000-00000-00&pdcontentcomponentid=7814&pdteaserkey=h1&pdislpamode=false&ecomp=f4k&earg=sr0&prid=e5f0194c-f42c-4a58-b86a-1a4a17341b13>

(R. at 30, 68), and then drank 10-15 shots (seemingly 15 based on her saying she drank 13 shots of whiskey and two shots of tequila). (R. at 69). Her binge came after not drinking for two months (R. at 91), and she drank those 15 shots in 30 minutes because she went upstairs with appellant about 30 minutes after arriving. (R. at 86). Yet, despite only weighing 140 pounds and consuming 15 shots of hard liquor within 30 minutes, she maintained steady control of her faculties for the remainder of the evening, with observers only noting some slight signs of intoxication. (R. at 69, 86, 91–92, 163–65).

■ also claimed appellant was holding her in place but also flipping her around while he was forcing her to have anal sex. (R. at 42–43, 74). She even claimed that she was on top of him as he was penetrating her anus against her will. (R. at 43). Yet, according to ■, “he eventually stopped and got up,” without leaving any DNA in her rectum. (R. at 46; Pros. Ex. 12, 13).

■ then claimed appellant took her underwear, “put it in his pocket,” and absconded with it, hiding in the closet while she wanted to get dressed. (R. at 47–48). However, appellant denied this, and Investigator ■ confirmed appellant did not have a walk-in closet in which he could comfortably hide. (R. at 168, Pros. Ex. 7, at 37:09–38:08, Pros. Ex. 8, at 43:12–45:00). Investigator ■ further testified that the closet was in an organized condition, not as if someone had squeezed in

and been hiding in it recently. (R. at 168). Therefore, ■■■'s credibility was significantly damaged during the trial.¹⁵

For appellant's part, the government attempted to highlight his inconsistent statements. However, in his second interview with law enforcement, appellant clarified that the girlfriend he mentioned in his interview with Investigator ■■■ was actually his ex-girlfriend with whom he was trying to reconcile. (*Compare* Pros. Ex. 7, at 7:13–8:07; Pros. Ex. 8, at 30:33, 36:13–37:00). Appellant also resolved confusion about when and how exactly ■■■ followed him upstairs. (*Compare* Pros. Ex. 7, at 7:13–8:07; Pros. Ex. 8, at 27:58–28:38). Finally, he was inconsistent about whether ■■■ said anything during the sexual intercourse. (*Compare* Pros. Ex. 7, at 39:19–40:00; Pros. Ex. 8, at 32:24).

However, he was consistent about two important details: 1) he is not interested in having anal sex at all; and 2) he did not have anal sex with ■■■. (R. at 170; Pros. Ex. 7, at 28:34–30:00; Pros. Ex. 8, at 31:35–32:08, 1:44:20–1:45:10). The DNA evidence also supports that assertion. Although there was male DNA found on ■■■'s anus (meaning the outside of her body) and in her vagina, there was no DNA found *in* her rectum. (Pros. Ex. 12, 13). Notably, ■■■ confirmed she had

¹⁵ The government did enter evidence that there were injuries to ■■■'s anus and rectum, but even the government expert admitted those injuries could have been caused by some other means, including something as benign as a large bowel movement. (R. at 244, 261).

not defecated following the alleged anal sex, which, had she done so, could have expelled the DNA from her rectum. (R. at 81).

Even the government's claim that appellant admitted to anal penetration during his second interview is not the trump card the trial counsel portrayed. (R. at 283). The trial counsel read an out-of-context quote with a time hack claiming appellant admitted to anal penetration, but at that point in the interview, appellant was talking about not knowing anal penetration had anything to do with his sexual encounter with ■■■ until Investigator ■■■ told him that was part of the allegation. (Pros. Ex. 8, at 31:33). Appellant was clear ■■■ attempted to direct his penis into her anus, but appellant did not have anal sex with her, and he is not interested in anal sex. (Pros. Ex. 8, at 31:35–32:20). In context, appellant's comment, "I guess there was some time it went inside," is not an admission, but merely an acknowledgement of ■■■'s accusation. (Pros. Ex. 8 at 31:55).

At the end of the interview, when law enforcement directly asked appellant, "Did your penis go into her anus," appellant said, "I'm not an anus guy. I find that nasty...If my penis ended up there, it could have been a slip up." (Pros. Ex. 8, at 1:44:20–1:45:10). If appellant had made the admission the government at trial claimed earlier in the interview, law enforcement's direct question, "Did your penis go into her anus" would have been completely unnecessary, and the interviewer would almost have certainly confronted appellant's denial with the

prior “inconsistent statement.” But that did not happen. Appellant’s statement was consistent that he did not penetrate ■■■’s anus with his penis.¹⁶

c. The military judge’s inadequate deliberations materially prejudiced a substantial right of the accused.

Ultimately, the military judge failing to take the time to reconcile the conflicting evidence in the case and view all of the admitted exhibits materially prejudiced appellant’s substantial right to a fair trial. Article 59(a); *United States v. Vazquez*, 72 M.J. 13, 20 (C.A.A.F. 2013) (“It is elementary that a fair trial in a fair tribunal is a basic requirement of due process.”) (internal quotations omitted). Broken down, it is objectively impossible that the military judge left the bench, returned to chambers, logged on to a computer, inserted two separate discs, opened the files, watched seventy-five minutes of video, reviewed the other unpublished exhibits, weighed inconsistencies and witness credibility, fairly deliberated, determined any flaws in the government’s case did not rise to the level of reasonable doubt, and returned to the bench to deliver a guilty finding in sixty minutes without there being material prejudice to appellant’s substantial right to a fair trial.¹⁷ Finally, because he could not redeliberate after he delivered his verdict

¹⁶ For the foregoing reasons, this court also has grounds for holding the finding legally and factually insufficient, as appellant personally asserts in his matters pursuant to *Grostepon*.

¹⁷ One could posit that the military judge watched the exhibits at 1.5x or 2x speed, but the record is clear that he did not. The defense counsel moved for a mistrial based on the impossibility of him watching both exhibits in their entirety, and the

and defense counsel objected to his unfair hastiness, he abused his discretion by not granting defense counsel's motion for a mistrial. *See Chandler*, 74 M.J. at 684.

2. Even if this court holds there was no error pursuant to R.C.M. 902 and Article 59(a), UCMJ, the military judge still should have declared a mistrial based on the *Liljeberg* factors.

Turning next to the *Liljeberg* factors, based on the aforementioned facts of this case, affirming the military judge's decision not to grant a mistrial would be an injustice to appellant. 586 U.S. at 864. Appellant was found guilty and completed his entire term of confinement despite the record proving that the factfinder did not consider the entirety of the evidence. (R. at 328).

Moreover, the military judge's admission that he did not review appellant's entire statements shows disparate treatment of evidence specifically favorable to appellant. (R. at 328). The military judge, perhaps realizing that he grievously erred, tried to minimize the disparate treatment. When first confronted with the impossibility that he reviewed all the evidence during the short time he deliberated, the military judge said that he watched the clips highlighted for him by the government and other portions he deemed relevant. (R. at 328). But he didn't mention the portions defense counsel highlighted. Only after defense counsel

military judge admitted that he did not. (R. at 328). If he watched them at 1.5x or 2x speed, he had the opportunity to explain that as part of his ruling on defense counsel's motion, but he simply admitted the truth; he did not watch the complete exhibits. (R. at 328).

challenged him on this point, did the military judge claim that he considered those portions highlighted by defense as well. (R. at 330).

Not only did this have a palpable impact on appellant's case, but affirming the military judge's failure to review the evidence favorable to an accused would create "an intolerable risk of undermining public confidence in the military justice system." *Hannah*, 2021 CCA LEXIS 192, at *42–*43. Though lacking affidavits from trial observers like in *Hannah*, such affidavits are not required as appearance of impartiality is reviewed objectively. *Martinez*, 70 M.J. at 158. In this case, viewed objectively, surely the military judge's careless deliberations, the impossibility that he reviewed all the evidence, and his admission that he did not review the entirety of the evidence would "erode[] public confidence in the judiciary," as well as military justice overall. *Springer*, 79 M.J. at 761.

In ruling on defense counsel's motion for mistrial, the military judge did not conduct any of the above analysis. Therefore, his ruling not to declare a mistrial is not entitled to deference, and it is impossible for this court to determine whether he had clearly erroneous findings of fact, applied incorrect legal principles, or applied correct legal principles unreasonably. *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014); *Commisso*, 76 M.J. at 321. For these reasons, this court should hold that the military judge erred in denying appellant's motion for mistrial and set aside the finding and the sentence.

II.

WHETHER THE MILITARY JUDGE ERRED IN FINDING PAGES 25 THROUGH 28 OF PROSECUTION EXHIBIT 6 WERE NONTESTIMONIAL.

Additional Facts¹⁸

On the night of ■■■'s allegations, JW picked her up from the party. (R. at 51). BH made statements that caused JW to bring ■■■ to the military police station on Fort Drum where JW reported ■■■'s allegations. (R. at 61–62, 104–05). Later, after the initial report to law enforcement, ■■■ went to the hospital. (R. at 62). While at the hospital, Investigator ■■■, the lead investigator from the New York State Police, interviewed ■■■. (R. at 110, 156–57). Though he did not stay in the room for the sexual assault exam itself, it is clear that this was a police matter prior to any medical examination. ■■■ reported her allegations to the military police before she ever went to the hospital, and she spoke with Investigator ■■■ immediately preceding the sexual assault exam. (R. at 61–62, 157; Pros. Ex. 6, p. 35).

The form the hospital used to document the exam is titled “Emergency Medical Record Reported Sexual Assault.” (Pros. Ex. 6, p. 25). The first page of the form (Pros. Ex. 6, p. 25) consists mostly of the purported victim’s symptoms

¹⁸ These facts are also relevant to Assignment of Error III, below.

and medical history. The second page is more of the same but also includes the doctor's narrative with his diagnoses and the results of an anoscope exam.¹⁹ (Pros. Ex. 6, p. 26). The doctor did not write on Page 3 other than his signature and the time. (Pros. Ex. 6, p. 27). Page 4 contains the patient's prescriptions, the doctor's "clinical impression," and his recommendation for whether the patient should be admitted or not. (Pros. Ex. 6, p. 28). Other hospital records within Pros. Ex. 6 also specifically note that the hospital contacted the New York State Police prior to the sexual assault examination (even though [REDACTED] went to the hospital from the military police station), and state police officers visited [REDACTED] at the hospital where she signed a form consenting to the release of her medical examination results to the state police. (Pros. Ex. 6, p. 10, 33, 35).

The physician who conducted the examination did not testify at trial because he was deceased at that time. (R. at 146). Therefore, the government first sought to admit the medical records using a self-authenticating affidavit, but the military judge sustained defense counsel's objection. (R. at 196). Next, the government sought to admit the medical records through a hospital records custodian. (R. at 196). Ultimately, the military judge admitted most of the medical records under exceptions to the hearsay rule, excluding page 34, portions of page 41, and pages

¹⁹ An anoscope is a medical device used to examine a patient's rectum by inserting the device into the rectum through the anus. (R. at 216, 220).

53–56. (R. at 196–02). He specifically admitted pages 25–28 based on Military Rule of Evidence (Mil. R. Evid.) 803(4). (R. at 199–200). He ruled that this evidence was nontestimonial because the *Rankin* factors “tipped the scales” in favor admissibility. (R. at 197–98, 199).

Standard of Review

Whether a statement is inadmissible testimonial hearsay is a question of law reviewed de novo. *United States v. Squire*, 72 M.J. 285, 288 (C.A.A.F. 2013). This is a constitutional error; therefore, in order to affirm the finding and sentence, the government must prove the error was harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458, 462–63 (C.A.A.F. 2019).

Law

The Sixth Amendment requires that the accused be confronted with the witnesses against him, unless the declarant is unavailable and the accused had a prior opportunity to cross-examine that witness. *United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)). To determine whether a statement is testimonial and thus covered by the Sixth Amendment, this court weighs “whether it would be reasonably foreseeable to an objective person that the purpose of any individual statement . . . is evidentiary, considering the formality of the statement as well as the knowledge of the declarant.” *Id.* at 121 (internal quotations omitted).

Core examples of testimonial evidence include “1) ex parte in-court testimony such as affidavits, custodial interrogations, prior testimony that the accused was not able to cross-examine, or ‘similar pretrial statements that declarants would reasonably expect to be used prosecutorially’; 2) extrajudicial statements in formalized trial materials; and 3) ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007) (quoting *Crawford*, 541 U.S. at 51–52).

Rankin also established several factors that “would cause an objective witness to reasonably believe that the statement would be available for use at a later trial.” *Id.* at 352. The first is whether the statement at issue was “elicited or made in response to law enforcement or prosecutorial inquiry.” The second is whether the statement involved “more than a routine and objective cataloging of unambiguous factual matters.” The third and final factor is whether “the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial.” *Id.* Notably, this third factor is based on context. It is not a “bright line threshold[.]” *Id.*

In *United States v. Gardinier*, the Court of Appeals for the Armed Forces (C.A.A.F.) held that the victim’s statements to a sexual assault nurse examiner (SANE) were testimonial hearsay. 65 M.J. 60, 65 (C.A.A.F. 2007). The court

determined “on balance” the victim’s statements were “in response to law enforcement inquiry with the primary purpose of producing evidence with an eye toward trial.” *Id.* at 66. The court highlighted the following facts as determinative: 1) the SANE conducted the exam in her role as a forensic examiner for a child advocacy center; 2) the form she used was titled “*Forensic* Medical Examination Form” (emphasis added); 3) the SANE referred to the report as the “medical legal record;” 4) the SANE asked the victim, “Can you tell me what you talked about with...the policeman?”; 5) the sheriff’s office arranged and paid for the SANE to do this examination; 6) the examination consent form stated the medical report would be provided to law enforcement; and 7) the government introduced the form through the SANE, who the government retained as their expert for trial. *Id.*

On the other hand, in *Baas*, the C.A.A.F. struck the balance the other way, holding a third party lab’s statements were diagnostic and not testimonial. 80 M.J. at 121. In *Baas*, the court reasoned there was no law enforcement involved with the lab at that point in the process. *Id.* Rather, medical professionals sent the victim’s sample to the lab to test for sexually transmitted infections for treatment purposes. *Id.* The doctor in the case confirmed she had no interaction with law enforcement at all. *Id.* And finally, “the test result itself lacks any indicia of the formality or solemnity characteristic of testimonial statements” because there was no sworn attestation or expression that the test would be later used for evidence in

a legal proceeding. *Id.* at 122. The court specifically distinguished *Baas* from *Gardinier* because, in *Gardinier*, “the SANE examined the victim several days after her initial medical examination and the sheriff’s office had arranged and paid for the SANE’s examination.” *Id.* at 121.

Notably, the C.A.A.F. has been clear that neither law enforcement referring an alleged victim to a medical professional, nor the medical professional’s knowledge that the exam results would likely be used in court, are determinative on whether a statement is testimonial. *Baas*, 80 M.J. at 122; *Gardinier*, 65 M.J. at 66. Both are merely factors weighed in the totality of the circumstances.

Argument

The testimonial and prejudicial statements at issue in this case are the physician’s statements and notes recorded on a Samaritan Medical Center form titled “Emergency Physician Record Reported Sexual Assault.” (Pros. Ex. 6, p. 25–28). On balance, this case is closer to *Gardinier*. In *Baas*, law enforcement was not involved in the case at the time of the diagnostic testing, leaving no ambiguity that the primary purpose of the test was treatment. 80 M.J. at 121. Here, law enforcement was directly involved immediately following [REDACTED]’s allegations and before anyone at the hospital treated her. (R. at 104–05, 156, Pros. Ex. 6, p. 35). The hospital was aware of that based on their own reports, and the

fact that uniformed police officers and Investigator KR were present and clearly recognizable at the hospital. (R. at 156, Pros. Ex. 6, 33, 35).

Furthermore, as in *Gardinier*, the title of the report indicates its potential later use. 65 M.J. at 66. Though the word “forensic” from the form in *Gardinier* is more overt, even the military judge in this case acknowledged that the words “reported sexual assault” on Pros. Ex. 6, p. 25 “does lead one to believe that it could be” used “for law enforcement or a future prosecution.” *Id.*; (R. at 197).

Most importantly, while law enforcement did not order and pay for the examination like in *Gardinier*, the record indicates cooperation between the hospital and law enforcement from the beginning of the hospital’s involvement. *See* 65 M.J. at 66; (Pros. Ex. 6, p. 10, 32–35). After all, ■■■ arrived at the hospital directly from the military police station at 0103 on 3 November. (R. at 62; Pros. Ex. 6, p. 29). A mere twenty-three minutes later, the hospital’s records show they affirmatively reached out to the New York State Police at 0125. (Pros. Ex. 6, p. 32–33). Then, when the New York State Police met with ■■■ at the hospital between 0200–0300, she signed a consent form for the hospital to disclose her health information to the police before the examination. (R. at 157–58; Pros. Ex. 6, p. 10). The sexual assault examination finally occurred at 0348 on 3 November. (Pros. Ex. 6, p. 35; *see also* R. at 157–58).

Even if the records custodian believed there is usually no law enforcement purpose for the form the doctor used, the facts here indicate there was such a purpose in this case. (R. at 193–94; Pros. Ex. 6, p. 10, 32–35). On balance, the facts of this case taken together, “would cause an objective witness to reasonably believe that the statement would be available for use at a later trial.” *Rankin*, 64 M.J. at 351.

Admission of these pages prejudiced appellant because they contain the only admitted evidence of trauma to ■■■'s rectum, which was crucial to the government proving anal penetration in this case. Without the doctor's notes on these pages, there was merely evidence of male DNA on ■■■'s anus (that is, on the outside of her body), and evidence of abrasions to the anus. (R. at 213, 214). This does not prove penetration beyond a reasonable doubt when there was no male DNA found in her rectum (Pros. Ex. 12, 13), ■■■ had not defecated prior to the medical exam (R. at 81), the government's own expert conceded that other things could have damaged ■■■'s anus (R. at 244), and appellant was consistent that he never penetrated ■■■'s anus (Pros. Ex. 7–8). (Despite Pros. Ex. 11, p. 20 (a photo of ■■■'s rectum) erroneously remaining in the record of trial as part of the admitted exhibit, the military judge had specifically excluded that photo. (R. at 140)). The military judge also only allowed Ms. ■■■■■■, the government's expert, to

discuss damage to the rectum because she was commenting on Pros. Ex. 6 as an admitted exhibit. (R. at 223).

Furthermore, in light of the constitutional magnitude of the military judge's error, the government must prove the erroneous admission of this evidence was harmless beyond a reasonable doubt. *See Tovarchavez*, 78 M.J. at 462–63. In light of the critical role pages 25–28 of Pros. Ex. 6 played in proving the *actus reus* in this case, the government cannot do so. Without the evidence of damage to ■■■'s rectum, the government had insufficient physical evidence of anal penetration, and conflicting witness testimony on not just consent, but penetration itself. (R. at 41; Pros. Ex. 7–8). The DNA evidence the government did introduce actually corroborated appellant's version of events, that is, he had consensual vaginal sex with ■■■, but he did not penetrate her anus. (Pros. Ex. 12, 13).

Therefore, the military judge erred when he determined that the report on pages 25–28 of Pros. Ex. 6 was nontestimonial evidence and it clearly prejudiced appellant. For that reason, this court should set aside the finding and sentence.

III.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING THE DOCTOR'S STATEMENTS IN PAGES 25 THROUGH 28 OF PROSECUTION EXHIBIT 6 PURSUANT TO MILITARY RULE OF EVIDENCE 803(4).

Additional Facts

The facts outlined in Assignment of Error II are also relevant to resolving this assignment of error. Beyond those facts, it is important to note the difference between the doctor recording ■■■'s statements for treatment versus the doctor's own conclusions and diagnoses in pages 25–28 of Pros. Ex. 6. Page 26, in particular, recorded the doctor's diagnoses and conclusions. Under the heading "Pelvic Exam/GU" the doctor wrote, "rectal tone is normal there are rectal fissures at 12 and 6 o'clock." (Pros. Ex. 6, p. 26). Later on the same page, in a section with blank lines he wrote, "Anoscope exam disclose [indiscernible] rectal mucosal fissure along the floor of rectum for approx. 1.5cm *Antibiotic and viral prophylactic treatment begun." (Pros. Ex. 6, p. 26). The military judge, in ruling on whether Pros. Ex. 6 pages 25–28 were admissible, stated, "the doctor's observations of the injuries are also admissible under 803, subsection (4)." (R. at 199).²⁰

²⁰ The cold record indicates the military judge is referencing page 25 of Pros. Ex. 6 on R. at 199, but context makes it clear he is actually talking about page 26. First, the military judge had just concluded talking about Pros. Ex. 6, page 25 on R. at

Standard of Review

A military judge's ruling on the admissibility of hearsay evidence is reviewed for an abuse of discretion. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). 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). "Where this Court finds that a military judge erred in allowing evidence to be admitted, the government bears the burden of demonstrating that the admission of that erroneous evidence was harmless." *United States v. Finch*, 79 M.J. 389, 398 (C.A.A.F. 2020).

Law

Mil. R. Evid. 803(4) provides, "A statement that – (A) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general

198–99. He then stated, "Turning to" indicating he was moving to the next page. (R. at 199). Also, there are no doctor's observations on page 25, so the only rational explanation is that the military judge is talking about page 26 after he said, "Turning to." (R. at 199). Finally, after the military judge discussed those observations, he stated, "Turning to the remainder of the document – documents; page 27." (R. at 199).

case” is an exception to the general rule prohibiting hearsay. The C.A.A.F. has summarized this rule more simply as “certain hearsay statements *made to medical personnel* are admissible” under Mil. R. Evid. 803(4). *Donaldson*, 58 M.J. at 484–85 (emphasis added). Mil. R. Evid. 803(4) is identical to Fed. R. Evid. 803(4), and multiple federal circuits have confirmed the rule “applies only to statements made by the patient to the doctor, not the reverse.” *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316 (9th. Cir. 1985); *see also Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 564 (7th Cir. 1996) (“Rule 803(4) does not purport to except, nor can it reasonably be interpreted as excepting, statements by the person providing the medical attention to the patient.”). This is underscored by the reason for the rule, that is, “where the declarant knows that a false statement may cause misdiagnosis or mistreatment, [a statement made in the course of procuring medical services] carries special guarantees of credibility.” *White v. Ill.*, 502 U.S. 346, 356 (1992).

Argument

In this case, the military judge abused his discretion because he had an erroneous view of the law. His view of the law was wrong because he considered “the doctor’s observations” to be covered by Mil. R. Evid. 803(4), but they are not. (R. at 199); *See White*, 502 U.S. at 356; *Donaldson*, 58 M.J. at 484–85; *Bulthuis*, 789 F.2d at 1316. By the military judge’s own finding of fact, the doctor’s notes, diagnoses, and conclusions on page 26 of Pros. Ex. 6 are not statements by the


patient at all. (R. at 199; Pros. Ex. 6, p. 26). On this point he is correct as no reasonable judge could read the doctor's comments about "rectal tone" and "rectal fissures" and conclude they convey a patient's statements for treatment rather than a doctor's diagnoses. (Pros. Ex. 6, p. 26). The doctor's note of a rectal fissure of a certain length is even more clearly an actual diagnosis because the doctor noted he observed it during an anoscope exam. (Pros. Ex. 6, p. 26). Finally, common sense dictates that the patient could not possibly have reported that she had a 1.5cm fissure on the inside of her rectum. (Pros. Ex. 6, p. 26).

This clearly prejudiced appellant for the same reasons highlighted in the assignment of error above. Without the rectal fissures diagnosis, it is extremely unlikely the government would have been able to prove their case beyond a reasonable doubt. Though appellant is not entitled to the heightened prejudice standard for this abuse of discretion to admit testimony under Mil. R. Evid. 803(4), it still materially prejudiced a substantial right of the appellant because the error was not harmless. *See Finch*, 79 M.J. at 398. The government cannot show that it played "no role in Appellant's conviction." *United States v. Long*, 81 M.J. 362, 370 (C.A.A.F. 2021).

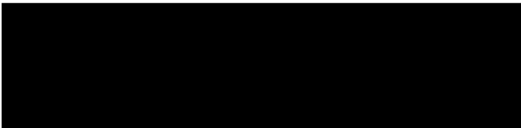
Therefore, these statements are outside the hearsay exception Mil. R. Evid. 803(4), the military judge abused his discretion in admitting them on that basis, and this court should set aside the finding and sentence.

Conclusion

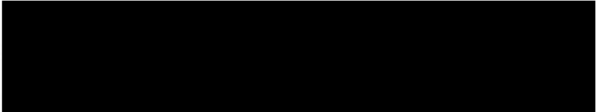
For the foregoing reasons, appellant requests that this court set aside the finding and sentence.




THOMAS J. TRAVERS
MAJ, 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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on March 8, 2022.



MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division
(703) 693-0737

APPENDIX A

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

I. The military judge improperly advised appellant of his forum rights.

Additional Facts

The offense alleged in this case occurred prior to 1 January 2019. (Charge Sheet). The charges were preferred on 14 July 2020 and referred on 10 September 2020. (Charge Sheet). On 25 September 2020 and 8 April, the military judges that sat on this case advised appellant that if appellant elected to be tried by the members, he would be sentenced by those members. (R. at 9–10, 21).

Alternatively, the military judges also explained that appellant could be tried and sentenced by the military judge alone. (R. at 10, 21). Ultimately, appellant chose to be tried by military judge alone. (MJAR; R. at 21). The military judges 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 9–10, 21).

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*, 81 M.J. 471, 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).¹

¹ Attached to this brief as Appendix B.

This EO “was a valid exercise of the President’s rulemaking authority,” and it established that Articles 16², 25(d)(2) and (3)³, and 53⁴, among others, did not go into effect for courts-martial involving offenses alleged to have been committed prior to 1 January 2019. *Brubaker*, 81 M.J. 471, 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, 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.

² 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.

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

⁴ 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).

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. *United States v. Hatfield* held that there is no ambiguity in the forum rights governing cases like appellant's because Article 25(d)(1) must be read in conjunction with Article 53, and even if there is ambiguity, the error is procedural.

In a non-binding memorandum opinion, a different panel from this court held that because Article 25(d)(1) only references the accused electing sentencing by members after findings, it must be read in conjunction with Article 53, which actually confers the option of sentencing by the members or the military judge. *United States v. Hatfield*, ARMY 20200410, 2022 CCA LEXIS 62, at *6 (Army Ct. Crim. App. 26 January 2022).

3. Precedent from the C.A.A.F. and Navy Marine Corps Court of Criminal Appeals demonstrates 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 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. (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*, 81 M.J. 471, 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 9–10, 21). 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 9–10, 21).

Alternatively, the military judge explained, appellant could be tried and sentenced by the military judge alone. (R. at 9–10, 21).

This is an error despite this court’s recent decision in *Hatfield* because that holding is flawed for two reasons. First, it concludes, without fully explaining, that

the inclusion of Article 53 in the EO explains the perplexing exclusion of Article 25(d)(1), which, in the court's eyes, makes the EO unambiguous. *Hatfield*, 2022 CCA LEXIS 62, at *7. However, the court's reading seemingly renders Article 25(d)(1) superfluous, void, or ineffective until post-2019, which is contrary to Supreme Court precedent on the proper canons of statutory interpretation. *Corley v. United States*, 556 U.S. 303, 314 (2009).

Second, the court's holding that the error is procedural rather than jurisdictional is incorrect. 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. The military judge erred by allowing multiple excited utterances outside the scope of Mil. R. Evid. 803(2).

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for abuse of discretion. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). A military judge abuses his discretion when his findings of fact are clearly erroneous or the military judge erroneously applies the law. *Id.* The standard for plain error is there was a plain and obvious error, and it materially prejudiced a substantial right of the accused.

Law

An excited utterance is an exception to the general prohibition on hearsay when the statement relates to “a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” *Bowen*, 76 M.J. at 87–88. The rationale for the exception is “a person who reacts ‘to a startling event or condition’ while ‘under the stress of excitement caused’ thereby will speak truthfully because of a lack of opportunity to fabricate. *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990). The CAAF thus adopted a three-

part test to determine whether a statement qualifies under this exception. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). For it to qualify the following must be present: “(1) the statement relates to a startling event, (2) the declarant makes the statement while under the stress of excitement caused by the startling event, *and* (3) the statement is ‘spontaneous, excited or impulsive rather than the product of reflection and deliberation.’” *Id.* (citing *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003); *United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987) (emphasis added)).

In this case, ■■■’s first excited utterance, “He hit me. He took it too far. He hit me.” is not even seemingly related to the charged misconduct and irrelevant to a relevant startling event because it is related to appellant allegedly striking ■■■, not anal penetration (the first *Donaldson* prong). (R. at 50); *Donaldson*, 58 M.J. at 482. It was also in response to another party-goer asking her what was wrong, rather than a spontaneous outburst (the third *Donaldson* prong). (R. at 50); *United States v. Jones*, 30 M.J. 127, at 129–30 (C.A.A.F. 1990).

■■■’s statements to JW a few minutes later are also not an excited utterance because, by the time JW came to pick up ■■■ from the party, ■■■ had time to deliberate and reflect on the incident (the third *Donaldson* prong). *Donaldson*, 58 M.J. at 482. JW found ■■■ outside when he arrived at the house. (R. at 96). Then, after she had had time to get out of the house, wait for JW to talk to other party-

goers, and sit in his car for some period of time, she made statements to him incriminating appellant. (R. at 102–04.)

The military judge abused his discretion because his analysis focused entirely on the second *Donaldson* prong, ignoring the other two. These statements prejudiced appellant because they improperly bolstered ■■■'s credibility, and her credibility was central to the government's case. For these reasons, appellant requests that this court set aside the findings and sentence.

III. The record of trial is incomplete.

The Charge and its Specification for which appellant was ultimately convicted was preferred, referred, and later withdrawn prior to it being re-preferred, re-referred, and tried at a general court-martial. (R. at 2). However, the original proceedings and any documents related to it are not included or attached to the record of trial. In *United States v. Reyes*, the C.A.A.F. held that there need not be a verbatim transcript for proceedings later withdrawn and re-preferred. 80 M.J. 218, 225 (C.A.A.F. 2020). However, in *Reyes* there was at least a summarized transcript of the previous sessions. *Id.* R.C.M. 1112(f)(1)(C) states that “[i]f the trial was a rehearing or new or other trial of the case, the record of any former hearings,” a court reporter “shall attach” those matters to the record of trial. While rehearing, new trial, and other trial have specific meanings under R.C.M. 810(a), Discussion, the Discussion is also clear that they are “general” meanings.

Appellant's position is that while a trial pursuant to a re-preferral and re-referral is not expressly contemplated by the drafters of R.C.M. 810, it is an "other trial," and at least a summarized transcript should be included with the final record of trial. Therefore, appellant requests that this court return the record of trial to the convening authority to supplement the record of trial.

IV. The military judge abused his discretion by allowing [REDACTED] to authenticate photos of her own anus.

The military judge abused his discretion by allowing [REDACTED] to authenticate photos of her own anus without explaining how she knows what her own anus looked like on or about 2 November 2018. (R. at 121–26). Theoretically, it is possible that using multiple mirrors or a camera, [REDACTED] could have first-hand knowledge of the appearance of her anus. However, that was not established on the record. All that was established was that [REDACTED] remembers someone with blue gloves putting a measuring stick by her anus. (R. at 124). The government did not establish how [REDACTED] knows what her own anus looks like either normally or on or about 2 November 2018. Put simply, the witness did not testify to something about her anus that she recognized and that would allow her to pick out her anus in a photo array of anuses.

Allowing the witness to authenticate these photos prejudiced appellant because no other witness could have laid the foundation for these photos because the doctor who took the photographs passed away. Therefore, if the government

could not authenticate and admit these photos, there would have been no photographic evidence of trauma to ■■■'s anus, which was key evidence in the government attempting to prove penetration. Without these photos, it is unlikely the government would have been able to prove its case beyond a reasonable doubt. Therefore, this court should set aside the findings and sentence.

V. 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.

Based on the facts outlined in appellant’s first assignment of error in the Brief on Behalf of Appellant about the military judge’s challenging deliberations and conflicting evidence, this court should exercise its Article 66 powers and hold the findings factually insufficient.

VI. The military judge erred by allowing [REDACTED] to testify about anoscope exams when she is not certified to conduct them.

An expert by “knowledge, skill, experience, training, or education may testify in the form of an opinion” if each of the following criteria are met: “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” Mil. R. Evid. 702; *United States v. Billings*, 61

M.J. 163, 166 (C.A.A.F. 2005) (“An ‘expert’ may testify if he or she is qualified and testimony in his or her area of knowledge would be useful.”)

This rule is informed by the *Houser* factors, which state that the military judge should consider, (a) the qualification of the expert; (b) the subject matter of the expert testimony; (c) the basis for the expert testimony; (d) the legal relevance of the evidence; (e) the reliability of the evidence; and (f) whether the probative value is substantially outweighed by other considerations. *Houser*, 36 M.J. at 397. Establishing these factors is incumbent upon the proponent. *Id.*⁵

Here, though qualified as an expert in sexual assault forensic examinations, the record is clear that Ms. [REDACTED] was not qualified to perform anoscope exams. (R. at 215, 217, 224). Given that she cannot conduct anoscope exams herself, and she has only seen three or four through her whole career, her testimony on the process in this case and how anoscopes are used generally was beyond her expertise, not helpful to the factfinder, and the military judge should have been excluded it. (R. at 215, 217–20). This testimony prejudiced appellant because the results of the anoscope exam were critical to the government proving its case.

⁵ *United States v. Ellis*, 68 M.J. 341, 342 (C.A.A.F. 2010) cited a four-part test that is consistent with the *Houser* factors, but phrased one of those factors as “Was the testimony ‘within the limits of [the expert’s] expertise?’” rather than the less descriptive “the subject matter of the expertise” as it is phrased in *Houser*. Similarly, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), decided after *Houser*, provides more detailed guidance on the fourth and fifth prongs of the *Houser* factors. *United States v. Henning*, 75 M.J. 187, 191 (C.A.A.F. 2016).

Without it, this court cannot be sure the factfinder would have convicted appellant. Therefore, this court should set aside the findings and sentence.

VII. The military judge erred by taking improper materials to the deliberation room and not following proper procedural steps for the admission of exhibits.

The military judge excluded photo 20 of Pros. Ex. 10; however, it remains among the stack of admitted photos in the record of trial. (R. at 140; Pros. Ex. 10). This suggests that the military judge may have improperly considered it during his deliberations. It is an extremely prejudicial photo because it depicts the inside of [REDACTED] anus, and could have been improperly used to prove penetration, where the evidence was otherwise weak. (Pros. Ex. 10, p. 20).

Moreover, the military judge also took the stipulation of expected testimony in Pros. Ex. 13 back with him to deliberate in violation of R.C.M. 811(f). (Pros. Ex. 13). The military judge should have had government counsel read the stipulation in open court and consider it like any other witness testimony. (R. at 270).

Finally, during sentencing, the military judge neither ensured the victim's unsworn statement was shown to defense counsel nor marked as an appellate exhibit. (R. at 303–04; R.C.M. 1001(c)).

Therefore, because the military judge's deliberations were tainted by these errors, this court should set aside the findings and sentence.

VIII. Allowing evidence of striking during sexual intercourse, stealing underwear, and a second attempted sexual assault was plain error pursuant to Mil. R. Evid. 404(b).

Facts

During the government's case in chief, ■■■, the alleged victim, testified to appellant striking her during sex, stealing her underwear, and following her into a bathroom after the incident and trying to pull her pants down. (R. at 44, 47, 49). All three of these acts were uncharged misconduct and for no other purpose other than to paint appellant as an unsavory character.

Mil. R. Evid. 404(b) bars "evidence of prior bad acts to show a general propensity of predisposition to commit a crime, but allows such evidence to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *United States v. Dairo*, 75 M.J. 867, 870 (Army Ct. Crim. App. 2016) (quoting *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989). In *Dairo*, this Court noted that motive and intent, while similar, are "separate concepts." *Id.* at 871. "Intent is an element. Motive is the why." *Id.*

For uncharged misconduct to be admissible, the evidence must (1) "reasonably support a finding . . . that appellant committed prior crimes, wrongs or acts", (2) make a fact of consequence more or less probable, and (3) pass a Mil. R. Evid. 403 balancing test. *United States v. Reynolds*, 29 M.J. 105, 109 (C.A.A.F. 1989). Some of the factors relevant to such a balancing test include the strength of

proof of the prior act (conviction versus gossip), the probative weight of the evidence, potential for less prejudicial evidence, the distraction of the evidence to the factfinder, and the time needed for proof of the prior conduct. *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000).

While the government may claim the testimony of uncharged acts in this case were *res gestae*, *res gestae* is a doctrine that “enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation.” *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992) (citations omitted). If [REDACTED] did not testify to these uncharged acts, there would be no such gap in the narrative. The factfinder would not be confused at all. In fact, the factfinder would have been in a better position to evaluate the charged conduct because he would not have been tainted by this propensity evidence. Because these acts were plainly uncharged misconduct, it was plainly for a propensity purpose, and the government cannot show it was harmless, this court should set aside the findings and sentence.

IX. It was plain error for the military judge to allow testimony of [REDACTED]’s follow-on care during merits.

On direct examination during the government’s case-in-chief on the merits, [REDACTED] testified that after 2 November 2018, she experienced neck pain, migraines, and sensitivity to lights and sounds. (R. at 64–65). Common sense dictates that this is completely irrelevant to making a fact of consequence more or less probable

as it relates to the actual charge and its specification. *See* Mil. R. Evid. 401. This testimony seems solely relevant to the uncharged acts and, even then, only relevant for sentencing under R.C.M. 1003. This evidence prejudiced appellant because it smuggled in damaging evidence for no other purpose but to make the victim more sympathetic. Therefore, this court should set aside the findings and sentence.

X. Appellant is entitled to relief for the government's unreasonable post-trial delay.

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 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)).⁶

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.*

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.)⁷ (citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)). Significant delays

⁶ Available at:

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

⁷ Available at:

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

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.)⁸ (quoting *United States v. Carroll*, 40 M.J. 554, 557 n.8 (A.C.M.R. 1994)). Evidence of systematic or 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.

⁸ Available at:
<https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/334>

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 193 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 it was not completed beyond the date of the Entry of Judgment, and there are no remarks. (Chronology Sheet). Though there is no demand for speedy post-trial in the record, that only slightly weighs against appellant.

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 118-day delay between entry of judgment and docketing at this court, by itself is excessive, considering the 150-day standard outlined in *Brown* as the total processing time allotted before it is presumptively unreasonable. 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)).⁹

⁹ 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 Drum 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.)¹⁰ (Pede, C.J., concurring).¹¹ Therefore, appellant requests that this court reassess his sentence.

XI. Appellant’s trial defense counsel were ineffective for failing to request waiver and forfeitures.

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

1. Automatic Forfeitures

A court-martial sentence to confinement for six months or less and a bad-

¹⁰ Available at:

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

¹¹ *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>

conduct discharge “shall result in the forfeiture of pay, or of pay and allowances, due that member during any period of confinement or parole.” Article 58b, UCMJ. Appellants convicted at courts-martial may request the convening authority defer automatic forfeitures until initial action and then waive them for up to six months afterwards for the benefit of dependents. UCMJ art. 57(a)(2) and 58b(b); *United States v. Emminizer*, 56 M.J. 441, 443-44 (C.A.A.F. 2002). Otherwise, automatic forfeitures take effect on the earlier of: (1) fourteen days after the date on which the sentence is adjudged, or (2) the date on which the convening authority approved the sentence. UCMJ art. 57(a)(1) and 58b(a) (1); *United States v. Lundy*, 60 M.J. 52, 54 (C.A.A.F. 2004).

2. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees an accused the right to the “effective assistance of counsel.” *United States v. Cronin*, 466 U.S. 648, 653-56 (1984); *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)). “By virtue of Article 27 . . . as well as the Sixth Amendment of the Constitution, a military accused is guaranteed effective assistance of counsel . . . before, during, and after trial.” *United States v. Scott*, 24 M.J. 186, 188-89 (C.M.A. 1987); *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000). This includes providing proper advice concerning the accused’s post-trial rights generally and deferral and

waiver of forfeiture specifically. *United States v. Fordyce*, 69 M.J. 501, 503 (Army Ct. Crim. App. 2010) (without reaching the issue of whether Fordyce’s counsel was deficient, this Court concluded failure to advise him of his right to request waiver of mandatory forfeitures for the benefit of his dependents constituted prejudicial post-trial error).

To prevail on an ineffective assistance of counsel claim, an appellant must satisfy a two-prong test: (1) competency and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). The inquiry under the first prong is whether counsel's conduct fell below an objective standard of reasonableness. *Id.* at 694. The second prong is satisfied by showing “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 695.

Due to the highly discretionary nature of a convening authority’s clemency power, “the threshold for showing post-trial prejudice is low.” *Lee*, 52 M.J. at 53. A convening authority’s discretion in granting waiver and deferral of forfeitures for the benefit of the dependents of an accused, whose term of service has not expired, is highly discretionary; thus, this Court will find material prejudice to the substantial rights of an appellant if there is an error and an appellant makes some colorable showing of possible prejudice. *Fordyce*, 69 M.J. at 503 (citing *Lee*, 52 M.J. at 53). An appellant can meet this “burden where he demonstrates that his

actions, in response to proper advice from his defense counsel, ‘could have produced a different result.’” *Fordyce*, 69 M.J. at 507 (Ham, J., concurring) (quoting *United States v. Fredrickson*, 63 M.J. 55, 57 (C.A.A.F. 2006)).

Argument

Appellate defense counsel did not request deferral and waiver of forfeitures in this case. (Post-Trial Matters). There was no strategic advantage to not requesting deferral and waiver of forfeitures. These matters were simply not submitted due to defense counsel’s failure to do so. This constituted deficient performance that satisfies the first prong of the *Strickland* test. This prejudiced appellant because submitting the request could have produced a different tangible result in the form of financial benefits. Therefore, appellant requests this court provide appropriate sentencing relief to remedy this error.

APPENDIX B

**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.

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

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