IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Private First Class (E-3) **WILLIS A. GRANT** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20200645 Tried at Fort Stewart, Georgia, on 19 March, and 6 August 2019 and 14 January, and 12–13 November 2020 before a general court-martial convened by Commander, Fort Hood, Colonel David H. Robertson and Christopher E. Martin, and Lieutenant Colonel Trevor I. Barna, Military Judges, presiding.

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

Assignment of Error I

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

Assignment of Error II

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

Assignment of Error III

WHETHER THE POST-TRIAL PROCESSING DELAY WARRANTS RELIEF.

PANEL NO. 3

Statement of the Case

On 13 November 2020, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, three specifications of assault consummated by a battery, and one specification of communicating a threat, in violation of Articles 120, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, 934 (2016, 2018) [UCMJ].[1] (R. at 331–32; Statement of Trial Results). The military judge sentenced appellant to reduction to E-1, confinement for three years, and a dishonorable discharge. (R. at 391; Statement of Trial Results). On 6 January 2021, the convening authority approved the findings and sentence as adjudged, and the military judge entered judgment on 8 January 2021.[2] (Action; Judgment). The case was docketed with this court on 19 July 2021. (Referral and Designation of Counsel).

Statement of Facts

A. Appellant struck his new bride, [redacted] bloodying her head and knocking her out, and then sexually assaulted her the following morning.

Appellant and [redacted] were married for approximately five months prior to their arrival at appellant's first duty station, Fort Stewart, Georgia. (R. at 156–57).

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[1] The military judge excepted certain language from one of appellant's assault consummated by battery convictions. (R. at 331; Statement of Trial Results). Appellant was acquitted of two specifications of sexual assault. (R. at 331; Statement of Trial Results).

[2] The convening authority's action was erroneously dated as "JAN 06 2020." (Action).

They stayed at an off-post motel while awaiting the availability of on-post housing. (R. at 157). On their first night in the area, appellant and [redacted] explored downtown Savannah with appellant's friends and their spouses. (R. at 157–58). While at a bar, appellant became upset and yelled at [redacted] because she inadvertently purchased an alcoholic drink for JH, one of the group's underage members. (R. at 158–59). Appellant then left the bar with a few others, leaving [redacted] with the other soldiers' wives. (R. at 159).

Appellant and [redacted] eventually returned to their motel room, where appellant resumed berating [redacted] (R. at 160). He then struck [redacted] on the head, breaking her nose and knocking her out. (R. at 160–61, 225–26). [redacted] awoke to find her blood soaked hair matted to her face and a pool of blood on the floor. (R. at 160–61, 225). As [redacted] wiped the blood off her swelling face, she asked appellant what did he do to her, and he replied, "I - - I hit you."[3] (R. at 161). [redacted] could not stand on her own, so appellant propped her up and stripped her bloody clothing before they slept for the night. (R. at 162).

The following morning, appellant mounted [redacted] and attempted to have sex with her. (R. at 163). [redacted] rebuffed appellant, and he responded that, "it's going to be bad like it was the night before" if she did not have sex with him. (R. at 163).

[3] This conduct formed the basis for Specification 1 of Charge II.

[redacted] knew that she could not withstand another beating, so she followed appellant as he rose from their bed. (R. at 163). Appellant kicked [redacted]'s leg, sending her falling back onto the bed.[4] (R. at 163–164). He then jumped on top of her and held her wrists up by her head as he penetrated her vagina with his penis.[5] (R. at 164–65). Appellant ignored [redacted]'s request to stop penetrating her. (R. at 165). Thus, [redacted] who was still recovering from the prior night's beating, simply closed her eyes and hoped that her lack of resistance would encourage appellant to ejaculate quickly and end the sexual assault. (R. at 164–65). Appellant ejaculated, took [redacted]'s cell phone, and left for morning physical training. (R. at 166).

When appellant finally returned [redacted]s cell phone a few days later, she received messages from JH asking to meet. (R. at 166, 229). JH ignored [redacted]'s attempts to avoid her and instead drove to [redacted]'s motel. (R. at 166–67, 229). JH and [redacted] both wept once JH saw the damage that appellant inflicted upon [redacted]'s face. (R. at 167). JH photographed [redacted]'s disfigured face and told [redacted] to leave appellant. (Pros. Ex. 2; R. at 169, 231). [redacted] declined JH's offers of support. (R. at 232–33).

[4] This conduct forms the basis for Specification 2 of Charge II.
[5] This conduct forms the basis for Specification 1 of Charge I.

B. Appellant threatens to kill [redacted] and her pets.

Appellant and [redacted] made plans with a group of appellant's fellow soldiers to watch a fireworks display during a Fourth of July beach trip. (R. at 170). However, members of the group decided to return to post prior to the fireworks display. (R. at 170). [redacted] asked appellant if they could remain behind to watch the fireworks, as they had driven separately from the group. (R. at 170). Appellant accused [redacted] of "mak[ing] him look stupid in front of people" and yelled at her to find her own way home. (R. at 171). Nevertheless, the couple eventually made it back onto post together, but upon arriving at their home, appellant told [redacted] that he would kill her and her dogs if she did not return home to Missouri.[6] (R. at 171).

[redacted] informed JH of appellant's threat, and JH immediately retrieved [redacted] from her home. (R. at 172, 233). Prior to JH's arrival, appellant took [redacted]'s military dependent spouse identification, saying [redacted] did not need her military identification if she was going to leave him. (R. at 172). [redacted]'s mother flew down from Missouri, packed, and moved [redacted] out of the on-post housing within forty-eight hours of appellant's death threat. (R. at 173).

Appellant and [redacted] only exchanged text messages intermittently until appellant visited [redacted] in Missouri during Thanksgiving. (R. at 174–75). Appellant informed [redacted] that he purchased a vehicle for her and that he planned to drop the

[6] This conduct forms the basis for The Specification of Charge III.

new vehicle off during his visit and return to Fort Stewart in [redacted]'s old vehicle. (R. at 174–75). Appellant and [redacted] had a "lighthearted time" together. (R. at 175).

C. Appellant assaulted [redacted] during a pre-deployment visit.

Appellant received orders to deploy to South Korea, so [redacted] agreed to visit him in February 2018. (R. at 175–76). While spending the night at appellant's friend's home, appellant struck [redacted] so forcefully that he knocked her off the bed.[7] (R. at 181). The unprompted blow was so startling that [redacted] screamed. (R. at 181). The presence of others in the home and [redacted]'s scream dissuaded appellant from further assaulting [redacted] (R. at 181). Upon appellant's deployment, [redacted] depleted her savings to move in with her grandparents in Kansas City. (R. at 183).

Assignment of Error I[8]

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

Additional Facts

Appellant was convicted of one specification of sexual assault, three specifications of assault consummated by battery, and one specification of communicating a threat, none of which occurred later than 1 February 2018.

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[7] This conduct forms the basis for Specification 3 of Charge II

[8] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. The government respectfully requests notice and opportunity to supplement its brief should this court consider any of those matters meritorious.

(Charge Sheet; Statement of Trial Results). During the 19 March 2019 arraignment, the military judge informed appellant of his right to be tried by a panel of military members and that the panel would also sentence him should he elect trial by panel. (R. at 5). Additionally, the military judge informed him that he could choose to be tried by military judge alone, and the military judge would determine appellant's sentence in the event of his conviction. (R. at 5). Appellant confirmed that he understood the difference between trial before members and trial before a military judge alone, as well as his choice between forums. (R. at 5). Appellant elected to be tried by a panel at this initial arraignment. (R. at 5).

On 6 August 2019, Lieutenant Colonel [LTC] Christopher Martin replaced Colonel [COL] David Robertson as the military judge presiding over appellant's court-martial. (R. at 10). The new military judge noted, and granted, appellant's request to defer forum selection. (R. at 16). Appellant submitted a written request for trial by military judge alone on 15 August 2019. (R. at 79). On 14 January 2020, appellant notified the military judge that his forum choice could change depending upon the outcome of the military judge's Military Rule of Evidence [Mil. R. Evid.] 413 ruling and that this trial defense counsel may need to have "additional discussions" with him about his forum selection. (R. at 131–32). The military judge acknowledged that "it's the accused right to make his own choice," and granted appellant's request to defer forum selection. (R. at 132).

On 12 November 2020, LTC Trevor Barna replaced LTC Martin as the military judge presiding over appellant's court-martial. (R. at 135). The new military judge asked appellant if he recalled the forum rights advice issued by the previous military judges. (R. at 140). Appellant confirmed that he remembered the prior advice, that he did not wish the military judge to repeat the advice, and that he had no questions about his forum selection rights. (R. at 140). Appellant acknowledged that he would surrender his right to trial by a panel of members if he elected trial by military judge alone. (R. at 141; App. Ex. XLIII). In light of this advice, appellant elected trial by military judge alone. (R. 141; App. Ex. XLIII).

Standard of Review

"The interpretation of UCMJ and R.C.M. provisions and the military judge's compliance with them are questions of law, which we review de novo." *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). Jurisdictional questions also receive de novo review. *United States v. Menlanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

Law and Argument

This court should deny appellant relief because he merely repeats the same strained interpretation of Article 25(d)(1), UCMJ's effective date that this court recently rejected in *United States v. Hatfield*, ARMY 20200410, 2022 CCA LEXIS 62 (Army Ct. Crim. App. 26 Jan. 2022) (mem. op.).

A. The military judge properly advised appellant of his forum selection rights because the Military Justice Act of 2016 amendments to Article 25(d)(1), UCMJ, did not apply to appellant's case.

Appellant's claim that the military judge failed to advise him of his supposed right to elect sentencing by a panel of military members after a trial by military judge alone must fail simply because appellant had no such rights. First, appellant sexually assaulted, pummeled, pushed, and threatened [redacted] in 2017 and 2018. (Charge Sheet; Statement of Trial Results). Second, Executive Order No. 13,825 § 10, 83 Fed. Reg. 9889, 9890 (Mar. 1, 2018)—which governs the amendments to Articles 25 and 53, UCMJ of which appellant wishes to avail himself, as well as the rules implementing those changes—"applies only to cases in which all specifications allege offenses *committed* on or after January 1, 2019." (emphasis added). Thus, the military judges presiding over appellant's case properly advised appellant of his forum selection rights—a mutually exclusive choice between trial and sentencing by a military judge or trial and sentencing by a panel. (R. at 5, 140).

Furthermore, this court has already expressly rejected a similar attempt to apply the MJA 2016 amended version of Article 25(d)(1), UCMJ, to criminal conduct which occurred prior to 1 January 2019. In *Hatfield*, this court found that although "[s]ection 10 of the EO was silent on when Article 25(d)(1), UCMJ, would go into effect," "this is not a case in which Article 25(d)(1) should be

considered in isolation to interpret its effective date." *Hatfield*, 2022 CCA LEXIS 62, at *5. Rather, the court found that Article 25(d)(1), UCMJ, had to be read in conjunction with Article 53(b)(1), UCMJ, as the later article provided the means to execute the former. *Hatfield*, 2022 CCA LEXIS 62, at *7. Thus, the court held,

> To the extent the omission of Article 25(d)(1) from Section 10 of the EO creates any ambiguity, the ambiguity is resolved by the inclusion of the entire Article 53 in Section 10 of the EO, making it clear that the President did not wish to provide appellants who committed their offenses prior to 1 January 2019 with the right to request judge alone sentencing after a panel trial.

Hatfield, 2022 CCA LEXIS 62, at *7. Similarly, it is abundantly clear that the President did not mean to confer upon appellant, whose criminal conduct occurred prior to 1 January 2019, the right to request panel sentencing after a military judge alone trial. Consequently, the military judge properly advised appellant of his forum selection rights and thus, this court should deny appellant relief.

Lastly, appellant's claim must fail because he waived this court's consideration of this issue. Appellant was afforded approximately 604 days from initial arraignment until the day he finally elected trial by military judge alone. (R. 9, 134). During that time, appellant considered his forum options and conferred with his civilian defense counsel, who "fully advised the [appellant] of his[ ] right to trial," prior to submitting a written request for trial by military judge alone. (App. Ex. XLIII). "Trial defense counsel are presumed to have properly advised

their clients regarding choice of forum, in the absence of evidence to the contrary." *United States v. Follrod*, ARMY 20020350, 2005 CCA LEXIS 573, at *2 (Army Ct. Crim. App. 15 Feb. 2005) (mem. op.) citing *United States v. Canatelli*, 5 M.J. 838, 840 (A.C.M.R. 1978). The record does not indicate, nor does appellant allege, that trial defense counsel failed to properly advise appellant of his forum selection rights.

Furthermore, the military judge twice advised appellant of his forum selection rights, confirmed that appellant had no questions about his rights, and even permitted appellant to defer forum selection until after the military judge ruled on his Mil. R. Evid. 413 suppression motion. (R. at 5, 16, 140–41). Appellant had ample opportunity to assert his alleged entitlement to the rights guaranteed under the MJA 16 amended version of Article 25(d)(1), yet he failed to do so until this appeal. Lastly, appellant cannot establish prejudice because he fails to even assert that advice about his supposed entitlement would have affected his choice of forum. *Hatfield*, 2022 CCA Lexis 62, at *10. Accordingly, appellant waived the issue and this court should deny appellant relief. *Hatfield*, 2022 CCA LEXIS 62, at *10.

Assignment of Error II

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

Additional Facts

A. Appellant repossessed the vehicle he gifted to [redacted]

Appellant's close family friend and "brother," GB, invited [redacted] to a local barbershop to celebrate "National Pot Smoking Day." (R. at 289). [redacted] accepted GB's invitation to smoke marijuana but was surprised when appellant, who had redeployed from Korea a few days prior, appeared with NC, another of his childhood friends. (R. at 275–76, 290). [redacted] suspected that GB only extended the invitation to facilitate appellant's attempt to reclaim the vehicle he originally purchased for [redacted] (R. at 290). GB denied [redacted]'s allegation and claimed to have no idea why appellant was there—despite having spoken with appellant a few days prior to his redeployment. (R. at 290).

GB claims that [redacted] then placed her vehicle in reverse and attempted to flee the scene although appellant and GB both stood behind her vehicle. (R. at 292). NC alleges that appellant "jump[ed] on top of the car so that he would not get run over." (R. at 278). GB testified that [redacted] screamed that appellant was "not getting the car" before she ultimately exited the vehicle and continued yelling at appellant. (R. at 292). GB then admitted to separating [redacted] from her vehicle while appellant

removed her things from the vehicle. (R. at 292). Both NC and GB claimed that [redacted] then assaulted appellant, with NC asserting that [redacted] told appellant, "Don't touch my stuff. It's not yours. Don't put your hands on my stuff." (R. at 279, 293). NC left the scene because "[he] did not want to be associated with anything that could potentially incriminate [himself] or . . . put [his] job [with the Department of Homeland Security] in jeopardy." (R. at 279). GB recalled "remov[ing] [appellant] from the situation," and the police arrived shortly thereafter. (R. at 293).

B. The military judge sustained the government's hearsay objection.

Appellant's civilian defense counsel [CDC] asked GB, "during your conversations after the car repossession incident, did [redacted] -- did you ever have conversations with her in which she expressed to you her – that she was upset with [appellant]?" (R. at 296). GB replied, "We did, yes, sir." The CDC then asked "was there ever a time when she told you, ['Fuck him, I'm going to take him for everything he's got']?" (R. at 296). The government objected, arguing that the CDC sought to elicit hearsay and noting that [redacted] was never challenged with this alleged statement. (R. at 297). The CDC argued that he was not offering the statement for the truth of the matter asserted, but rather that "the statement in general tends to show that a person's state of mind when they make that [statement] is anger, being extremely upset with somebody, vengeance,

spitefulness." (R. at 297). The military judge ultimately sustained the government's hearsay objection. (R. at 298).

Standard of Review

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011). An abuse of discretion occurs when a military judge's findings of fact are "clearly erroneous," if his decision is "influenced by an erroneous view of the law," or if it is "outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008); *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *Miller*, 46 M.J. at 65; *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

Law and Argument

"The Confrontation Clause preserves the right of an accused 'to be confronted with the witnesses against him.'" U.S. Const. amend. VI; *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006). "This right includes the right to cross-examine witnesses, including on issues of bias and credibility." *Id.* Rule 608(c) states, "Bias, prejudice, or any motive to misrepresent may be shown to impeach

the witness either by examination of the witness or by evidence otherwise adduced." Nevertheless, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

A. Any alleged error was harmless beyond a reasonable doubt.

Should this court determine the military judge erred, any error was harmless beyond a reasonable doubt.[9] Appellate courts consider the following in determining whether the erroneous exclusion of evidence was harmless:

> [T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

[9] The government does not concede error, as an argument could be made that [redacted]'s comment refer to their pending civil divorce rather than an intent to fabricate allegations against appellant. However, the military judge did not rule on appellant's implied theory of admissibility. Appellant offered GB's testimony that [redacted] said, "[']Fuck [appellant], I'm going to take him for everything he's got[']," to show "her motive to fabricate in making the claims she did in this case." (R. at 297). The military judge noted appellant had not confronted [redacted] with her alleged statement and sustained the government's hearsay objection. (R. at 297–98). Neither appellant, the government, or the military judge cited to the Military Rules of Evidence as they debated whether GB's recollection of [redacted]'s statement was admissible.

Moss, 63 M.J. at 238 (quoting *Untied States v. Bahr*, 33 M.J. 228, 234 (C.M.A. 1991)). The first factor favors appellant because [redacted]'s testimony was undoubtedly important to the government's case. Nonetheless, the remaining factors clearly indicate that the military judge's error was harmless beyond a reasonable doubt.

The main thrust of appellant's claim is that the military judge improperly denied him the chance to "demonstrate[e] the depth of [redacted]'s motive to fabricate and the extent of the vindictiveness she harbored against appellant." (Appellant's Br. 19). However, the military judge afforded appellant ample opportunity to attack [redacted]'s credibility throughout the trial—the disputed statement was merely cumulative to the bias evidence already before the military judge.

During his opening argument, appellant painted [redacted] as a "spiteful spouse who's mad about losing out on some money, losing a car, and hopefully trying to gain a little bit of evidence to use in her divorce case later down the road." (R. at 154). On cross-examination, appellant established that [redacted] was happy when appellant replaced her decade old high mileage vehicle with a new luxury sedan. (R. at 207, 288; Def. Ex. B, C). Additionally, [redacted] admitted that she was "mad" at appellant when he repossessed her vehicle because "he planned to leave [her] carless" after already leaving her homeless and living with her grandparents. (R. at 213). Appellant reinforced his characterization of [redacted] as "spiteful spouse" by juxtaposing [redacted]'s assertion that she lodged a non-support claim with appellant's

company commander months after the vehicle incident, with the company commander's testimony that he received the notification within two days of appellant's redeployment. (R. at 215, 309).

Appellant "demonstrat[ed] . . . the extent of the vindictiveness [redacted] harbored against appellant" when multiple witnesses testified that redacted "tried to run [appellant] over" while he attempted to repossess her vehicle. (Appellant's Br. 19; R. at 278, 292). Moreover, the military judge admitted GB's testimony that redacted was upset at appellant over the vehicle repossession incident. (R. at 296). Appellant further illustrated redacted's alleged motive to fabricate through witness testimony that redacted struck appellant several times as he repossessed her vehicle. (R. at 278, 293). Appellant highlighted redacted's alleged greed when he insinuated that redacted delayed divorce proceedings in order to increase her entitlement to transitional compensation.[10] (R. at 221). Additionally, redacted admitted that she delayed initiating divorce proceedings in order to use appellant's military health insurance for reconstructive rhinoplasty. (R. at 221). In sum, there was abundant evidence of redacted's motive to fabricate the allegations based on her disdain for appellant.

[10] "Transitional compensation payments . . . may be provided for dependents of Soldiers who are separated from active duty under a court-martial sentence resulting from a dependent-abuse offense . . . ." Army Reg. 608-1, Personal Affairs: Army Community Service, para. 4-12.a. (19 Oct. 2017).

Consequently, there is no doubt that the military judge afforded appellant "liberal admission of bias-type evidence." *Moss*, 63 M.J. at 236. Although the military judge prevented appellant from eliciting whether [redacted] ever told GB, "[']Fuck [appellant], I'm going to take him for everything he's got[']," the military judge "did not deny [appellant] the opportunity to establish that the witness[] may have had a motive to lie; rather, the limitations denied [appellant] the opportunity to add extra detail to that motive. *United States v. James*, 61 M.J. 132, 135 (C.A.A.F. 2005) (quoting *United States v. Nelson*, 39 F.3d 705, 707–08 (7th Cir. 1994)); (R. at 297). Indeed, the military judge was well within his discretion to limit this repetitive questioning because, "once the [appellant] has been allowed to expose a witness's motivation in testifying, 'it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the [factfinder].'" *Id.* at 136 (quoting *Nelson*, 39 F. 3d. at 708); *see United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004) (finding harmless error where the disputed bias evidence was cumulative to evidence already before the factfinder).

Finally, [redacted]'s allegations that appellant threatened, bludgeoned, and sexually assaulted her are corroborated by credible witness testimony and undeniable photographic evidence. JH recalled seeing [redacted]'s "beaten" face, as [redacted] attempted to hide her two black eyes and broken nose behind the motel door. (R. at 230). The photographs indisputably documented the damage appellant inflicted. (Pros.

Ex. 2). Appellant's ex-girlfriend corroborated his penchant for pinning his victims down as he sexually assaulted them. (R. at 242). This evidence, in conjunction with [redacted]'s credible testimony, overwhelming establishes appellant's guilt beyond a reasonable doubt and demonstrates why the error was harmless.

Assignment of Error III

WHETHER THE POST-TRIAL PROCESSING DELAY WARRANTS RELIEF.

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Argument

This court should find that any delays in the post-trial processing of appellant's case were reasonable. In doing so, the court should overrule the post-trial delay test it announced in *United States v. Brown*, which attempted to adapt the traditional *Moreno* analysis to changes in post-trial processing procedures ushered in by the Military Justice Act of 2016. 81 M.J. 507, 509–10 (Army Ct. Crim. App. 2021). Even if this court applies the post-trial test from *Brown*, appellant's claim still fails.

A. *United States v. Brown* was incorrectly decided.

As part of the Fiscal Year 2017 National Defense Authorization Act, Congress enacted the MJA 16. The MJA 16 made changes to the UCMJ that

"amounted to a sea of change in American military justice." David Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary's L.J., 1, 7 (2017). The MJA 16 and the resultant changes to the Rules for Courts-Marital (R.C.M.) "ushered in sweeping changes to longstanding post-trial processing procedures," including eliminating the requirement for convening authorities to take action on a finding or sentence and changing the timeline for an accused to submit clemency matters to the convening authority. *Brown*, 81 M.J. at 509–10; *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App 2020). As this court recognized in *Brown*, these changes "made a stringent application of *Moreno*'s phase I and II presumptions impossible . . . ."[11] 81 M.J. at 510; *see also Livak*, 80. M.J. at 633 ("[T]he specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules."). In an effort to reconcile these changes with the precedent in *Moreno*, the court announced that "moving forward, this court will presume unreasonable delay in cases when more than 150 days elapse between final adjournment and docketing with this court." *Brown*, 81 M.J. at 510.

[11] *Brown* refers to the period of time between trial and convening authority action as "phase I" and the period of time between action and docketing at the CCA as "phase II." 81 M.J. at 510.

B. The *Moreno* timelines are inapplicable after MJA 16.

In enacting MJA 16, Congress provided a statutory remedy for post-trial delay by explicitly granting the CCAs the authority to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record . . . ." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2) (2018). Thus, the justification for the judicially created presumptions in *Moreno* no longer exists.

Abandoning the timelines in *Moreno* in no way infringes on a service member's "constitutional right to a timely review" and appeal of his conviction and sentence. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34, 37–38 (C.A.A.F. 2003); *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004). Indeed, Article 66(d)(2), UCMJ, is merely the manner in which Congress has chosen to implement the guarantees and protections that due process requires. By enacting Article 66(d)(2), UCMJ, Congress has—at least with respect to delays after entry of judgment—provided a statutory remedy for improper post-trial errors or delays, thus satisfying the requirements of due process. *See Parratt v. Taylor*, 451 U.S. 527, 538 (1982) ("[P]ostdeprivation remedies made available by the State can satisfy the Due Process Clause.").

Additionally, with respect to improper delays that occur before entry of judgment, due process is satisfied because convicted service members have means

of redress both through writs or petitions for extraordinary relief and on direct appeal.[12] *See, e.g., Diaz*, 59 M.J. 40 (granting petition for extraordinary relief "without prejudice to Petitioner's right to assert a violation of his statutory and constitutional rights to speedy appellate review in the ordinary course of appeal"); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002) (finding that even absent a showing of a due process violation, CCAs still must determine what sentence "should be approved" under Article 66(d), UCMJ).

C. This court should adopt a new post-trial delay analysis.

The appropriate test for claims of unreasonable post-trial delay is to look at the period of the delay *after entry of judgment*; determine whether the "accused demonstrate[d] error or excessive delay"; and then determine whether this court should exercise its discretionary authority to grant appropriate relief. Article 66(d)(2), UCMJ.

For claims of delay in post-trial processing *prior to entry of judgment* under Article 60c, UCMJ, this court should find that due process is satisfied by the "adequate procedures to redress an improper deprivation of liberty" that already exist, including writs and petitions for extraordinary relief, and a CCA's duty under Article 66(d)(1) to only affirm so much of a sentence "that should be

[12] Depending on the nature of the deprivation, a military judge may also be able to grant appropriate relief under Article 60(b), UCMJ.

approved." *Betterman v. Montana*, 578 U.S. 437, 449–50 (2016). Even if this court were to conduct a traditional *Barker* four-factor analysis,[13] it should do so only after a showing of a facially unreasonable delay, determined not by judicially created timelines, but on a case-by-case basis as the courts did prior to *Moreno*. *See Toohey*, 60 M.J. at 102–103. As CAAF has noted, "[m]any factors can affect the reasonableness of appellate delay," including the "length of the record and complexity of the issues," and other "military-unique characteristics." *Id.* at 102. "[T]here is no talismanic number of years or months [of appellate delay] after which due process is automatically violated." *Id.* at 103 (alterations in original).

D. Any delays in the post-trial processing of appellant's case were reasonable.

Whether this court adopts any or all of the new post-trial delay analysis recommended by appellee or decides instead to apply the *Brown* test, appellant is not entitled to relief.

1. There was no error or excessive delay after entry of judgment.

The military judge entered judgment on 8 January 2021, and this court docketed appellant's case on 19 July 2021. On its face, 192 days is not excessive. Further, appellant does not allege any errors in the post-trial processing of

[13] As some courts have noted, "[t]he factors listed in *Barker* may not necessarily translate" to analyzing delays post-conviction. *Betterman*, 578 U.S. at 449; *see United States v. James*, 712 F. App'x 154, 161–62 (3d Cir. 2017) (suggesting that a showing of a due process violation requires more than a showing of a violation of one's rights using the *Barker* factors).

appellant's case. Neither does appellant allege that he suffered any particularized prejudice from any delay. Simply put, appellant has not "demonstrate[d] error or excessive delay in the processing of the court-martial after the judgment was entered into the record" that warrants this court exercising its discretion to grant appropriate relief under Article 66(d)(2).

2. Under *Brown*, appellant suffered no due process violation.

Even if this court applies the test announced in *United States v. Brown*, appellant is not entitled to any relief because he suffered no prejudice.

a. The length of the delay and reasons for the delay.

Appellee notes that the length of the delay from adjournment to docketing with this court—248 days—is presumptively unreasonable under *Brown*.[14] Nonetheless, the delay was reasonable because 180 days of delay were caused by COVID-19 related illness suffered by both parties. (Chronology Sheet); *see United States v. Canchola*, 64 M.J. 245, 247 (C.A.A.F. 2007) ("Reviewing courts can then weigh and balance [operational requirements] in determining whether they provide adequate explanation for any apparent post-trial delays."). Should the court decide that this factor weighs in favor of appellant, it should at least be mitigated by those operational requirements.

[14] Under the test proposed by appellee, there would be no presumption based on time alone.

b. Appellant's assertion of his right to timely appeal and review.

Appellant submitted a "Speed[y] Post-Trial Processing Request" through his trial defense counsel. (Speedy Post-Trial Request). Appellant's demand, made ten days after trial, should not be seen as an assertion by appellant that his rights were being violated but rather as a reminder to the government of its obligation to process his court-martial in a timely manner. If this factor weighs in favor of appellant, it should do so only slightly.

c. Prejudice.

Appellant suffered no prejudice from any delays in the post-trial processing of his court-martial. This is apparent when considering prejudice in light of appellant's three interests in timely post-trial processing. *Moreno*, 63 M.J. at 138–39. First, appellant's substantive assignments of error on appeal are meritless and therefore he has not suffered any oppressive incarceration awaiting appeal. *See Moreno*, 63 M.J. at 139 ("If the substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive."). Next, there is no evidence in the record—nor does appellant allege—that he has suffered any particularized anxiety and concern "distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id*. at 140. Finally, appellant has not specified how the delay

would have impaired his ability to present a defense at a rehearing and has "therefore failed to establish prejudice under this sub-factor." *Id*. at 141. It is clear that appellant has suffered no prejudice.

Because appellant suffered no prejudice, this court "cannot find a due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Brown*, 81 M.J. at 511 (internal quotations omitted). The facts of this case simply do not rise to that level. *See id.* (finding that 373 days between adjournment and docketing at ACCA was "not so egregious as to adversely affect the public's perception of our system's fairness and integrity"); *see also United States v. Arias*, 72 M.J. 501, 507 (Army Ct. Crim. App. 2008) (finding no public perception issue based on a post-trial processing timeline of 294 days).

E. Appellant's sentence is appropriate and should be affirmed.

In light of the seriousness of his misconduct and the absence in the record of any other facts warranting relief, this court should affirm appellant's sentence. Appellant threatened to kill [redacted] and repeatedly assaulted her. On one occasion, appellant struck [redacted] so brutally that he broke her nose, caused her to lose consciousness, and then sexually assaulted her the following morning. (R. at 287). He faced a maximum possible punishment of forfeiture of all pay and allowance, confinement from more than thirty years, and a dishonorable discharge. *Manual*

for Courts- Martial, United States (2019 ed.), App'x 12. The military judge sentenced appellant to reduction to the grade of E-1, confinement for three years, and a dishonorable discharge—a small fraction of his punitive exposure. (R. at 391). Even considering this court's broad discretion, there is simply nothing in the record—no excessive or "unexplained and unreasonable post-trial delay"—that warrants granting appellant relief in this case. Art. 66(d)(2), UCMJ; *Tardif*, 57 M.J. at 224. The delay in this case, while regrettable, was minimal. Considering the seriousness of appellant's misconduct, his sentence was absolutely appropriate. Accordingly, this court should affirm his sentence.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

[redacted]
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]
CRAIG J. SCHAPIRA
LTC, JA
Deputy Chief, Government
Appellate Division

[redacted]
CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

Certificate of Filing and Service

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 4 day of April, 2022.

[redacted]
Paralegal Specialist
Government Appellate
Division [redacted]