IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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

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

Assignments of Error

I.

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

II.

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

III.

WHETHER THE POST-TRIAL PROCESSING DELAY WARRANTS RELIEF.

PANEL NO. 3

Statement of the Case

On 6 December 2021, appellant filed his Brief on Behalf of Appellant. On 4 April 2022, the government responded with its Brief on Behalf of Appellee. This is Appellant's Reply.

Statement of Facts

Appellant rests on the Statement of Facts in the Brief on Behalf of Appellant.

Assignments of Error

I.

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

After appellant filed his brief, this court issued a memorandum opinion in *United States v. Hatfield*, which the government cited in its response. (Appellee Br. at 7). In *Hatfield*, this court held that Article 25(d)(1) only references the accused electing sentencing by members after findings; therefore, it must be read in conjunction with Article 53, which actually confers the option of sentencing by the members or the military judge. ARMY 20200410, 2022 CCA LEXIS 62, at *6 (Army Ct. Crim. App. 26 Jan. 2022) (mem. op.).[1] Moreover, this court reasoned, because Executive Order (EO) 13,825, §10(a) discusses Article 53 writ large,

[1] Available at https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/447

"appellants who committed their offenses prior to 1 January 2019 [do not have] the right to request judge alone sentencing after a panel trial." *Id.* at *7.

This court should decline to apply *Hatfield* here for three reasons. First, it failed to adequately discuss why the inclusion of Article 53 in the EO explained the perplexing exclusion of Article 25(d)(1). *Id.* at *6. In this court's eyes, the EO's inclusion of Article 53 in its entirety makes the EO's intent to delay sentencing forum selection unambiguous. *Id.* at *7. However, the court's reading seemingly renders Article 25(d)(1) superfluous, void, or ineffective, which is contrary to Supreme Court precedent on sound statutory interpretation. *Corley v. United States*, 556 U.S. 303, 314 (2009).

The *Hatfield* decision tried to square the circle by stating that Article 53, rather than Article 25(d)(1), "provides for the execution" of the sentencing forum request. *See* 2022 CCA LEXIS 62, at *6. That is circular logic because Article 53(b)(1)(B) states, "the accused elects sentencing by the members under section 825 of this title (article 25)." Therefore, based on this court's opinion in *Hatfield*, Article 25(d)(1), which does not mention Article 53, cannot be fully understood without reading Article 53 in its entirety. However, Article 53(b)(1)(B) itself makes it clear that Article 53 cannot be fully understood without reading Article 25. This creates an absurd analytical loop where each provision seems to give the other operative effect. What is clear is that Article 25(d)(1) was not included in the

EO delaying certain provisions of the Military Justice Act of 2016 (MJA-16) from taking effect unless and until the charged acts occurred on or after 1 January 2019.[2] Therefore, Article 25(d)(1) should have taken full effect for appellant's case.

Second, this court relying on Article 25(d)(1)'s failure to reference the military judge as the other potential sentencing forum is impractical. *Id.* at *6. Practically speaking, if Article 25(d)(1) confers upon the appellant the right to elect sentencing by the members, the realistic default option has to be the military judge. There is no other realistic option. Obviously, neither of the parties are in a position to impose a sentence, and the convening authority does not hear the trial so he or she is also not in a position to do so.

Third, this court's holding that the assignment of error is procedural rather than jurisdictional is incorrect because appellant's choice of forum was uninformed, and this created a jurisdictional defect. *See United States v. Morgan*, 57 M.J. 119, 121 (C.A.A.F. 2002). In *Turner, Townes*, *Morgan*, and *Alexander*, the Court of Appeals for the Armed Forces (C.A.A.F.) determined there was "substantial compliance" with the law regarding forum choice precisely because the military judge properly informed the accused of his forum rights. *United States v. Turner*, 47 M.J. 348, 350 (C.A.A.F. 1997); *United States v. Townes*, 52 M.J. 275

[2] To the extent there is ambiguity in the EO, it should be resolved in favor of conferring a right to an accused.

277 (C.A.A.F. 2000); *Morgan*, 57 M.J. at 120; *Alexander*, 61 M.J. 266, 269–70 (C.A.A.F. 2005). Therefore, in cases like appellant's where the military judge does not properly inform the accused of his forum rights, there can be no substantial compliance, and the error must be jurisdictional.

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

II.

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

1. The government's brief overlooked the key aspect of the prejudice analysis in this case.

In its brief, the government all but conceded the military judge abused his discretion and skipped straight to a prejudice analysis. (Appellee Br. at 14). Ultimately, the government suggested that the "evidence, in conjunction with [redacted] credible testimony, overwhelming[ly] establishes appellant's guilt beyond a reasonable doubt and demonstrates why the error was harmless."[3] (Appellee Br. at

[3] By arguing the credibility of [redacted] testimony renders the excluded evidence harmless beyond a reasonable doubt, the government used credibility as a sword and a shield. To the extent [redacted] argument was credible, the military judge's erroneous exclusion of her statement, "Fuck [appellant], I'm going to take him for everything he's got," would have damaged that credibility. In short, the government relied on [redacted] credibility to prove its case at trial, and now argues appellant was not prejudiced for being denied the right to fully test that credibility.

18). However, the test is not whether the entire case may have turned out differently, rather only that a reasonable fact-finder "might have received a significantly different impression of [the witness]'s credibility had [defense counsel] been permitted to pursue his proposed line'" of questioning. *Delaware v. Van Arsdall*, 475 U.S 673, 680 (1986).

In this case, surely the factfinder would have been left with a different view of KG's credibility had the military judge allowed and considered [redacted] statement, "Fuck [appellant], I'm going to take him for everything he's got." (R. at 296). While there was other evidence that [redacted] and appellant were at odds, there were only limited references to divorce[4] and nothing else that demonstrated the depths of her malice outside of the excluded statement at issue.[5]

[4] Though the government downplays the probative value of divorce as a motive to fabricate (Appellee Br. at 14, n. 9), this court held in *United States v. Solomon* that divorce can be "highly probative" Mil. R. Evid. 608(c) evidence. ARMY 20160456, 2019 CCA LEXIS 149, at *17, *18 (Army Ct. Crim. App. 2019) (mem. op.). https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/237. Even if the comment was not related to divorce, it was still relevant because no matter what [redacted] was referring to, it demonstrated her extreme bias against appellant. If there was a more tempered explanation, the government could have recalled [redacted] during their rebuttal case to explain, but only *after* the military judge properly admitted the evidence of her bias.

[5] The government improperly highlighted defense counsel's opening statement as one of the moments at trial rendering the excluded statement cumulative because opening and closing statements are not evidence. *See United States v. Larson*, 66 M.J. 212, 218 (C.A.A.F. 2008).

In sum, there is a clear difference in both kind and degree between evidence of [redacted] wanting to retain possession of a vehicle, transitional compensation, and health insurance, and her saying, "Fuck [appellant], I'm going to take him for everything he's got." (*See* Appellee Br. at 15–17; R. at 296). In fact, this statement was key to the defense counsel's theory of the case, as emphasized by the government's brief. (Appellee Br. at 13, 15). That is, she was more than just a pending divorcee, but a "spiteful spouse." (R. at 154, 297; Appellee Br. at 13, 15). Therefore, the government did not and cannot show that this statement would have "played no role" in the military judge's evaluation of [redacted] credibility. *See United States v. Long*, 81 M.J. 362, 370 (C.A.A.F. 2021) (holding that constitutional errors must have "played no role" in the analysis to be deemed harmless beyond a reasonable doubt.) Rather, the government's brief only highlighted the importance of the excluded testimony.[6]

[6] This case is distinguishable from *United States v. James* where the C.A.A.F. held that "[a] military judge has wide discretion to limit repetitive cross-examination or to prohibit cross-examination that may cause confusion" because, in this case, no other witness testified to the excluded statement, which would have added depth and magnitude to [redacted] motive to fabricate. Therefore, there is no rational argument that it was cumulative. (*See* Appellee Br. at 17); 61 M.J. 132, 136 (C.A.A.F. 2005)). It is also notable that the military judge in this case did not even exercise his discretion and rule that it was cumulative. Rather, he bungled the analysis regarding the admissibility of bias evidence and never reached that question. This case is also distinguishable from *United States v. Saferite* because, in that case, not only was the evidence at issue cumulative, but it "did little to establish bias" and "the danger of unfair prejudice was substantial." (*See* Appellee Br. at 17); 59 M.J. 270, 274 (C.A.A.F. 2004). Here, the excluded evidence would

2. In its brief, the government erroneously faulted appellant, the trial counsel, and the military judge for failing to cite to specific military rules of evidence as they debated the government's objection. (Appellee Br. at 14, n. 9).

The law on this point is clear, "there are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal.] [O]f critical importance is the specificity with which counsel makes the basis for his position known to the military judge." *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) (citing *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016) (quoting *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999))). Here, the trial defense counsel made appellant's position abundantly clear, that is, they were offering the excluded statement at issue to show [redacted] motive to fabricate allegations against appellant. Put simply, they wanted to show her bias, which is admissible pursuant to Mil. R. Evid. 608(c). (R. at 297).

III.

WHETHER THE POST-TRIAL PROCESSING DELAY WARRANTS RELIEF.

1. The government advocated for overturning *stare decisis* without a "compelling reason." *See United States v. Cardenas*, 80 M.J. 420, 424 (C.A.A.F. 2021).

In its brief, the government asked this panel to overturn *United States v. Brown*, which is an opinion of the court with precedential value. 81 M.J. 507

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have established both the existence of [redacted] bias and the fervor of it, and there are no other Mil. R. Evid. 403 concerns substantially outweighing the probative value.

(Army Ct. Crim. App. 2021); (*See* Appellee Br. at 18). Not only does this panel not have the authority, on its own, to overturn an opinion of the court, but the government neither cited all of the factors in *United States v. Andrews* nor offered a compelling argument as to why this court should overturn *Brown*. *See* A.C.C.A. R. 27(d); 77 M.J. 393, 399 (C.A.A.F. 2018) (to overturn precedent, this court must consider "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law.") *Brown* not only provides a workable framework for analyzing post-trial delay, but there have not been any intervening events *since it was decided*.

Most importantly, the Army's routine inability to meet the timeline in *Brown* underscores the need for upholding it. In just the last two and a half years, this court has granted relief in at least fourteen cases for unreasonable post-trial delay. *See United States v. Kizzee*, ARMY 20180241, 2019 CCA LEXIS 508 (Army Ct. Crim. App. 12 Dec. 2019) (summ. disp.) (274 days); *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38 (Army Ct. Crim. App 10 Feb. 2020) (summ. disp.) (296 days); *United States v. Notter*, ARMY 20180503, 2020 CCA LEXIS 150 (Army Ct. Crim. App. 4 May 2020) (summ. disp.) (337 days); *United States v. Diaz*, ARMY 20180556, 2020 CCA LEXIS 154 (Army Ct. Crim. App. 11 May 2020) (summ. disp.) (308 days); *United States v. Badgett*, ARMY 20190177

(Army Ct. Crim. App. 4 Nov. 2020) (summ. disp.) (320 days); *United States v. Guyton*, ARMY 20180103, 2020 CCA LEXIS 462 (Army Ct. Crim. App. 16 Dec. 2020) (mem. op.) (481 days); *United States v. Christensen*, ARMY 20190197, 2021 CCA LEXIS 159 (Army Ct. Crim. App. 29 Mar. 2021) (mem. op.); *United States v. Hemmingsen*, ARMY 20180611, 2021 CCA LEXIS 180 (Army Ct. Crim. App. 15 Apr. 2021) (mem. op.) (322 days); *United States v. Rivera*, ARMY 20190608, 2021 CCA LEXIS 262 (Army Ct. Crim. App. 27 May 2021) (summ. disp.) (288 days); *United States v. McKee*, ARMY 20190680, 2021 CCA LEXIS 264 (Army Ct. Crim. App. 27 May 2021) (summ. disp.) (285 days); *United States v. Meadows*, ARMY 20190260, 2021 CCA LEXIS 263 (Army Ct. Crim. App. 27 May 2021) (summ. disp.) (276 days); *Brown*, 81 M.J. at 507 (373 days); *United States v. Figueroa*, ARMY 20200059, 2021 CCA LEXIS 265 (Army Ct. Crim. App. 27 May 2021) (summ. disp.) (214 days); *United States v. Pitts,* ARMY 20200610, 2022 CCA LEXIS 89 (Army Ct. Crim. App. 9 February 2022) (summ. disp.) (239 days).[7]

The cases above are only the cases garnering relief. In Fiscal Year (FY) 19, this court received 362 new cases (that is, not a remand from C.A.A.F. or returned from the convening authority after remand). The Office of the Judge Advocate

[7] Each of the above unpublished opinions are available at https://www.jagcnet.army.mil/ACCALibrary/cases?categoryKey=pending

General, "U.S. Army Report on Military Justice for Fiscal Year 2019", at 1 (December 31, 2019).[8] Of those 362 cases, the convening authority completed initial action within 120 days (the standard in *United States v. Moreno*) in only 171 cases (47%). *Id*. Likewise, this court received 442 cases for the first time in FY 20. The Office of the Judge Advocate General, "U.S. Army Report on Military Justice for Fiscal Year 2020", at 2 (December 31, 2020).[9] Of those, seventy-seven were processed under pre-MJA 16 processing, and the average processing time for those cases was 243 days from sentencing to convening authority action. *Id.* Only six of the seventy-seven cases completed initial action by the convening authority within the 120 days prescribed by *United States v. Moreno*. *Id*. Though 68% of the post-MJA 16 cases were certified and completed within 120 days, that is still an unacceptable 32% failure rate.

2. The government's contention that relief for post-trial delay is limited to the parameters of Article 66(d)(2) is wrong. (*See* Appellee Br. at 20).

Adding subsection (d)(2) to Article 66 without any limiting language like "only" shows Congress expanded this court's discretion to grant relief for post-trial processing delay. *See United States v. Brown*, 81 M.J. 507, n.2 (Army Ct. Crim.

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[8] Available at https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Report%20-%20FY19%20-%20All%20Services.pdf?ver=2020-07-22-091702-650

[9] Available at https://jsc.defense.gov/Portals/99/Documents/Combined%20Final%20Article%20146a%20Reports%20FY20.pdf

App. 2021). This interpretation makes sense because if appellants could only obtain relief for delays after entry of judgment, the government would be encouraged to delay entering judgment for as long as possible to foreclose appellant's ability to obtain relief. Surely Congress did not intend to encourage this sort of gamesmanship, and this court was correct to reject the government's interpretation in *Brown*. *Id.*

3. There was no legitimate reason for the post-trial processing delay.

In its brief, the government contended that 180 days of delay were caused by COVID-19 related illnesses by both government and defense, citing to the Chronology Sheet. (Appellee Br. at 23). However, these 180 days were pre-trial delay, not post-trial. (Chronology Sheet). Appellant was sentenced on 13 November 2020. (R. at 391). The Chronology Sheet makes it clear that the COVID-19 related delays were from March to September 2020, prior to the merits and sentencing phases of the court-martial. Therefore, COVID-19 is wholly irrelevant to resolving this assignment or error.

4. The government's contention that the sentence is appropriate even considering the excessive post-trial delay ignores the reasons for granting relief due to dilatory post-trial processing.

The government claims appellant is not entitled to relief because he received, in the government's eyes, a sentence commensurate with the nature of the offenses for which he was convicted. (Appellee Br. at 25–26). However, the

sentence adjudged at trial could not have anticipated appellant's 248-day wait for docketing before this court, with neither relief nor finality in his case. *See United States v. Arriaga*, 70 M.J. 51, 55, 57 (C.A.A.F. 2011).

Granting relief in this case, and other cases where the government drags its feet on post-trial processing, is required not because of the underlying facts of appellant's individual case, but because "[d]ilatory post trial processing, without an acceptable explanation, is a denial of fundamental military justice." *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001). "A timely, complete, and accurate record of trial is a critical part of the court-martial process. Every soldier deserves a fair, impartial, and timely trial, to include the post-trial processing of his case." *United States v. Collazo*, 53 M.J. 721, 725 (Army Ct. Crim. App. 2000). As in *Collazo*, this court should be wary of "dilatory habits . . . creeping into post-trial processing." *Id*. at 725.

This is not a windfall to appellant. Rather, relief in this case is the appropriate result stemming from the government's failure to diligently process appellant's post-trial paperwork. Surely the government's duty to treat appellant fairly does not end upon the announcement of his sentence.

The delay in this case is also similar to *Ponder*, where this court held the post-trial processing was "not the example of diligence and efficiency expected of

the military." 2020 CCA LEXIS 38, at *3–*4.[10] In *Ponder*, this lack of diligence warranted relief not because the sentence was too light, but because "[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system." *Id.* at *4 (citing *United States v. Carroll*, 40 M.J. 554, 557, n.8 (A.C.M.R. 1994)).

Therefore, the crucial aspect of relief for post-trial delay is the government's inaction, not appellant's actions. 57 M.J. at 224. After all, the military judge in this case learned the facts of the case, determined the appropriate sentence, and assumed timely post-trial processing. Because the government failed to live up to the standard, and "[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system," appellant is entitled to additional relief. *Ponder*, 2020 CCA LEXIS 38, at *4.

[10] Available at https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/3044

Conclusion

WHEREFORE, PFC Grant respectfully requests this court grant the relief requested.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on April 11, 2022.

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