

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**MOTION FOR ACCESS TO
DIGITAL VERSIONS OF SEALED
MATERIALS**

v.

Docket No. ARMY 20210306

Chief Warrant Officer (CW3)
JASON J. GERANEN
United States Army,
Appellant

Tried at Fort Hood, Texas, on 19-21
May 2021, before a general court-
martial appointed by Commander,
Headquarters, III Corps and Fort Hood,
Lieutenant Colonel Scott Z. Hughes,
military judge, presiding.

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

Pursuant to Rules 6 and 23 of this Court's Internal Rules of Practice and Procedure, undersigned counsel respectfully move the Court to provide both military and civilian counsel access to sealed materials contained in the record of *United States v. Geranen*. Specifically, counsel ask the Court to provide digital (or electronic) copies of the sealed materials to all counsel, accompanied by an appropriate protective order prohibiting further copying, distribution, or use other than in the course of counsels' representation of CW3 Geranen.

The sealed materials at issue fall into two categories: trial documents and appellate documents.

Trial documents

At trial, the parties litigated issues under Military Rule of Evidence 412, involving the complainant's other sexual conduct or predisposition. The military judge signed a sealing order dated 5 January 2022, sealing the following: a CD containing the closed session audio; closed proceeding transcript pages 136-153; 428-434; 480-484; Appellate Exhibits XXXII and XXXIII (GOV Mot 412 and ENCL); Appellate Exhibit XXXIV (DEF Resp to AE XXXII); and Appellate Exhibits XXXVI and XXXVII (GOV Resp to AE XXXIV w ENCL). (Sealing Order).

At trial, multiple witnesses testified that the complainant had a long-term girlfriend at the time of the alleged offense. (R. at 462-63, 526, 556, 735.) The members also heard testimony that she "had not had sex with a man prior to this." (R. at 423, 445.)

Apparently, the Government sought to introduce some evidence under Mil. R. Evid. 412. (*See* Sealing Order.) Appellate defense counsel have not had an opportunity to review any of the sealed materials, including the motions and responses. We have a good faith argument, based on the record, that error occurred with respect to the testimony described above. Specifically, we believe that the

complainant's sexual history with men constitutes "other sexual conduct" and her status as a lesbian constitutes "sexual predisposition." Mil. R. Evid. 412 is a rule of exclusion and it is difficult to see, based on the record, how any of the three exceptions to the rule apply to this evidence. Therefore, it is imperative that all of CW3 Geranen's counsel, including civilian counsel (as lead counsel), personally review all materials related to this issue in order to provide effective assistance of counsel on appeal.

Motions and responses generally are filed electronically at the trial level. (*See* Rule 7.1.1, Rules of Practice Before Army Courts-martial, 1 December 2020.) Appellate defense counsel confirmed with military and civilian trial defense counsel that the Mil. R. Evid. 412 motions in this case were, in fact, electronically filed. The court reporter typed the transcript on a computer, so that file should be available electronically. The audio is, by definition, digital in nature. So, all of the materials at issue already exist in a digital/electronic format. We respectfully seek access to these electronic materials. If, for some reason, they are not currently in the possession of the Clerk of Court, we respectfully request that the Court order their production.

We ask that the Court provide these electronic materials simultaneously to civilian appellate defense counsel, military appellate defense counsel, and government appellate counsel. In the event that the Court prefers only to provide

digital copies to military appellate defense counsel and not civilian counsel, we request permission for the military counsel to securely transmit the materials to civilian counsel (via DOD SAFE, for example).

Obviously, undersigned counsel understand the significant privacy interests attached to Mil. R. Evid. 412 matters and do not object to a protective order as described above. But, all appellate defense counsel should have equal access to materials, especially those, like the ones at issue in this Motion, that were available to trial counsel, defense counsel, the military judge, and CW3 Geranen at trial.

Pursuant to R.C.M. 1103A(b)(4)(B)(i), “materials presented or reviewed at trial and sealed...may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]” A review of the entire record is necessary because this Court is empowered by Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c), to grant relief based on a review and analysis of “the entire record.” To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(c), UCMJ, 10 U.S.C. §866, counsel must therefore examine “the entire record.”

Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed material must be reviewed in order for counsel to provide “competent appellate representation.”

Id. Therefore, both military and civilian defense counsels’ examination of sealed materials is reasonably necessary to fulfill their responsibilities in this case, since counsel cannot perform their duty of representation under Article 70, UCMJ, 10 U.S.C. §870, Army Reg. 27-26, Rules of Professional Conduct for Lawyers, and their ethical duty to provide effective assistance of appellate counsel without first reviewing the *complete* record of trial.

Appellate documents

As mentioned, undersigned counsel believe an Assignment of Error lies with regard to Mil. R. Evid. 412 issues. Therefore, counsel will likely electronically file a redacted version of this AOE and an unredacted version via hard copy in accordance with this Court’s rules. The Government then will presumably follow the same procedure with regard to the Answer. As a matter of judicial economy, counsel seek an order from the Court authorizing military appellate government and defense counsel to securely transmit any and all pleadings or other matters which may be filed under seal in this case to civilian counsel (for example, the Answer and any attachments). This will avoid further delay in having counsel file additional motions.

CW3 Geranen respectfully requests that this Honorable Court grant this Motion.

Respectfully submitted,

PANEL NO. 4

MOTION FOR ACCESS TO
DIGITAL VERSIONS OF
SEALED MATERIALS

[REDACTED]
TERRI R ZIMMERMANN
Lead Civilian Appellate Defense Counsel
[REDACTED]

GRANTED: _____

DENIED: [REDACTED]

ARAP 6.9 and
6.11(b)

DATE: 25 July 2022

[REDACTED]
JACK B ZIMMERMANN
Civilian Appellate Defense Counsel
[REDACTED]

Zimmermann Lavine & Zimmermann, P.C.
770 South Post Oak Lane, Suite 620
Houston, Texas 77056
[REDACTED]
[REDACTED]

SARAH H. BAILEY
CPT, JA
Appellate Defense Counsel Defense
Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[REDACTED]
[REDACTED]

CERTIFICATE OF SERVICE

This motion was filed by email to the Court and counsel for the Government on 22 July 2022.



TERRI R ZIMMERMANN
Lead Civilian Appellate Defense Counsel

