

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20210236

Specialist (E-3)

THOMAS YEPEZ

United States Army

Appellant

Tried at Fort Hood, Texas, on 11 March 2020, 8 May 2020, and 26-27 April 2021, before a general court-martial appointed by Commander, Headquarters, 1st Cavalry Division, Colonel Lanny Acosta Jr., military judge, presiding.

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

Assignments of Error¹

**I. WHETHER THE MILITARY JUDGE ERRED IN DENYING
EVIDENCE PURSUANT TO MILITARY RULE OF EVIDENCE 412.**

**II. WHETHER THE DILATORY POST-TRIAL PROCESSING OF
THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT
REFERRED TO THE ARMY COURT OF CRIMINAL APPEALS
UNTIL 246 DAYS AFTER SENTENCING.**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Statement of the Case

On 27 April 2021, a military judge, sitting as a general court-martial, convicted appellant, Specialist (SPC) Thomas Yepez, 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). (Statement of Trial Results). The military judge sentenced appellant to be confined for twenty-eight months and discharged from the service with a dishonorable discharge. (Statement of Trial Results). On 3 June 2021, the convening authority approved the findings and sentence as adjudged. (Convening Authority Action). The military judge entered the Judgment of the Court on 15 June 2021. (Judgment of the Court).

Statement of Facts

Sergeant [REDACTED] first met appellant while on a unit rotation to Germany in November 2017. (R. at 287). Sergeant [REDACTED] and appellant became friends – they would occasionally text and call each other, and talk to each other in passing at work. (R. at 287). Appellant and SGT [REDACTED] also communicated using Snapchat,² sending each other photos and texts from March to June 2018. (App. Ex. XI, pg. 1,

² Snapchat is a photo and text message application that allows users to send photos and messages that will automatically delete once the photo or message has been viewed by the recipient, or a certain amount of time passes. (App. Ex. XI, pg. 3). Recipients can save photos or messages by taking a screenshot or using some other image-capture device or method. (App. Ex. XI, pg. 3).

App. Ex. XXI) (sealed). Around April or May 2018, SGT [REDACTED] began sending appellant sexually provocative photographs through Snapchat. (App. Ex. XXI) (sealed). Appellant saved three of the photographs SGT [REDACTED] sent him. The first photograph, which SGT [REDACTED] sent in April 2018, depicts SGT [REDACTED] in her bra and underwear with the text, “gotta get some gym and food into me” over the photograph. (App. Ex. XI, encl. 1; App. Ex. XXI) (sealed). Approximately one week later, SGT [REDACTED] sent appellant a photograph of her in her bra and underwear with the text “Guess I’m the skinny kind of thick” over the photograph. (App. Ex. XI, encl. 2; App. Ex. XXI) (sealed). She sent a third photo in May 2018, of herself nude in front of a mirror with heart emojis³ superimposed over her breasts and a winking face with its tongue sticking out over her groin. (App. Ex. XI, encl. 3) (sealed).

At the time, SGT [REDACTED] was in a romantic relationship with SGT [REDACTED] [REDACTED]. (R. at 408). In June 2018, SGT [REDACTED] and SGT [REDACTED] had dated for about a year, and were in a long distance relationship. (R. at 300, 408). During the relationship, SGT [REDACTED] accused SGT [REDACTED] of cheating on her. (R. at 409).

³ Emojis are pictographs of faces, objects, and symbols. *What’s the Difference Between Emoji and Emoticons?* <https://www.britannica.com/story/whats-the-difference-between-emoji-and-emoticons> (last visited 16 Jun. 2022).

In June 2018, appellant and SGT [REDACTED] decided to drink and play games at appellant's off-post apartment, located approximately five minutes away from SGT [REDACTED] own room. (R. at 288). Sergeant [REDACTED] walked to appellant's off-post apartment. (R. at 288). When she arrived, it was "sometime in the evening" but was still light outside. (R. at 289). Upon her arrival, the two "listen[ed] to music, and [drank whiskey], and play[ed] board games like UNO." (R. at 288).

Sergeant [REDACTED] testified that she drank more alcohol than usual. (R. at 290). Sergeant [REDACTED] recalled appellant helping her walk to the bedroom in his apartment, and then leaving the room. (R. at 292). Sergeant [REDACTED] testified that at some later point, she was sexually assaulted by appellant, and was blacking in and out during the encounter. (R. at 292-293).

After the sexual encounter with appellant, SGT [REDACTED] did not immediately leave. (R. at 297-298). Sergeant [REDACTED] believed that appellant had ejaculated on her stomach, because she woke the next morning and remembered that her stomach felt sticky. (R. at 297). Sergeant [REDACTED] made a restricted⁴ report to her unit Sexual Assault Response Coordinator (SARC) on 22 June 2018, and did not un-restrict her

⁴ A restricted report of sexual assault allows an alleged victim to receive a medical exam to receive medical treatment and collect forensic evidence without law enforcement opening an investigation. The alleged victim has the option to un-restrict his or her report and proceed with a law enforcement investigation at a later point in time by "un-restricting" her report. (R. at 340, 349).

report for approximately one year. (R. at 298-299). Sergeant [REDACTED] claimed she un-restricted her report after she “had an idea that [appellant] might have another accusation.” (R. at 299). Sergeant [REDACTED] said she overheard a conversation from the command team while passing by an office and heard that appellant and his wife were mad about a case involving a drunk female. (R. at 328-329). Sergeant [REDACTED] decided that this case “seemed similar to mine” and shortly after, she decided to un-restrict her report. (R. at 330).

Before trial, the defense provided notice and sought admission from the court to introduce the nude or semi-nude photos SGT [REDACTED] sent appellant pursuant to Military Rule of Evidence (Mil. R. Evid.) 412. (App. Ex. XI, pg. 1) (sealed). The defense argued the Snapchat communications between appellant and SGT [REDACTED] between March and June 2018, including the risqué photographs sent by SGT [REDACTED], were constitutionally required to support appellant’s mistake of fact defense. (App. Ex. XI) (sealed). The government opposed the defense motion. (App. Ex. XII) (sealed).

The military judge found that the defense failed to meet its burden because “there is no evidence that this evidence is ‘evidence of sexual behavior with respect to’ appellant. (App. Ex. XXIV, pg. 4) (sealed). The military judge also found that the first two photos (of SGT [REDACTED] in her underwear) did not constitute sexual behavior with appellant, because SGT [REDACTED] claimed she posted the photos in

Snapchat, and they were viewable by multiple people. (App. Ex. XXIV, pg. 4).

Sergeant [REDACTED] testified that she may have sent the first two photographs to appellant through a snapchat group, where multiple individuals receive the same photo, but the recipient would not be aware that the photograph was sent to other individuals. (R. at 80-81) (sealed). Sergeant [REDACTED] also testified that if she did not send the first two photographs to a group of people in snapchat, then she must have posted the photograph to her snapchat story, but the photograph appears the same way in either circumstance. (R. at 81) (sealed).

With respect to the third photograph of SGT [REDACTED], the one where she is undressed and placed emojis over her groin and breasts, the military judge found, “the only evidence other than the accused possessing it is that the complaining witness testified she may have posted it on her [snapchat] timeline.”⁵ (App. Ex. XXIV, pg. 4) (sealed). Sergeant [REDACTED] testified that she would not have sent the third photograph to multiple individuals or posted the photograph to her snapchat story. (R. at 80). The military judge found that appellant was in possession of the third photograph. (App. Ex. XXIV).

⁵ The military judge used the word “timeline” in his ruling to reference a Snapchat story. Snapchat stories allow users to string together pictures and videos taken throughout the day. Similar to other social media sites, this “slideshow” is public for all Snapchat friends. Unlike other social media sites, a Snapchat story is only visible for 24-hours. *What are Snapchat Stories?* <https://ischool.syr.edu/what-are-snapchat-stories/> (Last Accessed 21 Jun. 22).

The government argued that while appellant asserted that SGT [REDACTED] sent him the photographs in a direct message through snapchat, appellant had no way to determine whether he received the photograph as part of a group message or a direct message, because the snapchat interface would not show that information. (R. at 88) (sealed).

In finding the photographs inadmissible, the military judge found they were not relevant under Mil. R. Evid. 412(b)(3) because the defense failed to produce “any evidence that these photographs were in anyway intended for the accused alone”. (App. Ex. XXIV, pg. 5) (sealed). But the military judge failed to address whether the three photographs were constitutionally required for the purpose of establishing *appellant’s* honest and reasonable belief that SGT [REDACTED] wanted to engage in sexual conduct. (App. Ex. XXIV) (sealed).

I. WHETHER THE MILITARY JUDGE ERRED IN DENYING EVIDENCE PURSUANT TO MILITARY RULE OF EVIDENCE 412.

Standard of Review

This court reviews the military judge’s ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 for an abuse of discretion. *United States v. Carpenter*, 77 M.J. 285, 288 (C.A.A.F. 2018); *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F., 2000). Findings of fact are reviewed under a clearly

erroneous standard and conclusions of law are reviewed de novo. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010).

Law

Under Mil. R. Evid. 412, evidence offered by the accused to prove the alleged victim's sexual predispositions, or that she engaged in other sexual behavior, is inadmissible except in limited contexts. Mil. R. Evid. 412. Evidence is constitutionally required if it is: (1) relevant; (2) material; and (3) its probative value outweighs the dangers of unfair prejudice. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011).

Relevant evidence is that which has “any tendency to make the existence of any fact . . . more or less probable than it would be without the evidence.” Mil. R. Evid. 401. Materiality is a multi-factored test weighing the “importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to the issue.” *Ellerbrock*, 70 M.J. at 319 (internal quotations omitted).

In relation to prejudice, the question is whether there was “prejudice to the integrity of the trial process, not prejudice to a particular party or witness.”

Gaddis, 70 M.J. at 255.⁶ The exclusion of constitutionally required evidence is reviewed for harmlessness beyond a reasonable doubt. *See Ellerbrock*, 70 M.J. at 320. For non-constitutional evidentiary errors, the test for prejudice is “whether the error had a substantial influence on the findings.” *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017). In conducting the prejudice analysis, the court considers “(1) the strength of the Government’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.” *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011); *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

⁶ In *Gaddis*, the Court of Appeals for the Armed Forces (C.A.A.F.), while not outright overruling its earlier decision in *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004), called into question *Banker*’s continued vitality. The court, which has not cited *Banker* since it issued *Gaddis*, criticized *Banker* because it implied that Mil. R. Evid. 412 could trump the Constitution, a conclusion that *Gaddis* stated was “simply wrong.” *Gaddis*, 70 M.J. at 256. The test set forth in *Banker* “has the potential to lead military judges to exclude constitutionally required evidence merely because its probative value does not outweigh the danger of prejudice to the alleged victim’s privacy, which would violate the Constitution.” *Id.* Despite the C.A.A.F.’s evident abandonment of *Banker*, this court and other service courts for some reason continue to cite it. *See United States v. Carista*, 76 M.J. 511 (Army Ct. Crim App. 2017); *United States v. Leonhardt*, 76 M.J. 821 (Air F. Ct. Crim App. 2017).

Argument

The military judge erred in denying the defense's request to introduce the "sexting" messages and photos between appellant and SGT [REDACTED]. His Mil. R. Evid. 412 analysis suffered from two fatal flaws: First, the he misinterpreted the relevance of the photos SGT [REDACTED] sent. Appellant sought to admit the photos as part of his effort to establish that as a result of her sending him sexually explicit and risqué photos, *he* had a reasonable mistake of fact as to her consent to have sex with him. Nonetheless, the military judge focused exclusively on *who else* SGT [REDACTED] sent the photos to, not on appellant's singular perception of the situation when he received the photos. After all, appellant likely concluded he was the only recipient of the suggestive photos, and likely assumed SGT [REDACTED] wanted to pursue a physical relationship. Sergeant [REDACTED] intent with respect to others is irrelevant to whether *appellant* had a reasonable mistake of fact.

Second, the military judge failed to conduct *any* analysis regarding whether the evidence was constitutionally required. The evidence is relevant and material to appellant's state of mind regarding consent, crucial to cross-examination of SGT [REDACTED], and its probative value outweighs the dangers of unfair prejudice.

A. Even if Sergeant [REDACTED] Sent the Snapchat Photographs to Multiple Individuals, the Evidence is Relevant to Establish Appellant's Mistake of Fact as to Consent.

The military judge found that the defense had not established that the photographs were sent directly by SGT [REDACTED] to appellant, and thus, were not evidence that could be used to establish consent or a mistake of fact to consent. (App. Ex. XXIV) (sealed). The military judge incorrectly focused on evidence (or lack thereof) of SGT [REDACTED] intentions in sending the photographs (to a group of individuals, and not just appellant) instead of appellant's reasonable interpretation of SGT [REDACTED] intentions when he received the photographs – that she sent the photographs because she wanted to engage in a sexual relationship with appellant.

The defense sought to use evidence that SGT [REDACTED] sent the photographs to appellant in order to establish that he reasonably believed that she wanted to engage in sexual activity – her motivations or whether she sent the photographs to other individuals, is entirely irrelevant to that analysis. But the military judge's ruling undercut appellant's ability to ask relevant and necessary questions about the photos. In so doing, he robbed the defense of incredibly powerful impeachment evidence. It is difficult to imagine how SGT [REDACTED] could have explained why she sent those messages and photos to appellant if she was not interested in him romantically and physically. The admission of the photographs

was constitutionally required, and the military judge erred in refusing to admit the evidence. *Ellerbrock*, 70 M.J. at 320.

B. The Military Judge’s Ruling Prejudiced Appellant’s Trial.

Should this court find that the military judge erroneously excluded constitutionally required evidence, it must determine if that error had a substantial influence on the findings. *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017). This court must consider the strength of the government and defense cases, plus the materiality and quality of the excluded evidence. *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011).

1. The Government’s Case.

The military judge’s erroneous exclusion of the sexting evidence severely hampered appellant’s defense. Specifically, the government elicited testimony from SGT [REDACTED] that during the charged sexual encounter, appellant told SGT [REDACTED], “You asked for this. You wanted this . . . You wanted this to happen.” (R. at 294). When the military judge denied the defense the opportunity to elicit testimony about SGT [REDACTED] Snapchat interactions with appellant, the military judge denied the defense a meaningful opportunity to elicit critical mistake of fact evidence.

The government’s case consisted of only three witnesses: SGT [REDACTED], Major (MAJ) [REDACTED], a Sexual Assault Nurse Examiner (SANE), and a forensic DNA examiner from the Defense Forensic Science Center (DFSC). (R. at 338,

401). Major [REDACTED] testified that SGT [REDACTED] reported no loss of consciousness and no loss of memory during the sexual encounter when questioned the next morning. (R. at 358). Major [REDACTED] also testified that she recorded SGT [REDACTED] description of the “assault” exactly as it was reported to her, and recorded it on the DoD Sexual Assault Forensic Examination (SAFE) Report. (Pros. Ex. 31, pg. 4). The SAFE report does not disclose any loss of consciousness or black-outs. (Pros. Ex. 31, pg. 4). Sergeant [REDACTED] description of events, as reflected by MAJ [REDACTED] and reported the morning after her night with appellant, directly contradicted her in-court testimony that she was “blacking in and out.” (R. at 295).

The DFSC examiner provided little useful context or evidence for the government. No sperm or DNA from appellant was recovered from the vaginal swabs taken from SGT [REDACTED] during her examination with MAJ [REDACTED] the next day. (R. at 401). This was the entirety of the government’s case.

2. The Defense’s Case.

By stark contrast, the defense presented a compelling narrative. It elicited testimony from SGT [REDACTED] boyfriend at the time, SGT [REDACTED], to establish that SGT [REDACTED] lied about critical facts related to her encounter with appellant, and refused to identify her alleged “attacker”. (R. at 321). Sergeant [REDACTED] wanted SGT [REDACTED] to report what happened to her, going so far as to suggest that SGT [REDACTED] himself could report the incident on her behalf from his duty station at Fort Rucker,

Alabama. (R. at 322). Sergeant [REDACTED] did not “un-restrict” her report for approximately a year, until her relationship with SGT [REDACTED] ended. (R. at 323). Based on the evidence, it is entirely reasonable to conclude that SGT [REDACTED] made her report in an attempt to either mend her relationship with SGT [REDACTED], or to prove that she did not cheat on him while she was stationed in Germany.

The defense also established that SGT [REDACTED] lied to U.S. Army Criminal Investigation Division (CID) agents about critical details of her encounter with appellant. Specifically, SGT [REDACTED] never told CID that at some point during the night with appellant, she woke up to appellant performing oral sex on her. (R. at 319-320).

This was not her only lie. Sergeant [REDACTED] and SGT [REDACTED] were together for a year by the time SGT [REDACTED] went to appellant’s apartment in June 2018. (R. at 408). Sergeant [REDACTED] lied to SGT [REDACTED] about what happened with appellant. She told him that she was at a party with appellant when the charged event occurred. (R. at 410). Sergeant [REDACTED] never mentioned to CID, and the military judge did not make any finding, that SGT [REDACTED] ever saw the three photographs that appellant possessed of SGT [REDACTED]. (App. Ex. XI, pg. 18; App. Ex. XXIV) (sealed). It is likely that if SGT [REDACTED] had sent the three photographs to friends or to her public snapchat story, SGT [REDACTED] would have seen the photographs.

Instead, SGT [REDACTED] told her boyfriend that she was “raped” at a “party” – a patently false statement. Sergeant [REDACTED] omissions and mischaracterizations of her interactions with appellant lend further support to the admissibility of the Snapchat photos, because SGT [REDACTED] is clearly willing to lie about the circumstances of her encounter with appellant to protect her relationship with SGT [REDACTED]; thus, it is reasonable to conclude that SGT [REDACTED] is willing to lie about her intentions in her interactions over snapchat with appellant.

3. The Materiality of the Evidence.

The photographs were material to the defense case because they draw a clear connection between SGT [REDACTED] motive to fabricate regarding the night in question, and her relationship with SGT [REDACTED]. An alleged victim’s credibility is always relevant to the fact finder. *Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011).

Evidence that SGT [REDACTED] may have sent sexually suggestive photographs supports the defense’s theory in this case that she lied about her encounter with appellant in order to protect her relationship with SGT [REDACTED]. (R. at 443).

The evidence is also material because SGT [REDACTED] explanation of the photos is simply not credible. The military judge found SGT [REDACTED] simply could not recall where she posted the these photographs – semi-nude photographs – whether to her Snapchat story, or to a group of her friends in the snapchat application. (App. Ex. XXIV, pg. 2) (sealed). He also found that SGT [REDACTED] did not recall “taking, posting,

or sending” the photo of herself nude with emojis to appellant. (App. Ex. XXIV, pg. 2).

The idea that an adult American woman would simply “not recall” how, when, and why she sent semi-nude and explicit photographs, and to whom, strains credulity. Equally improbable is the idea that she would send intimate photos of herself nude and in her underwear, that she deliberately edited, on three separate occasions, to a public forum such as her Snapchat story or to a large group of snapchat friends. No evidence was ever presented that countered appellant’s affidavit that he was sent these photographs *directly* from SGT [REDACTED] and never downloaded the photos from SGT [REDACTED] snapchat story. (App. Ex. XXI) (sealed).

The crucible of cross-examination is our system’s best test of credibility. As such, to protect his liberty, appellant had a right to thoroughly and effectively cross-examine SGT [REDACTED], the only substantive witness against him. The requirement for constitutionally required evidence in Mil. R. Evid. 412(b)(3) includes the accused’s Sixth Amendment right to confrontation. *Ellerbrock*, 70 M.J. at 318. The right to be confronted by the witnesses against an accused also includes the right to cross-examination of those witnesses. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Further, it “is well settled that ‘the exposure of a witness’[s] motivation in testifying is a proper and important function of the constitutionally

protected right of cross examination.” *Gaddis*, 70 M.J. at 256 (internal quotations omitted).

The test for whether a trial judge’s limits were appropriate is “whether ‘[a] reasonable jury might have received a significantly different impression of [the witness’s] credibility had [defense counsel] been permitted to pursue his proposed line of cross examination.’” *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). Had the military judge allowed this constitutionally required evidence, he would have been able to consider the evidence in the context of evaluating SGT [REDACTED] credibility and believability in a case with no eyewitnesses and limited evidence.

4. The Quality of the Evidence.

The quality of the evidence at issue is extremely high. These messages and elicited photographs are objective physical evidence that predates the alleged incident. It places their entire relationship and interaction, leading up to that night, in context, and it directly informs what appellant, and SGT [REDACTED], expected when she went to his apartment that evening.

This evidence characterizes SGT [REDACTED] and appellant’s interactions together in Germany, away from their romantic partners, immediately prior to the alleged incident. Sergeant [REDACTED] boyfriend was stationed at Fort Rucker, Alabama, and appellant’s wife was not with him in Germany. Away from their spouses, the

Snapchat interactions represent independent evidence that appellant had a reasonable belief that SGT [REDACTED] was sexually interested in him. Put simply, why else would she ever send him nude photographs?

For these reasons, the military judge's Mil. R. Evid. 412 decision to exclude the Snapchat photographs was erroneous and significantly prejudiced appellant's ability to confront his accuser, and provide evidence of mistake of fact as to consent.

II. WHETHER THE DILATORY POST-TRIAL PROCESSING OF THIS CASE MERITS RELIEF WHERE THE CASE WAS NOT REFERRED TO THE ARMY COURT OF CRIMINAL APPEALS UNTIL 246 DAYS AFTER SENTENCING.

Facts Relevant to Assignment of Error

Appellant was sentenced on 27 April 2021. The next day, trial defense counsel submitted a request to the convening authority to waive and defer the automatic forfeiture of pay and allowances pursuant to Rules for Court Martial (R.C.M.) 1103, along with appellant's R.C.M. 1106 matters. (Memorandum for Commander, 1st Cavalry Division). The convening authority took no action on the adjudged sentence, and signed the convening authority action on 3 June 2021. (Action). On 15 June 2021, the military judge signed the Judgment of the Court. (Judgment of the Court). The trial counsel signed the precertification review on 10 November 2021. The record of trial was authenticated by the military judge on 30

November 2021. The record of trial was not received and docketed by this Court until 29 December 2021, 246 days after sentencing. The transcript of the trial itself is only 487 pages. The compiled record in its entirety is only 1,289 pages.

Standard of Review

Whether an appellant has been deprived of his due process right to a speedy appellate review is a question of law reviewed de novo. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

Servicemembers are entitled to timely post-trial review of their court-martial convictions. *Moreno*, 63 M.J. at 135. Appellate courts must determine whether any post-trial delay experienced by a servicemember is facially unreasonable. *Id.* at 136. This court established a presumption of unreasonable delay where more than 150 days elapse between final adjournment and docketing. *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App. 2021) (consolidating 120-day and 30-day timelines from *Moreno*).

Where a presumptively unreasonable delay is established, this court balances four factors to determine whether the delay violated the servicemembers right to due process. *Moreno*, 63 M.J. at 135. The relevant factors are: (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. *Id.* In evaluating the fourth factor of

prejudice, this court considers the following: “(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicting awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.” *Id.* at 138-139 (internal citation omitted).

Where post-trial delay is found to be unreasonable but not a violation of due-process, this court still has “authority under Article 66(d)(1), UCMJ, to grant relief for excessive post-trial delay without a showing of ‘actual prejudice’ within the meaning of Article 59(a).” *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). The Courts of Criminal Appeals rely upon “all the relevant facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay,” in deciding what findings and sentence should be approved. *Tardif*, 57 M.J. at 224.

When explanations are provided that attempt to explain dilatory post-trial processing, this court reviews the totality of the circumstances to evaluate the sufficiency of those explanations. *United States v. Bauerbach*, 55 M.J. 501 (Army Ct. Crim. App. 2001). Acceptable explanations may include “excessive defense delays in the submission of R.C.M. 1105 matters, post-trial absence or mental

illness or the accused, exceptionally heavy military justice post-trial workload, or unavoidable delays as a result of operational deployments.” *Id.* at 507. Routine court reporter problems are not an acceptable explanation. *Id.* (citing *United States v. Clevidence*, 14 M.J. at 19 (C.M.A. 1982)).

Courts of Criminal Appeals also have a third, additional authority pursuant to Article 66(d)(2), UCMJ, to provide relief specifically for excessive delays in the processing of a court-martial after the entry of judgment. *See Brown*, 81 M.J. at 510-11.

Argument

A. Post-Trial Relief is Warranted Under the Factors Applied in *Barker, Brown* and *Moreno*.

The delayed post-trial processing in this case, amounting to 246 days, is presumptively unreasonable under the standards established in both *Brown* and *Moreno*. When there is a presumptively unreasonable delay, this court conducts the due process review provided in *Barker v. Wingo*, 407 U.S. 514 (1972).

1. The Length of Delay.

The first factor, considering the length of delay, weighs in favor of appellant. First, the length itself is nearly double the *Brown* standard. Second, after the announcement of the sentence, appellant provided his post-trial request to defer

automatic forfeitures the very next day. No delay in the laggard processing of appellant's record of trial can reasonably be attributed to the defense in this case.

2. Reasons for the Delay.

The second factor, reasons for the delay, also weigh in favor of appellant. The letter of lateness the government submitted includes only one reason for the delay –an ongoing 15-6 investigation between 17 September 2020 thru 3 November 2020. (Memorandum of Record, Subject: Letter of Lateness) Even if a high-profile investigation were an acceptable excuse, there is no explanation why an investigation that concluded in November 2020 would have any impact at all on a trial that did not begin until five months later in April 2021. Further, the letter of lateness explains that appellant's record of trial was sent to Fort Polk court reporters on 8 July 2021, but does not provide any explanation why it took more than two months for Fort Hood to even realize that they needed assistance in completing appellant's record of trial.

3. Appellant's Assertion of the Right to Timely Review and Appeal.

The third factor for the court to consider is whether appellant asserted his right to a timely review, or objected to the delay. *Arriaga*, 70 M.J. at 57. In this case, appellant did not submit an objection or assertion of his right to speedy post-trial processing of his case. That said, this factor should not be assigned any real weight against appellant. Given the change in post-trial processing rules, trial

defense counsel must now submit matters to the convening authority for consideration faster than previously required. As such, under the new post-trial processing system, appellants will almost never be aware of any actual or potential post-trial delay when their trial defense attorney concludes their meaningful representation of their client by submitting their post-trial matters.

While appellant did not demand speedy post-trial processing of his case, this factor is only one of four to be considered. Appellant has a constitutional right under the Due Process clause of the Fifth Amendment to the prompt post-trial processing of his case, and it is not dependent upon his explicit invocation of that right. See *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004).

4. Prejudice.

The fourth factor is not dispositive, but evaluates whether appellant was prejudiced by the delay in the processing of his case. It is commonly understood by Soldiers in confinement that in order to apply for favorable post-trial actions through the confinement facility, a record of trial must be compiled and available for review. While there is no guarantee that appellant would receive parole, clemency, or any other post-trial action, it certainly creates additional anxiety on inmates who are unable to meet clemency, parole or other deadlines entirely due to government failures.

B. If this Court Finds No Due Process Violation Occurred, *Tardif* Relief is Appropriate in This Case.

Even if this court finds no due process violation, this court can and should, grant relief pursuant to its authority under Article 66(d)(2). *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2004).

Where post-trial delay is the only barrier to a timely conclusion of a Soldier's appellate process, and that conclusion is needlessly delayed, this court should consider under Article 66(d), the circumstances of a case to determine what sentence should be approved. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). "All practitioners, especially staff judge advocates, must ensure that the rights of the accused are not compromised, and that the interests of the government are protected." *United States v. Mack*, ARMY 20120247, 2013 CCA LEXIS 1016, slip op. at 7 (Army Ct. Crim. App. 9 Dec. 2013) (summ. disp.) (Pede, C.J., concurring)). Because appellant is already out of confinement, the only remedy that sanctions the government's inaction and provides relief to appellant is to set aside appellant's punitive discharge.

Dilatory post-trial processing, as this court is aware, is an Army problem – but it is especially a Fort Hood problem. The government's failure in this case is not an exception, but one in a pattern of dilatory and poorly explained delays of justice at Fort Hood. *See, e.g., United States v. Figueroa*, ARMY 20200059, 2021 CCA LEXIS 265 (A. Ct. Crim. App. May 27, 2021) (214 days from sentencing to

docketing); *United States v. Kirk*, ARMY 20200449 (Army Ct. Crim. App. 8 July 2021) ([Appellant's Brief](#)) (224 days of post-trial delay); *United States v. Mendez*, ARMY 20200726 (Army Ct. Crim. App. 22 October 2021) ([Appellant's Brief](#)) (184 days of post-trial delay); *United States v. Pitts*, ARMY 20200610 (Army Ct. Crim. App. 9 February 2022) ([Appellant's Brief](#)) (239 days of post-trial delay); *United States v. Lopez*, ARMY 20200568, 2022 CCA LEXIS 296 (Army Ct. Crim. App. 18 May 2022) ([summ. disp.](#)) (280 days of post-trial delay warranted sentence credit); *United States v. Tellez*, ARMY 20210271 (187 days of post-trial delay).

The government cannot justify the delays in this case, between the failure to ask for assistance from Fort Polk for more than two months after adjournment and sentencing, to the unexplained thirty-day delay between when this case was authenticated and when it was received by this court. The unjustified delays in the processing of this case, and the recent history of lackadaisical post-trial processing at Fort Hood suggest a pattern against which this court can and should provide meaningful relief.

Conclusion

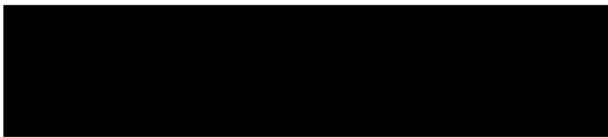
Appellant respectfully requests this court set aside the guilty finding of Specification 4 of The Charge. Appellant respectfully requests this court provide appellant meaningful relief for the post-trial delay in this case.



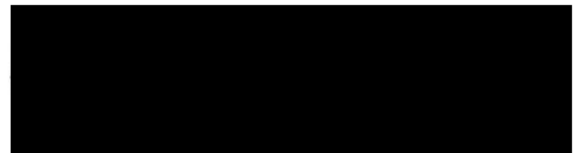
SARAH H. BAILEY
CPT, JA
Appellate Defense Counsel
Defense Appellate Division



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



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



MICHAEL C. FRIESS
COL, JA
Chief
Defense Appellate Division

APPENDIX

Appendix: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the Appellant, through appellate defense counsel, personally requests that this court consider the following matters:

I. WHETHER THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUSTAIN THE CONVICTION FOR THE CHARGE.

Standard of Review

This court reviews factual and legal sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531, 534 (Army. Ct. Crim. App. 2006).

Law

The test for legal sufficiency is “whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

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. The court must take a “fresh” and “impartial look

at the evidence” and apply “neither a presumption of innocence nor a presumption of guilt.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

In conducting this review, this court may independently judge the credibility of the witnesses at trial, resolve questions of fact, and substitute its judgment for that of the military judge or the court-martial members. Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). This does not mean that a conviction must be “free from conflict.” *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). The evidence must leave no fair and reasonable hypothesis other than appellant’s guilt. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003) (citation omitted). The government must prove guilt on every element beyond “an honest, conscientious doubt” and beyond “mere conjecture.” Rule for Courts-Martial (R.C.M.) 918c, Discussion.

Argument

As stated above, the charge before this court relied primarily on the testimony of SGT [REDACTED], a complaining witness with apparent and compelling motivations to fabricate her consensual encounter with appellant. Sergeant [REDACTED] relationship with SGT [REDACTED] presented a clear and compelling motivation to fabricate what occurred between herself and appellant at his home, where the two were alone. Sergeant [REDACTED] lied to SGT [REDACTED] about being at a party with appellant when she was allegedly

raped, in a clear attempt to avoid telling her boyfriend of one year that she voluntarily went to the home of another man by herself on multiple occasions.

The fact that SGT [REDACTED] received a sexual assault forensic examination the next day is not compelling evidence of appellant's guilt, but rather evidence of SGT [REDACTED] anxiety that her boyfriend may find out what happened between her and appellant when she did not return to her own room. This is supported by the fact that SGT [REDACTED] refused to provide her boyfriend with the name of her supposed "attacker" and did not want to participate in an investigation with the criminal investigation division (CID).

The government did not provide a single witness from the day after her sexual encounter with appellant who testified as to SGT [REDACTED] explanation about why she didn't return to her barracks room the night of the charged offense. The government conceded that appellant's DNA was *not* found in SGT [REDACTED] vagina. The government failed to overcome the considerable doubt presented by the facts and the defense that suggest SGT [REDACTED] lied about the nature of her encounter with appellant out of concern for her long-distance relationship with SGT [REDACTED].

For the reasons stated above, appellant respectfully requests this court find appellant's conviction for Specification 4 of The Charge factually insufficient and set aside his conviction.

II. WHETHER APPELLANT’S SENTENCE IS INAPPROPRIATELY SEVERE.

Standard of Review

Sentence appropriateness is reviewed de novo. *United States v. Martinez*, 76 M.J. 837, 840 (Army Ct. Crim. App. 2017).

Law

Article 66(c), UCMJ, mandates that this Court “affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Given this statutory mandate, this court has “wide discretion” in determining whether a particular sentence is appropriate. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999).

This court must consider the totality of the circumstances, including the character of the offender, and the seriousness of his offenses. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Argument

Appellant asserts that his sentence is inappropriately severe. Appellant has a high likelihood of rehabilitation and a very low risk of recidivism. Further, the government did not present any evidence to suggest that appellant was statistically likely to recidivate or commit similar offenses.

Appellant was charged with offenses against two different complaining witnesses, but convicted of only one offense against one complaining witness. Prior to trial appellant was flagged and prevented from relocating with his wife, who is a noncommissioned officer in 2019. His daughter was born in 2018, and appellant was separated from his family for more than a year due to being flagged because of the pretrial investigation. Appellant was prevented from taking a pass to visit his wife and child because he was flagged.

Appellant's sentence of twenty-eight months is inappropriately severe because it fails to take into account the rehabilitative potential of appellant, in addition to the hardships he faced prior to trial. Appellant respectfully requests this Court grant appropriate relief.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on June 27, 2022.



MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division

