IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20210520
Staff Sergeant (E-6) **LESLY J. LINDOR** United States Army	Appellant	Tried at Fort Hood, Texas, on 30 June and 21 September 2021, before a general court-martial appointed by the Commander, III Corps, Colonel Maureen A. Kohn, military judge, presiding.

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

Assignments of Error[1]

I. WHETHER THE GOVERNMENT VIOLATED THE RELIGIOUS FREEDOM RESTORATION ACT BY USING APPELLANT'S RELIGION AGAINST HIM.

II. WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

III. WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY BEING HOSTILE TO APPELLANT'S RELIGION.

IV. WHETHER THE GOVERNMENT VIOLATED THE EQUAL PROTECTION CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

[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.

V. WHETHER THE GOVERNMENT INTRODUCED EVIDENCE IN VIOLATION OF R.C.M. 1001 AND MADE IMPROPER ARGUMENT.

VI. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY.

Statement of the Case

On 21 September 2021, a military judge sitting as a general court-martial convicted appellant, Staff Sergeant Lesly J. Lindor, consistent with his pleas, of three specifications of attempted premeditated murder, one specification of conspiracy to commit premeditated murder, one specification of willful disobedience of a warrant officer, one specification of murder, and one specification of stalking, in violation of Articles 80, 81, 91, 118, and 120a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 891, 918, 920a [UCMJ]. (R. at 16; Charge Sheet, R. at 108). The next day, the military judge sentenced appellant to confinement for life and a dishonorable discharge. (R. at 298). Appellant's agreement with the convening authority limited his confinement to seventy years. (R. at 298, App. Ex. V).

The convening authority acted in accordance with the pretrial agreement on 29 October 2021. (Action). The military judge entered judgment on 1 November 2021. (Judgment). This court docketed appellant's case on 25 March 2022. (Referral and Designation of Counsel).

Facts

Appellant, after several attempts, succeeded in murdering his wife. (R. at 35–71; Pros. Ex. 1, paras. 38–113). He pleaded guilty to these, and other, crimes. (Charge Sheet; R. at 16, 108).

A. SSG Lesly Lindor, Appellant

Appellant was born in Les Cayes, Haiti on June 6, 1983. (Def. Ex. B, para. 2). Haiti was, and is, an extremely poor and troubled country. (Def. Ex. B., para. 3). When appellant was just six years old, tuberculosis killed his mother. (Def. Ex. B., para. 4). Growing up, one of the several women appellant lived with made him sleep on the floor. She beat him with an electrical wire and sometimes knocked him unconscious. (Def. Ex. B., para. 7). Another woman sexually assaulted him when he was seven or eight years old. (Def. Ex. D for Identification). After moving to America and joining the Army, appellant supported his family back in Haiti. (Def. Ex. B., paras. 11, 13).

B. Evidence about Vodou

Appellant believed in Vodou. (R. at 270). "Vodou is a blending (syncretism) of African religious traditions and Catholicism."[2]

[2] *Vodou, Serving the Spirits*, The Pluralism Project: Harvard University, https://pluralism.org/vodou-serving-the-spirits

References to Vodou pervade the prosecution exhibits and the government's sentencing argument. Even before trial, the government focused on appellant's religion as a basis for placing him in pretrial confinement. A commander, in reasoning that continued pretrial confinement was necessary, stated:

> In communications with Vodou practitioners, SSG Lindor paid at least $1,000 for various spells to be cast on the individual to get the individual to fall in love with him. SSG Lindor has also communicated with multiple Vodou practitioners about his investigation. In these communications be [sic] provided the Vodou practitioners with the name of the Government prosecutor and the members in the CID chain of command involved in the investigation. After providing these names, SSG Lindor requested that the Vodou practitioners cast spells on the named individuals to obstruct the investigation.

(Def. App. Ex. O, para. 4d).

At trial, the first mention of Vodou discussed the Vodou use of powders in rituals and the belief that certain powders can cause injury or death. (Pros. Ex. 1, para. 7). Prosecution Exhibit 1 explained that appellant asked for "expeditions" against his wife, requesting that spirits attack her. (Pros. Ex. 1, paras. 16–17).[3] The government included photographs of each of the expeditions in the stipulation of fact. (Pros. Ex. 1, paras 24–25, 49, 53). The photo of the first expedition appears to include, *inter alia*, a human skeleton and a child's doll in a fire pit. (Pros. Ex. 1, p. 16).

[3] An expedition is a Vodou ritual where a spirit is commanded to do something. (Pros. Ex. 1, para. 17). An expedition can cause good or bad things to happen. (R. at 32).

The government provided significant background information on Vodou and included in Prosecution Exhibit 1 that "within the Vodou tradition, Bawon is the guardian of the cemetery and the spirit ruler of the dead, of justice, and of punishment. [An expert] would also testify that ti-Bousou is another spirit or *Loa* capable of facilitating an expedition." (Pros. Ex. 1, para. 25). Later in Prosecution Exhibit 1 the government included that "a Vodou priest is invoking Baron La Croix, Baron Samedi, and all the Barons in the cemetery to assist with the expedition." (Pros. Ex. 1, para. 51).

The government included in extraneous information that appellant attempted to use his religion to influence someone to fall in love with him. (Pros. Ex. 1, para. 28). The government also included a photograph of the grim reaper in Prosecution Exhibit 1. (Pros. Ex. 1, p. 19). It described the video of a cat dying as occurring in "a djevo (sacred Vodou chamber)." (Pros. Ex. 1, para. 65).

At appellant's guilty plea itself, in addition to Prosecution Exhibit 1 (which was 109 pages), the government introduced 25 other prosecution exhibits amounting to hundreds more pages. Several of these exhibits are conversations between appellant and Bertin Charles, "a foreign national residing in [Les] Cayes, Haiti." (Pros. Ex. 1, para. 15). In one of them, the government included what appears to be a Vodou prayer. (Pros. Ex. 7, p. 15). Later in the same conversation, the government included descriptions of what also seems to be more Vodou rituals

and a Vodou prayer. (Pros. Ex. 7, p. 89, 91–93). The government introduced, independently, a video of one of the Vodou rituals performed in the expedition against appellant's wife. (Pros. Ex. 6). It involved fire, chanting, and what appears to be a skeletal figure. (Pros. Ex. 6).

In Prosecution Exhibit 1, the government included—specifically listed as evidence in aggravation—that appellant used Vodou to cast love spells and obstruction spells. (Pros. Ex. 1, para. 123). The government included photos of these religious exercises. (Pros. Ex. 1, p. 98–99). The government also described a religious ritual appellant requested which involved a rooster being stabbed and set on fire. (Pros. Ex. 1, para. 123). The government explained that this was an expedition against appellant's chain of command but did not describe the specific object of this religious exercise. (Pros. Ex. 1, para. 123). The government even introduced the video of this religious ritual itself, in which the rooster is, in fact, handled roughly, stabbed multiple times, and set on fire while still alive. (Pros. Ex. 20).

C. Evidence about Christianity

The government contrasted evidence of other, favored religious practices with Vodou. During its presentencing case, the government called eight family members and friends of appellant's wife. While questioning Ms. [redacted] the government elicited that appellant's wife loved church. (R. at 126). It further dug

into the substance of how appellant's wife and Ms. [redacted] used their faith, to which Ms. [redacted] responded: "We are both believers. Like any good preacher that she knows we will share sometime. We-we do the services together, like if its online or anything." (R. at 126). Then the government elicited what specific denomination appellant's wife and Ms. [redacted] were, and Ms. [redacted] shared that she was "Catholic" and appellant's wife was "Protestant." (R. at 126). Then the government inquired about appellant's wife's conversion from Catholicism to Protestantism. (R. at 127).

Next, the government called [redacted] appellant's wife's friend. (R. at 138). It specifically asked if [redacted] had "any sort of religious kinship" with appellant's wife. (R. at 143). And then asked what they would do together as "fellow Christians." (R. at 143). This elicited that [redacted] and appellant's wife would go to church together, and that appellant's wife was always praying and watching services on television. (R. at 143). To further belabor the point, the government asked if [redacted] and appellant's wife prayed together, and if they would go to church together. (R. at 143).

The government also called [redacted] appellant's wife's aunt. (R. at 163). She provided telephonic testimony with her Bible, which the government said was fine if she did not read it during her testimony. (Audio at 09:37:04 on 22 September 2021). The government elicited that [redacted] and appellant's wife would have long

conversations, longer if "talking about the church," and that they shared the "same belief we are never done talking about God, about the churches, about the scriptures." (R. at 167). The government wanted more information about those scripture conversations, and [redacted] obliged by testifying that occasionally she and appellant's wife would "have the 40 days prayer." (R. at 167). After briefly moving on to a topic other than religion, the government inquired again if there were more "of those conversations about the scriptures and 40 days of prayer . . ." (R. at 169). The government also wanted to learn more about [redacted] spiritual conversations with other people, not only appellant's wife. (R. at 169–70). Finally, the government drew out that appellant's wife had gifted [redacted] a 365-day devotional book and a Creole bible. (R. at 174–75).

D. The government's argument

The government used much of the evidence it introduced about religion in its sentencing argument. It mentioned that appellant's wife shared religious services with [redacted] (R. at 260), and that now those religious practices, "like the 40 days of prayer" won't be the same. (R. at 261). The government highlighted that [redacted] and appellant's wife prayed and worshiped together. (R. at 261). It made sure the military judge knew that appellant's wife lived a "life characterized by faith . . ." (R. at 263). The government emphasized that point again. (R. at 263–64). The government wanted the sentencer to "contrast the positivity and warmth"

of appellant's wife with what appellant did. (R. at 264–65). In describing what appellant did, the government referred to Vodou as "the occult" and "evil and supernatural forces." (R. at 270). The government highlighted that the actual existence or effectiveness of these forces did not matter. (R. at 270). The government made no such disclaimer for Christianity.

The government spent several transcript pages of its sentencing argument describing Vodou spirits by name and what they do in detail. (R. at 270–72). The government then mentioned that appellant used his religion for uncharged acts, like the love spells and to influence his chain of command. (R. at 273). To further its point, the government played Prosecution Exhibit 20 for the military judge. (R. at 273–74). This is the video of the rooster being rough handled, stabbed, and set on fire while still alive. (Pros. Ex. 20). The government only stopped playing the video at the request of the military judge. (R. at 274). Then, the government again described appellant's religious practices as "supernatural" forces. (R. at 274). The government highlighted appellant's religious practices done with the intent of making someone fall in love with him. (R. at 275). Finally, while again showing a video to the military judge, the government felt compelled to inform her that the cat was dying "in a sacred chamber of a [Vodou] sorcerer." (R. at 281).

I. WHETHER THE GOVERNMENT VIOLATED THE RELIGIOUS FREEDOM RESTORATION ACT BY USING APPELLANT'S RELIGION AGAINST HIM.

Law

The Religious Freedom Restoration Act [RFRA], 42 U.S.C. § 2000bb-1, applies to the military. *United States v. Sterling*, 75 M.J. 407, 410 (2016). It forbids the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability . . ." 42 U.S.C. § 2000bb-1 (a). The exercise of religion is broadly defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000bb-2 (4) (cross-referencing "exercise of religion" as defined in RLUIPA, 42 U.S.C. § 2000cc-5(7)(A)). Under RFRA, the government may only "substantially burden a person's exercise of religion . . . if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

In *Sterling*, the Court of Appeals for the Armed Forces considered whether the government violated RFRA by ordering Sterling to remove signs she—later—claimed were religious in nature. 75 M.J. at 414–16. The CAAF noted that RFRA is triggered by any "religious exercise" and that the lower court had defined that

term too narrowly. *Id.* at 415. The CAAF then noted that the burden first rested on an accused to establish a *prima facie* RFRA defense which required showing, "by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that the defendant sincerely holds." *Id.* Following that, the government would become responsible for showing "that its actions were 'the least restrictive means of furthering a compelling governmental interest." *Id.* at 416 (quoting *United States v. Quaintance*, 608 F.3d 717, 719–20 (10th Cir. 2010)).

In evaluating whether Sterling satisfied a *prima facie* case for RFRA, the CAAF analyzed the requirement that a religious belief be sincerely held. *Id.* at 416. It noted that this is a factual question within a trial court's authority and competence, with high deference to a claimant. *Id*. It reasoned it could decide that Sterling failed to meet her burden for establishing this by a preponderance of the evidence, but it assumed arguendo she did. *Id.*

The CAAF next turned to whether the government's actions imposed a substantial burden on Sterling. *Id.* at 417. It rejected "that every interference with a religiously motivated act constitutes a substantial burden" and required a showing that the practice is important to the individual's exercise of religion. *Id.* at 417–18. In determining that Sterling did not satisfy this prerequisite, the CAAF found important that no evidence existed that the signs Sterling displayed were

important to her religion. *Id.* at 418. The CAAF considered it a "salient fact[]" that it was not obvious to most people Sterling's signs even had a religious connotation. *Id.* at 419.

Argument

Just as a society is, and should be, judged by how it treats those accused of heinous offenses, so too is a society judged by how it treats those furthest from the mainstream. Vodou is a religious minority in the United States, especially when compared to Christianity, but the paucity of its adherents does not negate its protection under the Constitution and federal law. The government violated RFRA throughout appellant's court-martial by using his religion against him in placing him in pretrial confinement and as evidence in aggravation at trial.

A. Vodou is a religious belief under RFRA.

The standard for qualifying as a religious belief is not high and is easily satisfied here. The government itself referred to Vodou as a religion in Prosecution Exhibit 1. (Pros. Ex. 1, para. 12). The government even included in Prosecution Exhibit 1 the opinions of an expert in the field of Vodou employed by a university in its Religion Department. (Pros. Ex. 1, para. 12). Prosecution Exhibit 1 references this expert to explain various aspects of the Vodou religion to the reader. (Pros. Ex. 1, paras. 12, 17, 20, 25, 63). Vodou qualifies as a religious belief.

B. Appellant's belief in Vodou was sincerely held.

This fact is not in dispute. In fact, the government ensured that appellant satisfied this prong. During argument, the government stated that appellant believed in "evil and supernatural forces." (R. at 270). The government also highlighted the enormous amount of money appellant spent attempting to use his religion, Vodou. (Pros. Ex. 1, paras. 18, 19, 21, 23, 27, 52; Pros. Ex. 4; R. at 278).

C. The government substantially burdened appellant's religion.

As an initial matter, a basis for placing appellant in pretrial confinement was to prohibit him from practicing his religion. The government described appellant's religious exercise as serious misconduct and as a reason why confinement was necessary. (Def. App. Ex. O, para. 4d). By placing him in somewhere he cannot communicate with other practitioners of his religion, for the purpose of prohibiting that communication, the government substantially burdened appellant's religion.

However, the government did not just prohibit appellant from practicing his religion. Far worse, it used his religion against him to increase his sentence. The result was appellant being sentenced not only for his crimes, but also for his sincerely held religious beliefs.

Introducing evidence of religious practice to increase a prison sentence necessarily substantially burdens religious exercise. In *Sterling*, the CAAF noted it was unclear that signs Sterling posted were religious, why they were important to

her religion, and why removal of the signs was contrary to her religious beliefs. *Sterling*, 75 M.J. at 418. Here, appellant's practice of religion is the very evidence the government introduced in aggravation and exploited to increase his sentence.

Appellant pleaded guilty, so the government had no burden to prove anything. At sentencing, instead of focusing on the relevant charges, the government targeted religion. On balance, the government made this case about as much about Vodou as it was about murder. In fact, the government introduced superfluous evidence of religious exercise specifically in aggravation. (Pros. Ex. 1, para. 123). This evidence included a religious ritual to win someone's affection and a religious ritual to positively influence appellant's case. (Pros. Ex. 1, para. 123). But a description of the religious ritual was not sufficient, the government introduced a video too. (Pros. Ex. 20).[4] Upon review of this video, it is clear why.

The video is traumatizing. The "Vodou practitioner" (so titled by the government (Pros. Ex. 1, para. 123)) violently rubber banded pictures to a rooster, and then violently stabbed the rooster multiple times, before setting fire to the still-living rooster. (Pros. Ex. 20). This video was so jarring and disturbing the military judge makes clear to the government that she did not want to see it in open court.

[4] A review of the conversation between appellant and the Vodou priest, which the government did not introduce—despite introducing hundreds of pages of other conversations—reveals the purpose of the exhibition was to influence appellant's chain of command to not sanction appellant and allow him to continue working in the Army. (Def. App. Ex. I).

(R. at 273–74). This shock value was, of course, exactly what the government desired. It wanted to exploit the stigma surrounding Vodou to paint appellant as an evil person, to be sentenced accordingly.

D. The government's actions were not the least restrictive means of furthering a compelling government interest.

The government bears the burden of demonstrating that its actions were the least restrictive means of furthering a compelling government interest. It cannot meet this burden. Appellant acknowledges that at any court-martial the government has the compelling interests of seeking justice, deterring future crime, and protecting society. Those interests existed here. However, introducing evidence of appellant's religion against him was not the least restrictive way to promote those interests. This was a guilty plea. The government knew while working on Prosecution Exhibit 1, and before it went into court, that appellant would be convicted of murder, three specifications of attempted premeditated murder, and other charges. (Charge Sheet; Pros. Ex. 1; App. Ex. IV). It had every right to, within lawful boundaries, present the most aggravating case it could to seek the sentence it believed was just. But no evidence for the purpose of aggravation needed to, or should have, included appellant's religion.

The government's exploitation and denigration of appellant's religion was unnecessary. The military judge made it through the entire providence inquiry with appellant making only a handful of subdued references to his beliefs. (R. at

29, 31, 37, 40). The military judge herself only brought up his belief regarding the charged expedition and that he believed his attempt would succeed. (R. at 32, 38). Contrast the military judge's delicate handling of religion with the government's deep dive into Vodou. (Pros. Ex. 1, para. 25 ("[W]ithin the Vodou tradition, Bawon is the guardian of the cemetery and the spirit ruler of the dead, of justice, and of punishment. She would also testify that ti-Bousou is another spirit or *Loa* capable of facilitating an expedition.), para. 51 ("[A] Vodou priest is invoking Baron La Croix, Baron Samedi, and al the Barons in the cemetery to assist with the expedition."), para. 65 (Bartin Charles is with Lixson, his assistant, and a Vodou sorcerer within a djevo (sacred Vodou chamber).")).

The government had other evidence. It could have made its case about appellant's wife, his premeditation, and the tragedy of her loss. Instead, the government made its case about Vodou. There were numerous less restrictive means the government could have taken to further its interest, but the government leaned into the shock value of appellant's religion.

II. WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

Law

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. "[T]he

protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). A neutral and generally applicable law does not need a compelling governmental interest, even if it incidentally burdens a religious practice. *Id.* at 531. However, a law that is not neutral and generally applicable "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531–32.

In *Lukumi*, the Supreme Court held that city ordinances enacted to prohibit the sacrifice of animals pursuant to the religious practice of Santeria violated the Free Exercise Clause. *Id.* There, after learning that a Santeria church would be opening in the city, the city council of Hialeah, Florida held an emergency session. *Id.* at 526. The council eventually passed ordinances prohibiting the sacrificing of animals if not done for the primary purpose of consumption. *Id.* at 527. The sacrificing of animals is a key religious practice of Santeria. *Id.* at 524.

The Supreme Court noted that, even if the text of the ordinance was facially neutral, that was not sufficient, because "[t]he Free Exercise Clause protects against government hostility which is masked as well as overt." *Id.* at 534. The Court concluded that suppression of Santeria worship was the purpose of the ordinances because they only prohibited the killing of animals in ways necessary to

practice Santeria and did not require generally applicable procedures for the disposal of animal waste. *Id.* at 534, 536–39. The Court also found troubling the commentary by councilmembers leading up to the ordinance. *Id.* at 541. All told, the ordinances intended to suppress religion and were not neutral. *Id.* at 542.

Next, in turning to whether the ordinances were generally applicable, the Court stated that the government cannot selectively burden religiously motivated conduct. *Id.* at 543. Hialeah's ordinances were not a close call. *Id.* The ordinances did not prohibit the killing of fish or pests, nor prohibit hunters from eating their kill or disposing of the carcasses in the normal trash, and it permitted exemptions for the slaughter of small numbers of hogs and cattle. *Id.* at 544–45. The city ordinances permitted the same conduct in a secular sense that it prohibited in a religious one, and therefore was not generally applicable. *Id.* at 545–46.

Because the ordinances were not neutral and generally applicable, the Supreme Court applied strict scrutiny—requiring the laws be narrowly tailored to serve a compelling government interest. *Id.* at 546. The Court reasoned that the ordinances could have served whatever government interests existed without burdening religious practice had they been more narrowly tailored. *Id.* Additionally, because so much other conduct that presented the same harms was not regulated, the city could not even prove its interest was compelling. *Id.* at 547. Therefore, the ordinances did not survive strict scrutiny. *Id.*

In *United States v. Webster*, this court evaluated whether allowing Webster—a devout Muslim—to plead guilty for refusing to deploy with his unit violated the Free Exercise Clause. 65 M.J. 936 (Army Ct. Crim. App. 2008). This court assumed arguendo that requiring Webster to deploy substantially burdened his religious practice. *Id.* at 947. Nonetheless, it found that this furthered a compelling government interest with the least restrictive means. *Id.* This court noted that there are few greater obligations for the government than its own security, and soldiers could not decide for themselves whether to deploy. *Id.* Additionally, in Webster's case the government's means of furthering this objective were the least restrictive. *Id.* Numerous allowances were offered to Webster, to include his reclassification into a non-combat role. *Id.* Therefore, after fully considering Webster's constitutional claims this court declined to grant relief. *Id.* at 948–49.

Argument

By intentionally exploiting appellant's religion against him, the government's conduct was not neutral or generally applicable and it fails a strict scrutiny analysis.

A. The government's conduct was not neutral and generally applicable.

The government used evidence of appellant's religious practices in *United States v. Lindor*. This is facially not neutral. The government specifically targeted

appellant's religious exercise as evidence in aggravation for the case *against him*. The government action was also not generally applicable. The government does not do this in every case. Religion being discussed at all in military justice cases is extremely rare, and it appears to be non-existent as evidence introduced in aggravation. The government believed appellant's religion, and his practice of it, would make him less sympathetic and his crime more aggravating.

There is no statute, regulation, or published order to reference in this case. But the fact that the government acted *ad hoc* in no way makes the government's actions less of a government action. *See generally Webster*, 65 M.J. at 946–47 (evaluating the requirement that Webster deploy as a government action). Even though it did not go through any official enactment or promulgation, the government still subjected appellant to its power.

B. The government cannot satisfy strict scrutiny.

Because the government's actions were not neutral or generally applicable, the government must satisfy strict scrutiny for its actions to be lawful. It cannot. Even accepting that the government had a compelling government interest in pursuing justice, the pervasive and derogatory use of appellant's religion was not narrowly tailored. As discussed above, (Assignment of Error I), the government possessed other evidence in aggravation. It could have focused on other evidence

instead of appellant's religion. It chose not to do so, and instead attacked appellant's religion. This does not satisfy strict scrutiny.

III. WHETHER THE GOVERNMENT VIOLATED THE FREE EXERCISE CLAUSE BY BEING HOSTILE TO APPELLANT'S RELIGION.

Law

The government may not act in a manner hostile to a religion. *Masterpiece Cakeshop, Ltd, v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). There, a Colorado baker refused to make a wedding cake for a same sex wedding but was willing to provide the couple other services. *Id.* at 1724. The couple filed a discrimination complaint, and the Colorado Civil Rights Division investigated. *Id.* at 1725. The Colorado Civil Rights Commission [Commission] referred the case to an administrative law judge who ruled in the couple's favor, and the Commission affirmed the judge's findings in full. *Id.* at 1726. During several of the Commission's hearings, commissioners made comments suggesting that the baker's religious beliefs were not welcome in the business community and even compared the baker's "invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." *Id.* at 1729.

The Supreme Court noted that this could have been a close case, where a business owner may "have his right to the free exercise of religion limited by generally applicable laws." *Id.* at 1725. But beyond the facts of the case, and the

merits to either side, the Court determined, "[t]he neutral and respectful consideration to which [the baker] was entitled was compromised . . . ." *Id.* at 1729. The comments by the commissioners disparaged the baker's religion both by calling it despicable and characterizing it as "merely rhetorical." *Id.* The Court also found relevant that no commissioners objected to the disparaging comments, nor did the state court on appeal or the party representing the Commission before the Supreme Court. *Id.* at 1729–30. Finally, the Court pointed out that the Commission treated other bakers differently who refused to contract with an individual who was hostile to same sex marriage, reasoning, "[a] principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness." *Id.* at 1730–31.

The Court therefore determined that the Commission violated the First Amendment's prohibition on treating religion with hostility. *Id.* at 1731. The Commission was required "to proceed in a manner neutral toward and tolerant of [the baker's] religious beliefs." Instead, the record demonstrated that the Commission "was neither tolerant nor respectful of [the baker's] religious beliefs" and did not treat the baker's case with the required neutrality. *Id. See also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022) ("A plaintiff may also prove a free exercise violation by showing that 'official expressions of

hostility' to religion accompany laws or policies burdening religious exercise; in cases like that we have 'set aside' such policies without further inquiry.").

Argument

By impugning appellant's religious beliefs and weaponizing them against him, the government treated appellant's religion with hostility and contempt during his entire court-martial. The government abandoned any pretense of neutrality when it began questioning its witnesses. It abandoned the mantle of objectivity even further during its argument. The government argued that the foundations of appellant's religion may not exist or have any power.[5] (R. at 270). In a general court-martial, following findings of guilty pursuant to a plea, the United States of America felt it necessary to explain that appellant's religion was not real.

But the government did not stop at just denigrating appellant's religion; it cast moral judgment too. Throughout the government's sentencing case, the overwhelming theme was that Christianity was good and Vodou bad. Through three of its witnesses, the government extolled the virtues of appellant's wife, in no small part because of her Christianity. It emphasized *twice* that appellant's wife lived a "life characterized by faith . . ." (R. at 263–64). On the other hand, the

[5] If this was the government's position, it is unclear how it was a valid basis for keeping appellant in pretrial confinement. (Def. App. Ex. O, para. 4d).

government painted appellant's religion as "the occult" populated by "evil and supernatural forces." (R. at 270).

In *Masterpiece Cakeshop*, the Supreme Court set aside a government order after a state actor referred to a man's faith as a "despicable piece[] of rhetoric." *Masterpiece Cakeshop*, 138 S. Ct. at 1729. Here, the government painted appellant's religion as evil. His sentence should be set aside.

IV. WHETHER THE GOVERNMENT VIOLATED THE EQUAL PROTECTION CLAUSE BY USING APPELLANT'S RELIGION AGAINST HIM.

Law

A classification based on religion is inherently suspect. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Equal protection "command[s] that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007). When the government targets a suspect class, its actions are reviewed under strict scrutiny. *Id.* at 721.

Argument

The government used appellant's religion because of the nature of appellant's religion. In so doing, it took specific action—in the midst of the court-martial process, not in the charging of the case generally—against appellant based

not on his crimes or his character, but rather because of the specific religion he practiced.

Appellant is unable to find other military justice cases where the government introduced evidence of another religion as evidence in aggravation. This is unsurprising, as it is difficult to imagine what would possess a government actor to do so. Because the government treated appellant differently because of his religion, it must satisfy strict scrutiny. For the reasons discussed above, it cannot do so.

Prejudice

The government violated appellant's rights under RFRA, the Free Exercise Clause of the First Amendment (in two ways), and the Equal Protection Clause. In this context, these violations should be viewed as prejudicial per se. The government forced appellant, who pleaded guilty to his crimes, to sit through his court-martial while the United States of America vilified his religion. There should be no scenario where this court can find such an action to be harmless. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) ("An error can count as structural even if the error does not lead to fundamental unfairness in every case.").

Here, no prejudice analysis can determine the harm that appellant, or the military justice process, endured. Appellant's religious belief and exercise is protected by the First Amendment. His religion was not an element in the offenses

he pleaded guilty to committing. The government should have done everything in its power to make clear that appellant's case was not about religion. Instead, the government went the other way. It intermingled appellant's religion at every opportunity. It made appellant's case not just about murder, but about Vodou.

What impact will this have on other soldiers who may practice non-traditional religions? A "purpose of military law . . . is to assist in maintaining good order and discipline in the armed forces." *Manual for Courts-Martial*, *United States* (2019 ed.), pt. I. Ostracizing soldiers who don't conform to traditional religious beliefs does not serve this purpose.

The government should operate above the fray. A trial counsel "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Here, the main thrust of the government's case involved appellant's religion. It is hard to imagine a fouler blow. The harm here requires no prejudice analysis. This court should set aside appellant's sentence.

V. WHETHER THE GOVERNMENT INTRODUCED EVIDENCE IN VIOLATION OF R.C.M. 1001 AND MADE IMPROPER ARGUMENT.

Standard of Review

In the absence of an objection, improper argument is reviewed for plain error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). "Plain error

occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.*

Law and Argument

Rule for Courts-Martial [R.C.M.] 1001(b)(4) allows the government to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). Nowhere listed in R.C.M. 1001(b)(4) is evidence of an accused's religion. While it can be that a *victim* was intentionally selected because of his or her religion, it is still improper to introduce that evidence for the purpose of contrasting it with appellant's religion to use as aggravation. R.C.M. 1001(b)(4).

In *United States v. Erickson*, the CAAF encountered a trial counsel who called Erickson evil and compared Erickson to Adolph Hitler and other historical figures. 65 M.J. 221, 223 (C.A.A.F. 2007). The CAAF accepted that the government's argument was in error and that the error was plain and obvious. *Id.* at 223–24. In analyzing prejudice, the CAAF evaluated three factors: (1) the severity of the misconduct, (2) measures taken to cure the misconduct, and (3) the weight supporting the conviction. *Id.* at 224.

An Illinois court of appeals, in *People v. Roberts*, considered whether a judge's consideration of appellant's race was improper. 2012 IL App (3d) 100791-U (2012). A judge, who was African-American, weighed the effect that appellant

was African-American would have on the public perception of the community. *Id.* at P22, P25. The appellate court reasoned it could not "ignore or condone even an appearance that the trial court, no matter how well-meaning or benign its intent, considered race when it sentenced the defendant." *Id.* at P64. It found that remand was warranted. *Id.*

The government here focused on appellant's religion as evidence in aggravation. This is error. As discussed, the nature of the error in this case should obviate the need for any prejudice analysis. This court should set aside appellant's sentence.

VI. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY.

Facts Relevant to Assignment of Error

Appellant's court-martial adjourned on 22 September 2021. (R. at 299). Appellant demanded speedy post-trial processing that same day. (Speedy Post-Trial Processing Request). This court did not receive appellant's case until over six months later, on 25 March 2022—184 days after adjournment. (Referral and Designation of Counsel).

Standard of Review, Law, and Argument

"Claims of unreasonable post-trial delay are reviewed de novo." *United States v. Cooper*, ARMY 20200614, 2022 CCA LEXIS 399, at *2 (Army Ct. Crim.

App. 7 July 2022) (summ. disp.) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). This court presumes a delay is unreasonable when more than 150 days elapsed 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 post-trial delay is found to be unreasonable, but not a due process violation, 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)). This court looks to "all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay," in deciding what findings and sentence should be approved. *Id.* at 224.

Following adjournment, the government took over six-months to docket at this court a guilty plea with a transcript shorter than 300 pages. This delay is presumptively unreasonable under *Brown*, and the government's delay memo is unpersuasive. Because of the meritorious and unresolved legal errors addressed above, all four factors of the *Moreno* test favor appellant. This court should grant appellant relief.

WHEREFORE, appellant respectfully requests this honorable court grant meaningful relief.

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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to the Court and the Government Appellate Division on 18 October 2022.

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