

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20210236

Specialist (E-4)  
**THOMAS R. 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 convened by the Commander,  
1st Cavalry Division, Fort Hood,  
Colonel Lanny Acosta, Jr., Military  
Judge, presiding.

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

**Assignment of Error I<sup>1</sup>**

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

**Assignment of Error 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.**

---

<sup>1</sup> 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 that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

## **Statement of the Case**

On 27 April 2021, a military judge sitting as a general-court martial, convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2016) [UCMJ].<sup>2</sup> (R. at 453; Statement of Trial Results). The military judge sentenced appellant to be confined for twenty-eight months and a dishonorable discharge. (R. at 468). On 3 June 2021, the convening authority took no action on the adjudged finding and sentence. (Action). On 15 June 2021, the military judge entered judgment. (Judgment).

## **Statement of Facts**

### **A. Appellant sexually assaulted Sergeant [REDACTED].**

Sergeant (SGT) [REDACTED], who was a specialist at the time, met appellant in November 2017 while their battalion was on a rotation in Germany. (R. at 286–87). By June 2018, the two Soldiers were friendly and would occasionally talk to each other. (R. at 287). In the afternoon of 21 June 2018, appellant and SGT [REDACTED] made plans to play board games that night at appellant’s off-post apartment. (R. at 287–88). At his apartment, they drank whiskey, while playing board games in his kitchen, for several hours. (R. at 288–89). After appellant and SGT [REDACTED] drank

---

<sup>2</sup> Appellant was convicted of Specification 4 of The Charge. (R. at 453). The military judge found appellant not guilty of all other charged offenses. (R. at 453).

nearly an entire bottle of whiskey, SGT ■■■ became sick and ran to the bathroom twice to vomit. (R. at 290). After her second time vomiting, appellant helped SGT ■■■ walk to his bed, where she fell asleep. (R. at 290–92).

At some point in the night, SGT ■■■ woke up to appellant kissing her and taking her clothes off as she slipped in and out of consciousness. (R. at 293). As he kissed her, SGT ■■■ told appellant to stop, that she had a boyfriend, and that appellant had a wife. (R. at 293). Appellant responded by telling her, “You asked for this. You wanted this.” (R. at 294). As SGT ■■■ continued to slip in and out of consciousness, appellant groped SGT ■■■’s breasts and penetrated her vagina with his penis. (R. at 294–96). Once appellant ejaculated on her stomach, he left the room. (R. at 296). A few hours later, when SGT ■■■ was able to wake up and balance herself, she left his apartment. (R. at 298).

**B. Sergeant ■■■ reported the sexual assault the morning after the incident.**

The morning after the sexual assault, SGT ■■■ received a sexual assault forensic exam and filed a restricted report with a Sexual Assault Response Coordinator, knowing that she could later unrestrict her report if she changed her mind. (R. at 298–99). Approximately three days after the assault, SGT ■■■ told her boyfriend at the time, SGT ■■■, about the assault. (R. at 407). Sergeant ■■■ eventually unrestricted her report a year later, around August 2019, when she felt emotionally ready and supported. (R. at 299). Around this time, SGT ■■■ also

learned that appellant had another sexual assault accusation against him; however, she did not know who the other alleged victim was. (R. at 299–300, 323).

Additional facts are incorporated below.

### **Assignment of Error I**

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

#### **Additional Facts**

Before trial, appellant moved to present three images of SGT ■■■ under Military Rule of Evidence (Mil. R. Evid.) 412(b)(2) and (b)(3). (App. Ex. XI (sealed)). The images were undated and did not provide any context, such as who the sender or recipient was, how they were sent, or why they were sent. (App. Ex. XI, Encl. 1–3 (sealed)). Two days prior to the motions hearing, the defense submitted an affidavit signed by appellant, which stated that SGT ■■■ sent him the images in April and May 2018 via one-on-one Snapchat<sup>3</sup> messages. (App. Ex. XXI (sealed)). The military judge heard evidence during a closed hearing on 8 May 2020. (R. at 67–98 (sealed)). At the hearing, the defense called SGT ■■■ as their sole witness and did not proffer any other additional evidence, aside from appellant’s

---

<sup>3</sup> Snapchat, a social media application, allows users to send media directly to individuals, groups, or post the media on their “story.” (R. at 75, 81 (sealed)). If the media is posted on a user’s story, it is publicly available for twenty-four hours. (R. at 72).

affidavit. (R. at 69, 98 (sealed)). The military judge subsequently denied the defense motion in a written ruling that contained extensive findings of facts and law. (App. Ex. XXIV (sealed)).

### **Standard of Review**

A military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 is reviewed for an abuse of discretion. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011). Findings of fact are reviewed for whether they are clearly erroneous and conclusions of law are reviewed de novo. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010).

### **Law**

In assessing whether a military judge abused his discretion, “such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the trial court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors.” *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (citations omitted). “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. Solomon*, 72 M.J. 176, 180 (C.A.A.F. 2013) (cleaned up).

Military Rule of Evidence 412 is a rule of exclusion that serves “to protect victims of sexual offenses from the degrading and embarrassing disclosure of

intimate details of their private lives while preserving the constitutional rights of the accused to present a defense.” *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004) (citations omitted); *United States v. Gaddis*, 70 M.J. 248, 251 (C.A.A.F. 2011). It “is intended to ‘safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.’” *Manual for Courts-Martial, United States* (2016 ed.) [MCM], App’x. 22, at A22-42. “Under M.R.E. 412, not only is evidence of the alleged victim's sexual propensity generally inadmissible, evidence offered to prove an alleged victim engaged in ‘other sexual behavior’ is also generally excluded.” *Banker*, 60 M.J. at 221.

There are three exceptions to this general rule of exclusion. In this case, appellant claims the third exception should apply. (Appellant’s Br. 10). The third exception allows the admissibility of the evidence if its exclusion “would violate the constitutional rights of the accused.” Mil. R. Evid. 412(b)(3). “Generally, evidence must be admitted within the ambit of M.R.E. 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice.” *Ellerbrock*, 70 M.J. at 318 (citing *Gaddis*, 70 M.J.

at 255).<sup>4</sup> “[T]he probative value of the evidence must be balanced against and outweigh the ordinary countervailing interests reviewed in making a determination as to whether evidence is constitutionally required.” *Gaddis*, 70 M.J. at 255 (citation omitted).

The test for materiality “is a multi-factored test looking at ‘the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.’” *Ellerbrock*, 70 M.J. at 318 (citation omitted) (alteration in original). If the evidence is relevant and material, the military judge applies the Mil. R. Evid. 412 balancing test to determine if the evidence is “favorable” or “vital” to the defense. *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010).

## **Argument**

### **A. The military judge did not abuse his discretion by excluding evidence that was irrelevant and not constitutionally required.**

Appellant argues that the military judge misinterpreted the relevance of the photos SGT ■■■ sent, and he failed to conduct any analysis regarding whether the evidence was constitutionally required. (Appellant’s Br. 10). Appellant’s claims

---

<sup>4</sup> *Ellerbrock* was decided when Mil. R. Evid. 412’s constitutional exception was organized under subparagraph (b)(1)(C). *Manual for Courts-Martial, United States* (2008 ed.).

lack merit. The military judge applied the correct law to the facts presented and reasonably concluded that appellant failed to meet his burden to overcome Mil. R. Evid. 412(b)(3). (App. Ex. XXIV (sealed)).

**1. The images were not relevant.<sup>5</sup>**

Appellant asserts that even if SGT ■ sent the images to multiple individuals, the images are still relevant to establish appellant's mistake of fact as to consent. (Appellant's Br. 11). However, appellant's argument glosses over the military judge's finding that the first two images were posted on an application viewable to multiple individuals and that SGT ■ may have posted the third image on her Snapchat story. (App. Ex. XXIV, p. 4 (sealed)). The military judge's findings regarding whether the images were publicly viewable is important: if appellant saw the images on SGT ■'s public Snapchat story, appellant cannot claim he reasonably interpreted the images to mean SGT ■ wanted to have sex with him. (Appellant's Br. 11).

Appellant accuses the military judge of incorrectly focusing on who else SGT ■ sent the images to, rather than focusing on appellant's "singular perception of the situation." (Appellant's Br. 10). However, the military judge necessarily had to focus on who SGT ■ sent the images to, and whether the

---

<sup>5</sup> Due to the "the analytic structure of [Mil. R. Evid.] 412," the relevancy argument is the same for both Mil. R. Evid. 412(b)(2) and (b)(3). *Banker*, 60 M.J. at 225.



images were publicly posted, as a threshold matter. In his affidavit, appellant stated that SGT [REDACTED] directly sent him the images, and that he did not download the images from a Snapchat story. (App. Ex. XXI (sealed)). However, the affidavit is silent on whether appellant also saw the images on SGT [REDACTED]'s Snapchat story. In other words, appellant's affidavit leaves open the possibility that (a) he received the images from SGT [REDACTED] in a direct message; (b) he subsequently downloaded those images; and (c) he also saw, but did not download, those same images on her Snapchat story, which appellant would have known was viewable by others.

Since appellant only provided an affidavit and did not testify at the motions hearing, the military judge could not ask appellant whether he had also viewed the images on SGT [REDACTED]'s Snapchat story. Therefore, the military judge had to shift his focus to whether SGT [REDACTED] posted the evidence publicly. Since the defense failed to prove that appellant thought the images were exclusively for him or, alternatively, that SGT [REDACTED] did not publicly post the images, the military judge could not make a finding about appellant's perception of the situation based on the scant facts presented at the motions hearing. Additionally, there was no objective indications of a flirtatious relationship between appellant and SGT [REDACTED] to support the defense's theory as to why SGT [REDACTED] would privately and exclusively send appellant the images. (App. Ex. XXIV, p. 5 (sealed)). Since the defense was unable to demonstrate that the images constituted "evidence of sexual behavior with

[appellant],” the images were not relevant to this case and thus not constitutionally required. Mil. R. Evid. 412(b)(3).

Even assuming *arguendo* that SGT [REDACTED] directly and exclusively sent appellant the images, it would still not be relevant. It was unreasonable for appellant to assume the images meant SGT [REDACTED] consented to sex. (Appellant’s Br. 10). As appellant points out, none of the images exposed SGT [REDACTED]’s private areas. (Appellant’s Br. 3; App. Ex. XI, Encl. 1–3 (sealed)). Further, neither of the text blocks accompanying two of the three images<sup>6</sup> provide any indication that she was giving appellant unfettered permission to have sex with her, much less at any time. (Appellant’s Br. 3; App. Ex. XI, Encl. 1–2 (sealed)). According to appellant, SGT [REDACTED] sent him the images sometime in April and May 2018. (App. Ex. XXI (sealed)). However, SGT [REDACTED] was sexually assaulted on 21 June 2018. (R. at 287, 295). Even with a generous assumption that the images were sent on the last day of May, it would be unreasonable for appellant to assume that SGT [REDACTED] still wanted a sexual relationship twenty days later. Since it was unreasonable for appellant to equate the images with SGT [REDACTED]’s consent, the images were irrelevant to the case. *See* (App. Ex. XXIV, p. 4–5 (sealed)) (“The public or group postings of all three

---

<sup>6</sup> Additionally, the text blocks do not indicate that the images were directed at appellant or any specific individual at all. (App. Ex. XI, Encl. 1–3 (sealed)).

photos are not relevant under [Mil. R. Evid.] 412(b)(2) to prove consent to some later conduct with the accused.”).

Lastly, appellant faults the military judge of “fail[ing] to conduct *any* analysis regarding whether the evidence was constitutionally required.” (Appellant’s Br. 10) (emphasis in original). However, the military judge conducted a thorough analysis on relevancy, (App. Ex. XXIV, p. 4–5 (sealed)); therefore, “based on the analytic structure of [Mil. R. Evid.] 412, in ruling on relevancy the military judge was not also required to address the constitutional exception or the application of the balancing test.” *Banker*, 60 M.J. at 225. Since the images were irrelevant under Mil. R. Evid. 412(b)(2), the evidence was also irrelevant under Mil. R. Evid. 412(b)(3).

## **2. The images were not material.**

Appellant alleges that the images were material “because they draw a clear connection between SGT [REDACTED]’s motive to fabricate regarding the night in question, and her relationship with SGT [REDACTED].” (Appellant’s Br. 15). According to appellant, SGT [REDACTED] lied about her encounter with him in order to protect her relationship with SGT [REDACTED]. (Appellant’s Br. 15; App. Ex. XI, p. 9 (sealed)). However, this purported motive is undercut by the fact that SGT [REDACTED] and SGT [REDACTED] were in different units—and different continents—at the time. (R. at 285–86, 322). As the defense themselves pointed out in their closing argument, there was “no

indication” that SGT [REDACTED] would have found out about the sexual encounter and that there was “no reason to lie.” (R. at 442). Therefore, “it was within the judge's discretion to determine that such a cursory argument did not sufficiently articulate how the testimony reasonably established a motive to fabricate.” *Banker*, 60 M.J. at 225.

Appellant also alleges that the images were material “because SGT [REDACTED]’s explanation of the [evidence] is simply not credible.” (Appellant’s Br. 15). However, the defense never presented this theory to the military judge,<sup>7</sup> and this court’s review for error “is properly based on a military judge’s disposition of the motion submitted to him or her—not on the motion that *appellate* defense counsel now wishes *trial* defense counsel had submitted.” *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (emphasis in original).

**3. The images were not vital to the defense’s case and does not survive Mil. R. Evid. 403’s balancing test.**

Even if this court finds the images to be both relevant and material, the military judge did not err because the images were not vital to appellant’s case. Appellant’s conclusory generalizations aside, he fails to specify why this particular avenue of impeachment was vital to his defense.

---

<sup>7</sup> Since SGT [REDACTED] testified at the motions hearing that she could not recall where she had posted the images, the defense had ample opportunity to present this theory to the military judge.

Evidence admissible under Mil. R. Evid. 412 is nonetheless “subject to challenge under Mil. R. Evid. 403.” Mil. R. Evid. 412(c)(3).<sup>8</sup> Here, the dangers associated with admitting the images easily outweighed its minimal probative value because the images had no probative value.

First, the images—sent at least twenty days prior to the sexual assault—is not probative of whether SGT [REDACTED] consented to have sex with appellant. Second, there is no rational link between the images and SGT [REDACTED]’s alleged motive to protect her relationship with SGT [REDACTED]—if SGT [REDACTED] had consensual sex with appellant, SGT [REDACTED] would not have found out about it. (R. at 285–86, 322, 442). Third, the fact that SGT [REDACTED] could not recall where she had posted the images does not affect her credibility. Sergeant [REDACTED] testified that she would post similar images on her Snapchat story or send them to others, individually or in group chats. (R. 71–74, 80 (sealed)). If she regularly posted similar images on her Snapchat story or sent them to others, no one would fault her for not remembering—at a motions hearing *two years after* SGT [REDACTED] allegedly sent the images to appellant—whether or to whom she sent the images to.

---

<sup>8</sup> The probative value of evidence offered pursuant to Mil. R. Evid. 412(b)(1)-(2) must outweigh “the danger of unfair prejudice to the victim’s privacy.” Mil. R. Evid. 412(c)(3). No such requirement exists for evidence offered pursuant to Mil. R. Evid. 412(b)(3). *Gaddis*, 70 M.J. at 256.

**B. Even if the military judge abused his discretion, it was harmless error.**

If the excluded evidence was constitutionally required,<sup>9</sup> the court must determine whether the error was harmless beyond a reasonable doubt. *Ellerbrock*, 70 M.J. at 320. Since appellant alleges that the constitutional error was a violation of the Confrontation Clause, (Appellant's Br. 18), this court would apply the five-part balancing test articulated by the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986): (1) the importance of the witness's testimony to the government's case, (2) whether the testimony was cumulative, (3) the presence of contradictory or corroborating evidence, (4) the extent of other cross-examination allowed, and (5) the strength of the government case. *United States v. Roberts*, 69 M.J. 23, 28–29 (C.A.A.F. 2010).

**1. Sergeant ■■■'s testimony was important to the government's case, but her testimony regarding the images would have been cumulative.**

The first *Van Arsdall* factor favors appellant. Since there was no other eyewitness testimony to the sexual assault, SGT ■■■'s testimony was vital to the government's case.

---

<sup>9</sup> The government does not concede that the alleged error would be of a constitutional magnitude because the prohibited evidence was not constitutionally required. However, the government analyzes the alleged error under the more stringent harmless beyond a reasonable doubt standard in order to show that there was no prejudice, regardless of the standard.

On the other hand, both the second and fourth *Van Arsdall* factors weigh in favor of the government: the images would have been cumulative since appellant was able to fully cross-examine SGT [REDACTED] and call SGT [REDACTED] as a witness.<sup>10</sup>

Appellant asserts that the images were necessary to the defense's case because it supported their motive to fabricate theory and impeached SGT [REDACTED]'s credibility. (Appellant's Br. 15, 17). However, the images would have been cumulative because the defense was already able to argue that SGT [REDACTED] was not credible, and that she was in a relationship at that time. For example, during their closing argument, the defense stated:

You heard that she accused [SGT [REDACTED]] of cheating or some kind of infidelity issue . . . . What's her relationship with [appellant]? She's friends with him . . . . [W]hy is she lying to her boyfriend? She tells him she's at a party. This was no party. . . . Your Honor, she's 20 years old. Maybe a little hung over. Regretting the sex that she had the night before . . . . Why does she lie? Because she wants the benefit of being seen as a victim to her boyfriend, the kind of person that every Soldier in the Army knows needs to be or have be respected and not questioned about what happened.

(R. at 440, 442–43). The defense was able to argue that SGT [REDACTED] was “not a credible historian,” (R. at 441), and provided her motive for lying, (R. at 443), because appellant was able to thoroughly cross-examine SGT [REDACTED]. Specifically, the defense examined SGT [REDACTED] regarding her relationship and communications with appellant, (R. at 301–03), the night of the sexual assault, (R. at 303–305, 307–

---

<sup>10</sup> The government did not call SGT [REDACTED] as a witness. (R. at 407).

10), her relationship with SGT [REDACTED] and her reporting the assault to him, (R. at 305–07, 321–323), why she filed a restricted report and later decided to unrestrict it, (R. at 322–24, 330–31), and minor inconsistencies in her reports and testimony. (R. at 310–12, 319–20).

Therefore, since appellant “had the opportunity to argue the totality of the circumstances supporting his theory of consent or mistake of fact as to consent” and because defense counsel was “able to thoroughly cross-examine [REDACTED],” any alleged error was harmless beyond a reasonable doubt. *United States v. Rankin*, ACM 39486, 2019 CCA LEXIS 486, at \*19 (A.F. Ct. Crim. App. 9 Dec. 2019) ([mem. op.](#)); *see also United States v. Ramos-Cruz*, ARMY 20150292, 2020 LEXIS 52, at \*10 (Army Ct. Crim. App. 27 Feb. 2020) ([mem. op.](#)) (finding that a military judge’s ruling to exclude evidence under Mil. R. Evid. 412 was harmless beyond a reasonable doubt because “the damaging potential” of the defense cross-examination was fully realized at trial).

**2. Sergeant [REDACTED]’s testimony was corroborated and uncontradicted, and the government’s case was strong.**

The third *Van Arsdall* factor, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, also weighs in favor of the government. The analysis in this case is similar to *United States v. Grimes*, where the appellant was convicted of rape, and this court conducted a harmlessness beyond a reasonable doubt test using the *Van Arsdall*



factors. ARMY 20100720, 2014 CCA LEXIS 63, at \*23–24 (Army Ct. Crim. App. 31 Jan. 2014) ([mem. op.](#)). Here, as in *Grimes*, “[t]here was no contradictory testimony regarding [SGT ■■■]’s version of events—appellant did not testify at trial nor did he testify for the purposes of the Mil. R. Evid. 412 motion. There were, however, several pieces of corroborating testimony including DNA evidence which confirmed sexual intercourse (but not [consent]),” (R. at 388–403), the testimony of the sexual assault forensic examiner (SAFE) who treated SGT ■■■ after the sexual assault, (R. at 338–66; Pros. Ex. 31), and SGT ■■■’s testimony confirming SGT ■■■’s report to him three days after the assault, (R. at 300, 410). *Id.* at \*24–25.

This leads to the fifth *Van Arsdall* factor, the overall strength of the government’s case. In addition to the corroborating testimony and evidence discussed above, the government had a strong victim who provided credible testimony, lacked motive to fabricate, and was consistent about the major details of the sexual assault. First, it was uncontroverted that SGT ■■■ was highly intoxicated at the time of the sexual assault, and that appellant provided the alcohol to her at his off-post apartment. (R. at 303, 288). Second, SGT ■■■ testified how she threw up twice, had to be helped into bed, that she was asleep when appellant started sexually assaulting her, that she was blacking in and out of consciousness when appellant continued to sexually assault her, and how she told him no. (R. at

290–94). Third, SGT [REDACTED] received a forensic exam and reported her sexual assault the next morning. (R. at 298). Fourth, she also reported the assault to her boyfriend, SGT [REDACTED], a mere three days after the assault. (R. at 300). All of this evidence presented together left no reasonable doubt as to appellant’s guilt.

### **3. Appellant’s case was weak.**<sup>11</sup>

By stark contrast, the defense’s case was weak. The defense only had one merits witness, SGT [REDACTED]. (R. at 407, 415). Aside from SGT [REDACTED]’s testimony, the defense presented no other evidence to rebut the government’s persuasive case.<sup>12</sup>

Appellant makes an incredible, and unfounded, assertion 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.” (Appellant’s Br. 14). However, there were no infidelity issues in their relationship, (R. at 411), no evidence of a strained relationship, and no way for SGT [REDACTED] to know if SGT [REDACTED] cheated on him unless she told him, (R. at 442). Moreover, if, as appellant implies, SGT [REDACTED] unrestricted her sexual assault report in order to mend her relationship with SGT [REDACTED], she would not have waited until August of 2019 to unrestrict her report—at least eight months after she and SGT [REDACTED] had broken up.<sup>13</sup>

---

<sup>11</sup> The strength of the defense’s case is not a factor articulated in *Van Arsdall*, but appellee addresses it in response to appellant’s brief. (Appellant’s Br. 13–14).

<sup>12</sup> The defense exhibits that were admitted into evidence solely concerned the other alleged victim in the case. (Def. Ex. Q, R).

<sup>13</sup> Sergeant [REDACTED] testified that they broke up “in the end of 2018.” (R. at 411).

Appellant also points out how the defense discredited SGT [REDACTED] about minute details. (Appellant's Br. 14–15). However, it only emphasizes how weak their case was: the defense did not have a plausible or coherent theory of the case, so their only option was to try to discredit SGT [REDACTED] in any way possible.

Appellant grasps at minor inconsistencies, like how SGT [REDACTED] failed to tell Criminal Investigation Command (CID) that appellant also sexual assaulted her orally. (Appellant's Br. 14). Sergeant [REDACTED] testified that she told the SAFE, on the day of the assault, that she was unsure if appellant performed oral sex on her because she was in and out of consciousness during the sexual assault. (R. at 326). Sergeant [REDACTED] then made her statement to CID in August 2019, over a year after the sexual assault. (R. at 312). Considering the length of time that had passed and her state of consciousness during the sexual assault, it is a given that SGT [REDACTED] would forget some details of the night in question—especially since she had nothing to gain by intentionally omitting to CID that appellant sexually assaulted her with his mouth, in addition to his penis.

Therefore, even assuming the military judge erred, there is no reasonable possibility it contributed to appellant's conviction considering the strength of the government's case. Accordingly, appellant has suffered no prejudice and is entitled to no relief from this court.

## **Assignment of Error 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.**

#### **Additional Facts**

On 27 April 2021, appellant's court-martial adjourned. The next day, he submitted post-trial matters and requested the convening authority defer automatic forfeitures until entry of judgment and waive automatic forfeitures beginning on entry of judgment for the maximum period allowable. (R. at 487; Post-Trial Matters). The convening authority took no action on the findings or sentence. (Action). On 15 June 2021, the military judge entered judgment. (Judgment).

On 10 November 2021, the trial counsel signed the precertification review. (Certification). On 30 November 2021, the military judge authenticated the record of trial. (Certification). On 8 December 2021, the court reporter certified the record of trial. (Certification). On 29 December 2021, this court docketed appellant's case. (Chronology). The total number of days from adjournment to docketing was 246 days.

#### **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

There are two distinct analyses in addressing claims of post-trial delay: determining whether appellant suffered a due process violation under the Constitution and determining sentence appropriateness under Article 66(d)(1), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

### A. Fifth Amendment Procedural Due Process.

Servicemembers convicted at courts-martial have a due process right to a timely review and appeal of their convictions. *Moreno*, 63 M.J. at 135. Unreasonable delay in post-trial processing is presumed when “more than 150 days’ elapse between final adjournment and docketing with [the Army Court of Criminal Appeals].” *United States v. Brown*, 81 M.J. 507, 510 (Army Ct. Crim. App. 2021).<sup>14</sup> This presumption triggers a four-factor analysis (*Barker* factors)

---

<sup>14</sup> This court should overrule *Brown*, which attempted to adapt the *Moreno* analysis to the Military Justice Act of 2016 (MJA 16) post-trial processing procedures. 81 M.J. at 509–10. *Brown* was decided on a faulty premise: rather than asking *whether Moreno* was still necessary, *Brown* incorrectly focused on *how* to apply *Moreno*. In *Moreno*, CAAF justified its judicially created rules by explaining that some action was needed to deter and remedy excessive post-trial delays. 63 M.J. at 142. Subsequently, however, Congress took *its own* legislative action with MJA 16 and provided a statutory remedy through Article 66(d)(2), UMCJ. Thus, the justification for the judicially created presumptions in *Moreno* no longer exists. *See also United States v. Anderson*, 82 M.J. 82, 88–90 (C.A.A.F. 2022) (Maggs, J., concurring) (questioning the continued viability of *Moreno* in light of MJA 16 and *United States v. Betterman*, 578 U.S. 437 (2016)). Therefore, this court, in overruling the *Brown* test, should adopt a new analysis. The

that examines: “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.” *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four *Barker* factors must be balanced, and “no single factor [is] required to find that post-trial delay constitutes a due process violation.” *Id.* at 136 (citing *Barker*, 407 U.S. at 533). However, the *Barker* analysis is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

Military Courts of Criminal Appeals (CCAs) will also further examine prejudice, one of the *Barker* factors, in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant’s anxiety and concern while awaiting the outcome of the appeal; and (3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing.

---

appropriate test for claims of unreasonable post-trial delay is to look at the period of 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. UCMJ art. 66(d)(2). 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, and a CCA’s duty under Article 66(d)(1), UCMJ, is to only affirm so much of a sentence that “should be approved.” *Betterman*, 578 U.S. at 449–50 (Thomas, J., concurring); UCMJ art. 66(d)(1).

*Moreno*, 63 M.J. at 138–39. The first sub-factor “is directly related to the success or failure of an appellant’s substantive appeal. 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.” *Moreno*, 63 M.J. at 139 (citing *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991)). Similarly, for the third sub-factor, the showing of prejudice “is directly related to whether an appellant has been successful on a substantive issue of the appeal and whether a rehearing has been authorized.” *Id.* at 140. The second sub-factor requires an appellant to “show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.” *Id.*

In situations where the appellant is unable to show they have suffered prejudice, “[the 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 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Ashby*, 68 M.J. at 125.

This analysis is “separate and distinct from the consideration of prejudice as one of the four *Barker* factors.” *Id.* Under this review, the court considers “the totality of the circumstances” based on the “entire record.” *Id.* The court “will not presume prejudice from the length of the delay alone,” but instead requires “evidence of prejudice in the record.” *Id.*

## **B. Sentence Appropriateness.**

Absent a due process violation, this court next considers whether relief for excessive post-trial delay is warranted based on the CCA’s sentence appropriateness authority under Article 66(d), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Pursuant to Article 66(d)(2), UCMJ, a CCA may 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. Similarly, in conducting its sentence appropriateness review under Article 66(d), a CCA has “broad discretion to grant or deny relief for unreasonable or unexplained [post-trial] delay . . . .” *Ashby*, 68 M.J. at 124 (quoting *United States v. Pflueger*, 65 M.J. 127, 128 (C.A.A.F. 2004)). Therefore, even without a showing of actual prejudice, this court may also grant relief for “unexplained and unreasonable post-trial delay.” *Tardif*, 57 M.J. at 224 (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)).



When there is post-trial processing delay, this court looks to the totality of the circumstances to determine what sentence should be approved. *United States v. Garman*, 59 M.J. 677, 678 (Army Ct. Crim. App. 2003). There is no “bright-line time limit” for post-trial processing; rather, various factors such as the length of the record, existence of post-trial processing errors, and failure to demand speedy post-trial processing. *Id.* at 681–82. Moreover, even “unacceptably slow” post-trial processing does not immediately render a sentence inappropriate. *Id.* at 683. This is a “highly case specific” review. *Simon*, 64 M.J. at 207.

### **Argument**

Appellant’s case exceeded the presumptive 150-day standard under *Brown*. 81 M.J. at 510. However, the government did not violate appellant’s due process rights because there was no prejudice. Further, under the totality of the circumstances, he deserves no relief under a sentence appropriateness analysis. Therefore, this court should affirm the findings and sentence as adjudged.

#### **C. The first three *Barker* factors weigh in favor of appellant.**

From the date the military judge adjourned appellant’s court-martial to the date of docketing with this court, 246 days elapsed, exceeding the timeline provided in *Brown* by ninety-six days. 81 M.J. at 510; (R. at 487; Docketing Notice). Thus, the first factor weighs in favor of appellant. The government attributed the delay to a Department of Defense-mandated Army Regulation 15-6

investigation that diverted court reporter support for two months; furthermore, when this case adjourned, the unit had eighteen cases that still required transcribing and processing. (Memorandum from Headquarters, 1st Cavalry Division, Fort Hood, Texas, to Memorandum for Record, Subject: Letter of Lateness – Specialist (E4) Thomas R. Yopez, Record of Trial (8 Dec. 2021)). Although the government explains the delay, the second factor slightly weighs in appellant’s favor. *Moreno*, 63 M.J. at 137. The third *Barker* factor weighs in appellant’s favor since appellant demanded speedy post-trial processing.<sup>15</sup> (Speedy Post-Trial Processing Request).

**D. The fourth *Barker* factor weighs in favor of the government.**

However, appellant fails to establish prejudice. Because the substantive ground for appellant’s assignment of error is without merit, “appellant is in no worse position due to the delay.” *Moreno*, 63 M.J. at 139. Further, Appellant’s brief cites no particularized prejudice—or any prejudice specific to appellant himself—stating only that the delay creates “additional anxiety on inmates who are unable to meet clemency, parole or other deadlines.”<sup>16</sup> (Appellant’s Br. 23).

Appellant made no argument and provided no supporting evidence related to any

---

<sup>15</sup> Appellant mistakenly states he did not assert his right to speedy post-trial processing of his case. (Appellant’s Br. 22).

<sup>16</sup> Even if appellant is asserting that he personally suffered additional anxiety because he was unable to meet clemency or parole deadlines, this court has held that such assertion of prejudice is “mere speculation.” *United States v. Ney*, 68 M.J. 613, 617 (2010) (quoting *Moreno*, 63 M.J. at 140).

specific, “*particularized anxiety*” he personally experienced while awaiting the resolution of his case. *See Moreno*, 63 M.J. at 140 (emphasis added). Thus, his claim of prejudice fails.

**E. The delay does not impugn the fairness or integrity of the military justice system.**

Appellant has failed to show that the delay was so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system” and overcome the absence of prejudice. *Brown*, 81 M.J. at 511 (citing *Toohey*, 63 M.J. at 362).

This court has tended to find post-trial delays between trial and convening authority action to be egregious under the *Toohey* standard when they were much greater in length than 246 days. *See Brown*, 81 M.J. at 511 (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). Appellant does not argue that a delay of 246 days is “egregious” under *Toohey*. As such, under the “difficult and sensitive balancing process,” the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

**F. Appellant does not merit relief under a sentence appropriateness analysis.**

Even where no due process violation occurs, this court must still determine “on the basis of the entire record” what sentence “should be approved.” UCMJ art. 66(d). In this case, the post-trial delay in no way affected the trial proceedings that produced appellant’s sentence. Further, appellant’s sentence is appropriate in light of his crime and the maximum allowable punishment for his conviction.

Appellant sexually assaulted a fellow soldier while she was slipping in and out of consciousness. (R. at 293). Despite her pleas for him to stop, appellant continued to assault her while telling her that she “asked for this.” (R. at 293–94). Furthermore, appellant committed this crime while he was married to another soldier, who was approximately four months pregnant with his child at the time. (R. at 471, 473). Appellant’s conviction of sexual assault required a mandatory dishonorable discharge and permitted a maximum punishment of confinement for thirty years. (R. at 453; Statement of Trial Results); *MCM*, App’x. 12, at A12-4. The military judge sentenced appellant to confinement for twenty-eight months and a dishonorable discharge—a small fraction of his total punitive exposure. (R. at 486).

Appellant argues his delay of 246 days is emblematic of what has become a pervasive problem in the Army and specifically at Fort Hood. (Appellant’s Br. 24). Even assuming *arguendo* that there is such a problem at Fort Hood, the

dilatory post-trial processing timeline for other cases there does not support appellant's position that his due process rights were violated.<sup>17</sup> Furthermore, appellant cites to no authority under which this court can consider delays in separate cases to determine "on the basis of the entire record" what sentence "should be approved" in this particular case. UCMJ, art. 66(d)(1).

Consequently, the post-trial delay in this case is unrelated to the appropriateness of appellant's sentence. In light of the seriousness of the offense for which appellant was convicted, and the fact that the trial proceeding was not tainted by the post-trial delay, this court should affirm appellant's sentence. *See Garman*, 59 M.J. at 678 (noting that this court "look[s] to the totality of the circumstances of the post-trial process" when assessing whether relief is warranted).<sup>18</sup>


---

<sup>17</sup> The court should decide this case based solely on facts in the record, and it should not consider other cases of dilatory post-trial processing. *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (finding that a CCA cannot consider matters outside the "entire record" when reviewing a sentence).

<sup>18</sup> Appellant also requests relief in accordance with Article 66(d)(2), UCMJ. (Appellant's Br. 24). For the same reasons identified above, and since the time between entry of judgment and docketing in this case was 197 days, this court should deny appellant's request.

## Conclusion

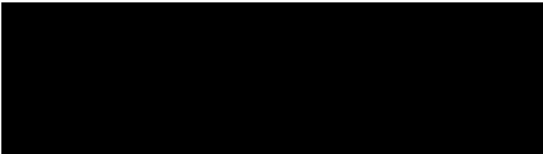
WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence and deny relief.<sup>19</sup>



LISA LIMB  
CPT, JA  
Appellate Attorney, Government  
Appellate Division



PAMELA L. JONES  
MAJ, JA  
Branch Chief, Government  
Appellate Division



CHRISTOPHER B. BURGESS  
COL, JA  
Chief, Government  
Appellate Division

---

<sup>19</sup> Additionally, the government requests that this court, under R.C.M. 1111(c)(2), correct a clerical error on the Statement of Trial Results (STR) by changing the date from “14 April 2018” to “21 June 2018” for Specification 4 of The Charge. Currently, Specification 4 of The Charge incorrectly lists the date of offense as “14 April 2018.” (STR). The STR should reflect “21 June 2018” as the correct date of the offense. The charge sheet reflects the correct date, and the evidence presented throughout trial clearly demonstrated that 21 June 2018 was the correct date. (Charge Sheet; R. at 287; Pros. Ex. 31).

**CERTIFICATE OF SERVICE, U.S. v. YEPEZ (20210236)**

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED] [REDACTED] on the 6th day of October, 2022.

[REDACTED]  
DANIEL L. MANN  
Senior Paralegal Specialist  
Government Appellate Division  
9275 Gunston Road  
Fort Belvoir, VA 22060-5546  
[REDACTED]  
[REDACTED]