

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20210543

Specialist (E-4)

TONEY E. HENDERSON, JR.

United States Army

Appellant

Tried at Joint Base Lewis-McChord, Washington, on 6 May, 8 June, 27 September– 2 October 2021, before a general court-martial convened by the Commander, Headquarters, 7th Colonel Larry A. Babin, 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 ABUSED HIS
DISCRETION UNDER MIL. R. EVID. 413 BY ALLOWING THE
GOVERNMENT TO INTRODUCE EVIDENCE OF A CASE
WHERE APPELLANT WAS ACQUITTED**

**II. WHETHER THE PROSECUTORIAL MISCONDUCT BY
MISTATING FACTS ABOUT THE MIL. R. EVID. 413
EVIDENCE CAUSED APPELLANT TO RECEIVE AN UNFAIR
TRIAL**

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 Appendix A.

Statement of the Case

On 25 October 2021, an enlisted panel sitting as a general court-martial convicted appellant, Specialist (SPC) Toney Henderson Jr., contrary to his pleas, of one specification of wrongfully committing a sexual act upon a child who had attained the age of twelve but not sixteen years by using unlawful force, one specification of abusive sexual contact, one specification of domestic violence, one specification of disorderly conduct, and one specification of indecent conduct in violation of Articles 120b, 120, 128b, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920b, 920, 928, 934. (R. at 1624). The military judge sentenced appellant to reduction to E-1, 198 months confinement, and a dishonorable discharge. (R. at 1686).

On 9 November 2021, the convening authority approved the findings and sentence. (Convening Authority Action). On 10 December 2021, the military judge entered judgment. (Judgment of the Court). This court docketed appellant's case on 26 August 2022. (Referral and Designation of Counsel).

Introduction

Specialist Tony Henderson was denied a fair trial. In obtaining a conviction, the military judge gave the government carte blanche to use evidence from a prior case where appellant was acquitted. It argued he was emboldened by the acquittal and, because of the previous trial, he now knew better, he could not have a

reasonable mistake of fact defense. In essence, the government argued the previous acquittal was wrong, and impermissibly invited the panel to right that wrong.

The government in this case drastically mischaracterized the evidence from appellant's prior trial. Most notably, the [REDACTED] aggressively and repeatedly cross-examined appellant regarding DNA evidence, specifically referring to the testimony of a DNA expert. The only problem was, there was no DNA expert who testified at the prior trial.

These errors compounded to make a demonstrably weak case that should have been decided on its merits, into one decided on overwhelmingly prejudicial and impermissible arguments by the government.

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 413 BY ALLOWING THE GOVERNMENT TO INTRODUCE EVIDENCE OF A CASE WHERE APPELLANT WAS ACQUITTED

Facts Relevant to Assignment of Error

A. The Military Rule of Evidence (Mil. R. Evid.) 413 Hearing and Rulings.

The government had previously court-martialed appellant for forcibly sodomizing Ms. [REDACTED], for which appellant was acquitted. (R. at 155). In the instant

case, the government sought to introduce evidence of appellant's prior sexual relationships with Ms. [REDACTED] and another person.²

The government argued Ms. [REDACTED] allegation negates appellant's reasonable mistake of fact defense with respect to the currently Article 120, UCMJ offense against Ms. [REDACTED] and Ms. [REDACTED]. According to the government, appellant's previous court-martial somehow put him "on notice." In other words, "[t]here was no reasonable mistake of fact when very similar actions occur in the future." (R. at 175).

The government characterized the defense's argument against admissibility as, "he got away with it once and, thus, you have to get him here." (R. at 182). The government seemed to endorse this logic while simultaneously denying such an intent. "If that's why we excluded prior acquittals then there would be no . . . prior acquittals allowed into [evidence]." (R. at 182).

In his ruling, the military judge conducted a Mil. R. Evid. 403 balancing test and mentioned the *Wright* factors. *United States v. Wright*, 53 M.J. 476 (C.A.A.F 2000). (App. Ex. LXII). He did not consider the acquittal beyond what he characterized as standard defense arguments, but did not explain further. (App.

² The Military Judge denied the Mil R. Evid. 413 evidence related to Ms. [REDACTED]. The government also sought to introduce evidence of the Ms. [REDACTED] case under Mil R. Evid. 404b. The military judge found the government's notice to defense lacking and denied admission of the evidence. (App Ex. LXIII).

Ex. LXII). He gave favorable treatment to the government's emboldening argument. (App. Ex. LXII). Ultimately, the military judge gave no weight to appellant's prior acquittal, instead finding it was a neutral factor for admissibility. (App. Ex. LXII).

B. The Mil. R. Evid. 413 Evidence Was the Centerpiece of the Government's Case.

Despite the government's assurances that appellant's prior acquittal would not result in a trial within a trial, it was indeed the primary focus of the government's trial strategy. The government introduced text messages between Ms. ■■■ and appellant. (Pros Ex. 9) (R. at 784). It called Ms. ■■■ after Ms. ■■■, but before two other named victims in the instant case (R. at 766). During its cross-examination of appellant, the trial counsel questioned appellant about Ms. ■■■ before anything related to the instant charges. (R. at 1267).

In closing, the government focused on its Mil. R. Evid. 413 evidence before addressing any charged offenses. (R. at 1517). The government also argued appellant could not have a reasonable mistake of fact defense because of his previous court-martial experience. (R. at 1534). The government used the acquittal as a cudgel, claiming appellant learned from his earlier acquittal to seek an easier target – one who was younger and not sober like Ms. ■■■. (R. at 1514). “[H]e chose his victims wisely, learned from his mistakes, and his tactics evolved.” (R. at 1509 -1510). Indeed, the government's PowerPoint presentation, excluded

from the panel's view only because the government failed to timely provide the slides to the defense, demonstrated with clarity the government's theme: "emboldened"; "new tactics"; and "learned from mistakes." (App. Ex. CVI)(R. at 1477).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). When a military judge abuses his discretion in conducting the Mil. R. Evid. 403 balancing test, the error is non-constitutional. For a non-constitutional error, the government has the burden of demonstrating that the error did not have a substantial influence on the findings. *Solomon*, 72 M.J. at 182 (C.A.A.F. 2013).

Law

In a court-martial for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant. Mil R. Evid. 413. However, this does not allow for a free-for-all. The judge must *also* balance the evidence under Mil. R. Evid. 403. *Solomon*, 72 M.J. at 180. In cases of a prior acquittal, "[t]here is a need for great sensitivity when making the determination to admit evidence of prior acts that have been the subject of an acquittal." *United States v. Griggs*, 51 M.J. 418, 420 (C.A.A.F. 1999) (holding that underlying evidence of an

acquittal may be admitted so long as the testimony is limited and the panel is informed of the acquittal).

A military judge abuses his discretion when he fails to give adequate weight to an acquittal in conducting the 403 balancing test or when he allows the 413 evidence to subsume the charged offenses and become the focus of the trial. *Solomon*, 72 M.J. at 182 (C.A.A.F. 2013); *See also United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (finding a “distracting mini-trial” occurred where trial counsel’s opening statement began with reference to the Mil. R. Evid. 413 prior act and his closing argument emphasized the prior act)(citation and internal quotation marks omitted); cf. *United States v. James*, 63 M.J. 221, 222 (C.A.A.F. 2006) (the military judge limited the scope of admissible propensity evidence to brief testimony); *United States v. Bailey*, 55 M.J. 38, 41 (C.A.A.F. 2001) (the military judge kept the witness testimony abbreviated and focused to ensure a minimum amount of time would be spent on Mil R. Evid. 413 evidence).

When a military judge’s analysis of the acquitted charge begins and ends with the recognition that a prior acquittal on a charge of sexual assault does not bar subsequent admission of the same allegation under Mil. R. Evid. 413, he conducts the 403-balancing test incorrectly thereby abusing his discretion. *United States v. Bridges*, 74 M.J. 779, 780-81 (Army. Ct. Crim. App. 2015). When that occurs, this court looks for harmlessness by weighing: (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. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005).

Argument

A. The Military Judge Abused His Discretion in Failing to Use Great Sensitivity in the Mil. R. Evid. 403 Balancing Test on the Acquittal Evidence.

In this case, the military judge improperly treated the acquitted allegations the same as any other propensity evidence. By allowing impermissible arguments and for the government to make the Mil. R. Evid 413 evidence the centerpiece of its case, the military judge allowed the government to violate the tenets of *Solomon* and *Griggs*. Other than looking to the intervening circumstances, the military judge failed to consider the other relevant factors or provide analysis regarding the acquittal and how the government planned to use it. The military judge evaluated only what he called the “obvious reasons that this factor may weigh against admissibility as asserted by the defense.” (App Ex. LXII). After determining admissibility, the military judge failed to limit the scope of the admissible evidence.

1. The Government Misused the Mil. R. Evid. 413 Evidence.

The government went well beyond what is permissible for propensity evidence. Mil. R. Evid 413 allows the government to argue an accused has a proclivity to commit future acts based on past conduct. But the use of such

evidence is not unlimited. Here, the military judge allowed the government to exceed any limitation and argue the prior acquittal established appellant had a proclivity, not that his prior acts demonstrated a possible proclivity. This was an abuse of discretion for two reasons.

First, factually the cases are different. In this case, appellant's reasonable mistake of fact was to both Ms. [REDACTED] age and consent, rather than just consent, as with the Mil. R. Evid. 413 witness, Ms. [REDACTED]. In addition, a glaring error in the court's reasoning is the failure to consider that an acquittal teaches no lesson – if anything, it has the opposite effect. Rather than curtail his understanding of consent, the acquittal could stand for the proposition that appellant was vindicated in his view of consent. It is highly improper and extremely prejudicial to argue an acquittal had the deterrent effect of a conviction.

Second, the government plainly argued the panel got it wrong in appellant's earlier court-martial and the current panel had to set things right. "Who is going to believe her? Right? Who is going to believe her even if she comes forward? They didn't believe Ms. [REDACTED]. Why would they believe Ms. [REDACTED]?" (R. at 1512, 1516). The government argued appellant was emboldened because of his prior acquittal, not that the prior circumstances with Ms. [REDACTED] showed appellant had a proclivity to commit certain acts.

This court has found this improper use of the evidence to be error. “[T]he judge also did not consider the danger of unfair prejudicial confusion over the extent to which a panel might consider the evidence without running an unacceptable danger of convicting or punishing appellant for a charge that resulted in appellant’s acquittal.” *Bridges*, 74 M.J. at 781. The government should have been limited to arguing appellant had a proclivity, not that his current panel had to make things right because of appellant’s prior acquittal, implying of course that the acquittal was an error.

The government’s improper use of the acquittal spilled over to its sentencing case. The government began its sentencing argument asserting appellant deserved harsher punishment for what he did to Ms. [REDACTED]. (R. at 1671). The military judge corrected the trial counsel and instructed him not to mention Ms. [REDACTED] during the sentencing argument. (R. at 1671). Nonetheless, the trial counsel’s improper comment underscores the centrality of the previous case to the government’s characterization of appellant and theory of the case.

2. The Government Overused the Mil. R. Evid. 413 Evidence.

Not only did the government misuse this evidence, that is for improper purpose, but they overused it for those purposes that are normally allowed. When dealing with Mil. R. Evid. 413 evidence, especially when that evidence was the subject of a prior acquittal, the use of that evidence should be limited if it is to

come in at all. *See, e.g. Berry*, 61 M.J. at 97 (finding the panel was likely to decide the case on a collateral issue when the government mentioned the 413 evidence first in opening statements and focused heavily on it in closing argument.); *James*, 63 M.J. at 222 (holding the military judge did not violate Mil. R. Evid. 403 by restricting the evidence to brief testimony and forbidding the government from introducing evidence that [the appellant] was convicted of that offense).

This court should look to the amount of time the government dedicated to the Mil. R. Evid. 413 evidence to determine whether admitting it was an abuse of discretion. *Solomon*, 72 M.J. at 182. This is so even though the military judge could not have known that at the time of ruling on the evidence's admissibility. *Id.*

Here, the evidence from appellant's prior trial and acquittal subsumed all the other evidence. Applying the time devotion standard from *Solomon*, it is clear the government exceeded the allowable time for focusing on Ms. [REDACTED] case. In *Solomon*, the Mil. R. Evid 413 witnesses were the first two called. 72 M.J. at 182. Similarly, Ms. [REDACTED] was called after Ms. [REDACTED], but before three other charged victims including a sexual assault victim.

Further, just as the government's focus on the Mil. R. Evid. 413 evidence in *Berry* was problematic because it was the focus of its closing argument, here, the government began its closing by discussing the Ms. [REDACTED] case. In fact, the first seventeen lines of the transcript of the government closing are about Ms. [REDACTED] and

how appellant's acquittal emboldened him. (R. at 1509, 1510). By focusing argument on the other case, a "distracting mini-trial" occurred just as in *Berry*. 61 M.J. at 97.

Finally, unlike *James*, the evidence was not limited to brief testimony. Here, the evidence the government introduced extended to text messages between Ms. [REDACTED] and appellant (Pros. Ex. 9) and DNA evidence.³ (R. at 1276). Despite the defense's objection, Ms. [REDACTED] testified beyond the facts of the incident and included injuries she claimed to have sustained to her anus. (R. at 790). To rebut this, the defense was forced to call the Sexual Assault Nurse Examiner who treated Ms. [REDACTED] but noted no injuries to her anus. (R. at 1106).

Because the Mil. R. Evid. 413 evidence at issue was not kept to brief and focused testimony, the government clearly overused it to overwhelming prejudice.

B. The Government Made the Mil R. Evid. 413 Evidence the Thrust of Its Entire Case, and thus it had a Substantial Impact on the Outcome of the Case.

To determine if improper Mil. R. Evid. 413 evidence was harmless, military courts look to the strength of the rest of the case. *Solomon*, 72 M.J. at 182.

Here, the strength of the government's remaining case was weak. Ms. [REDACTED] admitted to deleting text messages, favorable to appellant, that indicated she had consented. (R. at 684). Her Facebook page indicated she was eighteen and she

³ This is the basis of Assignment of Error II.

openly discussed how often she drank alcohol – even calling herself a “whole alcoholic.” (Pros. Ex. 5). This gave the clear impression she was old enough to buy and consume alcohol.⁴

Ms. ■ sent appellant sexually suggestive photos of her buttocks and, after receiving sexually explicit videos from him, agreed to meet him. (R. at 959, 927). They also discussed sexually transmitted diseases (STDs). (R. at 927). All of this was in pursuit of a romantic and sexual relationship and the basis for a reasonable mistake of fact defense.

There were no eyewitnesses or independent corroboration of either offense and both alleged victims had a reason to lie.

The quality of the government’s Mil. R. Evid. 413 evidence was low. Ms. ■ admitted to consenting to appellant preforming oral sex on her before the alleged sexual assault. (R. at 773). This gave rise to a reasonable mistake of fact as to consent defense. (R. at 796, 797). After hearing all the evidence, the panel acquitted appellant. (R. at 155).

An acquittal and a defense combined greatly undermine the strength of the government’s evidence. And when a military judge fails to consider this in his Mil. R. Evid. 403 analysis, he has erred. *See Solomon*, 72 M.J. at 181 (finding

⁴ In Assignment of Error III, appellant asserts that the Charges and Specifications regarding Ms. ■ and Ms. ■ are factually insufficient.

error when a military judge failed to consider that an alibi defense and an ultimate acquittal from the previous case greatly reduces the probative weight of the prior act). Here, much like in *Solomon*, the reasonable mistake of fact defense combined with the acquittal greatly reduced the strength of proof of the prior act.

Due to the inflammatory nature of the testimony and the government's argument, the evidence was highly likely considered by the members as much more than propensity evidence. This was an abuse of discretion, and the government cannot meet this burden to prove that it did not have a substantial impact on the findings. *See Berry, 61 M.J. at 98*. The charges and specifications involving Ms. [REDACTED] and Ms. [REDACTED] must be set aside and a rehearing authorized.

II. WHETHER THE PROSECUTORIAL MISCONDUCT BY MISTATING FACTS ABOUT THE MIL. R. EVID. 413 EVIDENCE RESULTED IN APPELLANT RECEIVING AN UNFAIR TRIAL⁵

Facts Relevant to Assignment of Error

A. Trial Counsel Misstated the Strength of DNA Evidence.

Appellant testified in his own defense. The [REDACTED] conducted the cross-examination and her first questions were about Ms. [REDACTED], the alleged victim from the prior case. The [REDACTED] questioned appellant by stating that he "told Dupont

⁵ The defense requested a mistrial due to the cumulative errors of prosecutorial misconduct, a member of the public trying to attack appellant, and the government implying defense counsel caused a witness to change her testimony. (R. at 1330; 1354; and 1356.)

Police Department you never penetrated Ms. [REDACTED]? And you also told the Dupont Police Department that you never penetrated Ms. [REDACTED] anus; correct?” (R. at 1271-5). Appellant replied that he had never engaged in anal sex. (R. at 1275).

The [REDACTED] then asked appellant if “you sat and listened to that entire trial.” (R. at 1276). “In that trial there was DNA evidence.” “The DNA examiner testified at that trial, didn’t he.” Appellant replied, “They said it was two forms of DNA, ma’am.” The [REDACTED] replied, “Two forms of DNA, and it was found *in* Ms. [REDACTED] anus wasn’t it.” (R. at 1276) (emphasis added). The defense objected. (R. at 1276).

B. The First Hearing on the Objection, the Ruling, and the Subsequent Questioning

Defense counsel said the [REDACTED] misstated the facts from appellant’s prior acquittal because the DNA was found *around* the anus and not *inside* the anus. (R. at 1277). The [REDACTED] conceded her misstatement and requested to restate the question. (R. at 1278). The military judge sustained the objection and instructed the panel to disregard the question. (R. at 1278; 1280). Then the following colloquy took place:

Q: You sat in a trial for this matter in [2018], correct, related to Ms. [REDACTED]?

A: Yes, ma’am.

Q: And at that trial, a DNA expert testified, correct?

A: Yes, ma’am.

Q: [T]he DNA expert at that trial found that around Ms. [REDACTED] anus was your DNA – two types of DNA; correct?

A: Two types of DNA, and they didn't---

Q: Both yours?

A: No. Both of them wasn't mine, ma'am.

Q: They found your DNA around her anus.

A: If I can recall, I don't even think they even found my DNA around her anus. I can be wrong, but if--from my memory, I don't think my DNA was around her anus. (R. at 1280, 1281).

C. The Second Hearing on the Objection, the Surprise Discovery Concerning the DNA Evidence, and the Military Judge's Ruling.

Before starting re-direct examination, the defense counsel again objected to the government's DNA evidence characterization. More troubling, the court found that despite the [REDACTED] multiple questions insisting a DNA examiner testified at Ms. [REDACTED] trial, no DNA expert testified at Ms. [REDACTED] trial. (R. at 1328).

Based on the material misstatements, the defense counsel moved for a mistrial for prosecutorial misconduct. (R. at 1330). The defense accused the government of violating the ethical standard of diligence by failing to learn whether the DNA examiner testified before questioning appellant. (R. at 1330). The SVP claimed the error was the result of a "wrong note." (R. at 1336). The government provided DNA analysis from Ms. [REDACTED] case which was gathered

during the investigation, but at that trial, no DNA analyst was called to testify. (R. at 1337).

The military judge concluded that, in his opinion, the panel believed appellant's DNA was not found near Ms. [REDACTED] anus. (R. at 1341). The judge gave no basis for his ability to read the minds of the members of the panel who heard the [REDACTED] incorrect assertions. The military judge asked the [REDACTED] if she agreed she was reckless and did not exercise due diligence. (R. at 1348). The [REDACTED] conceded she was negligent in her note taking but would not concede she lacked due diligence because of the "legal definitions related to them." (R. at 1350, 1351). The military judge stated he was not trying to determine if professional responsibility violations were committed, only if a mistrial was warranted. (R. at 1351, 1352).

The defense counsel argued appellant was placed in a no-win scenario and a curative instruction would not suffice. (R. at 1354). The defense contended a curative instruction that the government misstated the evidence, i.e., no DNA evidence was presented, might be helpful to set the record straight, but would also impeach appellant himself because he had conceded before the panel that a DNA examiner testified at his earlier trial. Therefore, his credibility would be diminished. (R. at 1354). The military judge suggested an instruction to the panel

to disregard DNA testimony in the prior court-martial, because the court believed this would not negatively affect appellant. (R. at 1355).⁶

The military judge again questioned counsel about how a curative instruction to disregard the DNA evidence and prohibit further introduction of DNA evidence would not cure the issue. (R. at 1355). The defense argued it would impact its decision to present evidence that appellant's DNA was not found on the perineal or in the vaginal or anal cavities. (R. at 1366). But the [REDACTED] argued that it was appellant who caused the DNA confusion by mentioning "two-types of evidence." (R. at 1370).

The military judge next asked defense counsel if the [REDACTED] actions warranted her removal. (R. at 1371). The defense believed the [REDACTED] removal would not remove the taint and again moved for a mistrial. (R. at 1372).

The military judge questioned the government why excluding the Mil. R. Evid. 413 evidence would not be an appropriate remedy short of a mistrial. (R. at 1385). The government argued appellant opened the door when he took the stand and testified about Ms. [REDACTED]. The military judge expressed concern about the

⁶ The defense counsel gave the military judge several options on how to cure this error, beyond a mistrial or a curative instruction. One alternative was for the court to reconsider the Mil. R. Evid. 413 decision regarding Ms. [REDACTED], because the Mil R. Evid 403 trial within a trial issue had gotten out of hand. (R. at 1360). Another option presented by defense was a mistrial on only the Article 120, UCMJ offenses. (R. at 1362).

argument, stating appellant choosing to testify did not give the government the right to make misstatements. (R. at 1386).

Despite the military judge's apparent frustration and exasperation with the government's several arguments, he nonetheless denied the mistrial motion and denied the motion to exclude the Mil. R. Evid. 413 evidence. He provided a curative instruction to disregard all questions and answers regarding DNA testimony. (R. at 1395). He did not remove the [REDACTED] and he did not limit the government's further exploitation of the 413 evidence. The military judge reduced his findings of fact and conclusions of law to writing. (App. Ex. CXI). The ruling did not address the cumulative nature of the issues presented, nor did it consider any other remedies other than a mistrial or evaluate if the trial counsel violated any ethics rules. (App. Ex. CXI).

Standard of Review and Law

A military judge's decision to grant a mistrial is reviewed for an abuse of discretion. *United States v. Thompson*, 58 M.J. 43, 47 (C.A.A.F. 2003)

Prosecutorial misconduct is generally defined as, "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996); *Thompson*, 58 M.J. at 47 (C.A.A.F. 2003) (considering prosecutorial misconduct for a prosecutor asking

witnesses about exhibits which had been excluded). In analyzing allegations of prosecutorial misconduct, “courts should gauge the overall effect of counsel’s conduct on the trial, and not counsel's personal blameworthiness.” *United States v. Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006) (considering if a prosecutor coaching a witness amounted to prosecutorial misconduct).

The rules of professional responsibility require statements made in open court, to be factual. A prosecutor must diligently determine the assertions made in court are indeed true. “A statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.” Army Reg. 27 -26, Rules of Professional Conduct for Lawyers, Rule 3.3(3) (28 June 2018) [AR 27-26].

American Bar Association (ABA) Standard 3-6.7(d) states, “the prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.” Standards for Criminal Justice Prosecution Function and Defense Function § 4-7.6(d) (Am. Bar Ass'n 1993).

“The underlying rationale for the good faith basis requirement stems from the concern that false insinuations in a question, even if followed by an indignant denial from the witness, undoubtedly leave a trace of prejudice in the jury’s mind. As one court has sternly noted, if this rule is breached, the violator should be severely censured. Such practice is impermissible and should not be tolerated.”

Todd A. Berger, *The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail To Prevent Truthful Witness From Being Discredited Through Unethical Means*, 99 Marq. L. Rev. 283, 313 (2015).

Argument

A. There was Prosecutorial Misconduct and it Prejudiced Appellant's Right to a Fair Trial.

The military judge abused his discretion in failing to declare a mistrial when the trial counsel bolstered the Ms. [REDACTED] case by repeatedly asking appellant about evidence that was never presented at his first court-martial. The curative instruction provided fell far short of curing the misconduct because it failed to include that the prosecutor was wrong in her questions, and it effectively prevented appellant from presenting his own DNA related evidence. This error compounded the prejudice from Assignment of Error I.

1. The Military Judge Incorrectly Analyzed Prosecutorial Misconduct.

In his ruling, the military judge incorrectly focused his analysis on the [REDACTED] personal blameworthiness, rather than its prejudicial impact on appellant's trial or the rules of professional conduct. (App. Ex. CXI). A prosecutor's personal blameworthiness, is not the appropriate analysis. *Rodriguez-Rivera*, 63 M.J. at, 378.

Just as in *Thompkins*, the military judge focused his mistrial ruling on personal blameworthiness. (App. Ex. CXI). There, the Court of Appeals for the

Armed Forces (CAAF) noted the military judge was incorrect in stressing assistant trial counsel's inexperience and nervousness, as well as the unintentional nature of the errors because this focused on the personal culpability of the prosecutor.

Thompkins, 58 M.J. at 47. Here, the military judge used the wrong legal standard when he expressly declined to consider professional ethics – and left that determination to the Staff Judge Advocate. (R. at 1351, 52). To determine if prosecutorial misconduct occurred, the military judge should have evaluated the relevant professional responsibility rules – not left it up to someone else to determine. *Meek*, 44 M.J. at 5. By failing to apply the law correctly -- focusing on personal blameworthiness and not the rules of professional responsibility--the military judge abused his discretion.

2. Repeated Misstatements by [REDACTED] While Questioning Appellant Violated the Rules of Professional Responsibility.

The [REDACTED] questioning about DNA was false in multiple ways. She falsely claimed appellant's DNA was found inside Ms. [REDACTED] anus. (R. at 1267). This seasoned prosecutor had to concede she misstated *inside* versus *around* Ms. [REDACTED] anus. (R. at 1267). This is not a minor mistake, as Ms. [REDACTED] claimed to have been anally penetrated and the DNA questions using the word "inside" tended to corroborate her claim of penetration, much more than if she had used the word "around." There was no good faith basis to ask this question as it was factually

incorrect and required an objection to correct the record. This factual inaccuracy unfairly bolstered Ms. [REDACTED] credibility.

Then, multiple times, the [REDACTED] emphasized the non-existent DNA expert testimony. Despite the non-existent testimony, the [REDACTED] repeatedly asked appellant to confirm the DNA examiner's testimony. (R. at 1328). Despite a ruling that the errors in questioning were not intentional, the severity of the misconduct was high as it overstated the strength of the corroborating evidence that the government was using in the Mil R. Evid. 413. evidence – the lynchpin of their case.

These misrepresentations cannot be dismissed as simply referring to the “wrong note.” Which begs the question, why did the [REDACTED] even have notes that falsely indicated: 1) appellant's DNA evidence had been found *inside* Ms. [REDACTED] anus; and 2) a fictional expert showed up at court to testify about it? These are two extremely damning facts that didn't materialize from the ether. It demands a better explanation than a prosecutor having simply walked to a podium with the wrong piece of paper.

The ABA and Army ethics standards were violated because the prosecutor asked a question without any good faith basis. The [REDACTED] had no evidence to support the notion that DNA was found inside Ms. [REDACTED] anus and no good faith basis to claim the DNA examiner testified in the trial regarding Ms. [REDACTED] because, again, no DNA examiner ever testified. The military judge even asked the [REDACTED] if

she would concede did not have a good faith basis to ask the question. The [REDACTED] did concede that she made a mistake. (R. at 1350). There was no serious censure to the [REDACTED] and the panel was left with a prejudicial and incorrect view of the state of the evidence from the Ms. [REDACTED] case. This is the exact issue the ethical standards address.

The military judge had some sense there was an ethics issue. He was moved to inquire if the [REDACTED] removal from the case was warranted. (R. at 1371). Rather than acting on this violation, the military judge decided to credit the prosecutor's take that it was simply negligent conduct and did not remove the [REDACTED]. The military judge failed to consider that even negligent conduct can be a violation of professional responsibility duties.

Rather than taking full responsibility for this error, the [REDACTED] doubled down, and claimed that she would not have questioned appellant on the Ms. [REDACTED] case if he did not testify about it on direct examination. (R. at 1385). Essentially, she laid the blame for her violating appellant's rights on appellant himself and the military judge failed to check this error. This was an error requiring a mistrial.

B. The Curative Instruction Prejudiced Appellant and Failed to Correct the Error.

Once the military judge decided that an error was made, he had to fashion an appropriate remedy. But rather than order a mistrial or preclude the Mil. R. Evid. 413 evidence, the court merely issued a curative instruction requiring the members

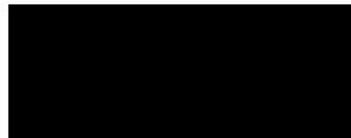
to disregard any DNA evidence. (R. at 1399). This instruction did not go nearly far enough because it never addressed the improper impression that the panel received that the DNA evidence from the Ms. [REDACTED] case was strong. Despite the defense counsel stating their dissatisfaction with the instruction multiple times, the military judge never told the panel members that the [REDACTED] had misstated or mischaracterized the evidence. (R. at 1355, 1360)

The military judge fashioned this milquetoast instruction to cure the concern of defense counsel that a correction impeached appellant because he agreed there was testimony in the first trial. The defense counsel was correct in their assertion that appellant was placed in a no-win situation. Either the panel was corrected that the prosecution erred, or they were prohibited from considering DNA evidence, thus limiting the defense's ability to present favorable DNA evidence. (R. at 1368, 1369). Ultimately, after the instruction, the defense did not present any DNA evidence of its own.

The government misconduct in this case boxed the military judge into a situation where the only appropriate remedy was a mistrial, or at least a mistrial regarding the Article 120 charges. It is difficult to imagine a curative instruction that could successfully correct the panel, admonish the [REDACTED], and free the defense to present whatever helpful evidence they saw fit. Because a mistrial was the only warranted remedy, the military judge erred.



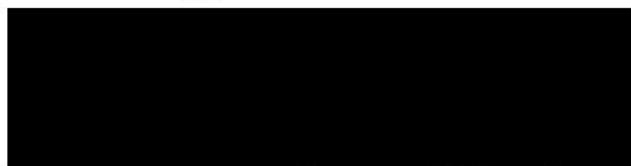
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APPENDIX A

Appendix A: 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 SPECIFICATION 2 OF CHARGE I, THE SPECIFICATION OF ADDITIONAL CHARGE I AND THE SPECIFICATION OF ADDITIONAL CHARGE II IS FACTUALLY SUFFICIENT

Facts Relevant to Assignment of Error

A. Ms. [REDACTED] was on the run from her mother and made friends with appellant on Facebook.

In the spring of 2019, Ms. [REDACTED] was fifteen years old, and she often ran away from home. (R.at 642). When she would run away, she would stay on the couches of people she met through Facebook, after lying about her age. (R. at 646, 657).

Ms. [REDACTED] and appellant became friends on Facebook. (R. at 645).

Appellant knew a person had to be at least eighteen to have a Facebook page, so he believed she was at least eighteen. (R. at 1245). Furthermore, Ms. [REDACTED] told him that she was “grown” indicating she was above the age of majority. (R. at 1245).

Appellant picked Ms. ■ up and drove to a gas station so that she could purchase rolling papers. (R. at 1247). Once again, a person needs to be eighteen-years-old to purchase rolling papers, so appellant believed Ms. ■ was an adult.⁷

B. Ms. ■ Gets Personal with Appellant.

Ms. ■ made further statements that implied she was an adult. On 5 May 2019, Ms. ■ posted a public Facebook message declaring she wanted to drink alcohol. (R. at 648). She also “liked” a post appellant made that day. (R. at 648). Appellant messaged Ms. ■ and asked if she wanted to meet and drink. (R. at 649). Ms. ■ replied yes, she was “a whole alcoholic.” (Pros. Ex. 5). Ms. ■ provided appellant her address so he could pick her up. (R. at 660).

As promised, appellant brought a bottle of Hennessy. Ms. ■ started chugging the bottle without needing a chaser.⁸ (R. at 660). She said she drank so quickly because it was as if she had just worked out and was thirsty. (R. at 661).

C. Ms. ■ and Appellant Stay in his Car Together.

Ms. ■ and appellant drove back to appellant’s apartment. There, Ms. ■ asked appellant if she could go inside. (R. at 663). Appellant said they could not

⁷ Ms. ■ told appellant she thought she had to be twenty-one to purchase the papers. When appellant told Ms. ■ eighteen was the age, she said she did not have her I.D. (R. at 1247).

⁸ A chaser is another beverage used to wash away the taste of an alcoholic beverage. A chaser is typically employed by inexperienced or novice drinkers of alcohol.

because his child's mother, with whom he was estranged, was inside. (R. at 663).

Ms. ■ testified that they remained in the car drinking, talking, and eventually had sex. (R. at 664).

D. Ms. ■ Deleted Text Messages

During sex, Ms. ■ was aggressive. She bit appellant's lip and his ear. (R. at 1251). Ms. ■ stated, "sorry. I like that dominant stuff." Appellant stopped the sex, and told her, "I aint really fuck – I aint really messing with it." (R. at 1251).

The next day, appellant and Ms. ■ exchanged text messages where he said, "I just wasn't fucking with the way you, like, bit my lip. I'm not into that dominant shit." Ms. ■ replied, "It's cool. I get aggressive when I'm drunk." (R. at 1255). Later, after accusing appellant of sexually assaulting her, Ms. ■ admitted to deleting these text messages before giving the rest of the conversation to CID. She said she deleted the messages because she knew it made it seem like she was friendly with him and it was okay. (R. at 684).

E. Ms. ■ Gets Her Mother Back on Her Side.

The incident with appellant occurred on 5 May while she was angry with her mother and staying away from home. On 15 May, Mother's Day, Ms. ■ went back home and alleged appellant assaulted her. (R. at 702). After learning Ms. ■ was sexually assaulted, Ms. ■ mother was no longer angry at her for running

away. Instead, she sought to confront appellant. (R. at 685). Unable to find him, she left a threatening note on appellant's car. (R. at 686).

After threatening appellant, Ms. [REDACTED] mother took her for medical treatment. No evidence of assault could be collected. (R. at 686, 687). Ms. [REDACTED] told the physician the sexual assault happened in appellant's apartment. (R. at 752). At trial, Ms. [REDACTED] claimed to have gotten a scar on her leg from when appellant forced her into the backseat. (R. at 688). When the physician testified, she claimed Ms. [REDACTED] never complained about having a scar on her leg. (R. at 760).

F. Ms. [REDACTED] and Appellant Began Talking Online.

Ms. [REDACTED] began a text message relationship with appellant. (R. at 865). Ms. [REDACTED] testified she became "interested" in appellant and she liked him. (R. at 866). She tried to convince appellant that their relationship should evolve into more than just texting. (R. at 866). Ms. [REDACTED] confessed she was flirting with appellant. (R. at 912).

During these conversations, appellant and Ms. [REDACTED] developed a trusted and emotional connection, including Ms. [REDACTED] divulging her bipolar disorder. (R. at 913). Appellant, in turn, shared with Ms. [REDACTED] about suffering from depression. (R. at 914).

G. Ms. [REDACTED] and Appellant Share Sexually Explicit Photos and Videos with Each Other.

Ms. ■■■ and appellant agreed to share photos. In asking for a photo of appellant, Ms. ■■■ specifically said, “I want to see what I’m working with.” (R. at 925). Ms. ■■■ sent appellant pictures of her backside wearing only leopard print short shorts. (R. at 958, 959).

H. Ms. ■■■ Inquires about Appellant’s Sexual Health.

On 11 February 2020, Ms. ■■■ asked appellant about STDs and how often he was checked. Ms. ■■■ claimed she was screened for STDs every six months. (R. at 927). Ms. ■■■ explained it was important for him to be checked before they did anything. (R. at 927).

I. Appellant Picks Ms. ■■■ Up.

On 12 February 2020, after flirting via text message and FaceTime calls, Ms. ■■■ and appellant met. (R. at 928).

Appellant arrived and Ms. ■■■ got into his car. They talked and appellant attempted to kiss ■■■ and placed his hand on her leg. (R. at 931). They talked more and soon after, Ms. ■■■ left the car. (R. at 931).

Standard of Review

Matters of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

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,” the members of this court are “themselves convinced of appellant’s guilt beyond a reasonable doubt.” *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003)(citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *Washington*, 57 M.J. at 399. This court must make “its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.” *Id.* In so doing, this court may “weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.” *Id.*

Argument

The government failed to prove appellant did not have a reasonable mistake of fact as to the age of Ms. ■■■, or that he had a reasonable mistake of fact as to consent from Ms. ■■■ and Ms. ■■■. The entire case hinged on the credibility of the two women and the Mil. R. Evid. 413 evidence. Without that Mil. R. Evid. 413 evidence neither woman had the credibility necessary to sustain a conviction for the following reasons: 1) Ms. ■■■ testimony is not credible because she had a strong motive to fabricate, specifically, a need to rekindle the relationship with her mother; 2) Ms. ■■■ told appellant she was of age and lied about her age, explicitly

or implicitly, several times; 3) Ms. ■ deleted exculpatory text messages that corroborated appellant's account of the events as consensual; and 4) Ms. ■ exchanged sexually explicit photos and videos and had conversations about STDs, indicating a desire to pursue a sexual relationship.

A. Ms. ■ is Not Credible Because of Her Motive to Fabricate

Ms. ■ fabricated the allegation because she was desperate to return to her mother. The government's entire case for sexual assault rested on Ms. ■ credibility. Yet, Ms. ■ motive to fabricate demonstrated she was not a credible witness. Therefore, the government failed to prove this sexual encounter was not consensual and to prove appellant's guilt beyond a reasonable doubt.

On the day of the charged offenses, Ms. ■ was a runaway living with a person she only knew from Facebook. (R. at 658). It is more than coincidence that Ms. ■ did not report until ten days after the incident – on Mother's Day. On Mother's Day, Ms. ■ was thinking about restoring her relationship with her mother. Ms. ■ accusation fully accomplished this goal. When she returned home and told her mother, her mother brought her to appellant's house and left a threatening note. (R. at 685)

In cases involving sex crimes, "the credibility of the putative victim is of paramount importance." *United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F.

2013). But Ms. [REDACTED] testimony is not credible. She lied to avoid losing her mother and so she could return home.

Furthermore, her testimony was often inconsistent with statements she made closer to the incident. This is not surprising considering the delayed report. First, she was not consistent as to where the incident occurred – telling the physician that it occurred at appellant’s apartment and not in his car. (R. at 752). Next, on direct she testified she suffered a scar on her leg, but when the physician testified, he claimed Ms. [REDACTED] had never disclosed a scar. (R. at 760). Because her testimony is not credible, the government has not proven her lack of consent or disproven mistake of fact as to consent.

B. Appellant’s Belief that Ms. [REDACTED] was Eighteen-Years-Old is Corroborated.

The entirety of the case to prove Ms. [REDACTED] was below sixteen was based solely on Ms. [REDACTED] word. Ms. [REDACTED] claimed she told appellant she was fifteen, but all of her words and actions outside the courtroom stated or implied that she was an adult. (R. at 646, 648-649, 660-661, 1245, 1247, 1251, 1255).

Ms. [REDACTED] conduct led appellant to believe she was at least old enough to drink alcohol, have a Facebook account, and legally purchase rolling papers. Appellant testified Ms. [REDACTED] told him she was “grown” meaning she was over eighteen, and claimed she was an experienced drinker. (R. at 1245)(Pros Ex. 5). Also, the two discussed purchasing rolling papers. Appellant testified Ms. [REDACTED]

stated she could have purchased the papers herself, but she did not bring her wallet with her ID. (R. at 1247). This is corroborated by the Facebook messenger conversations where Ms. [REDACTED] and appellant discussed purchasing marijuana and drinking. (Pros. Ex. 5). Ms. [REDACTED] testimony is not corroborated by anything.

C. Ms. [REDACTED] Deleted Messages Confirming Her Consent.

Once Ms. [REDACTED] created her allegation against appellant, there was no going back. To cover her tracks, she chose to delete exculpatory messages. She understood if her account of what happened was disproven, she risked losing the good relationship she forged with her mother. Her mother would likely go back to being angry with her for running away.

Appellant's account of the incident states he broke off the sexual activity when Ms. [REDACTED] became overly aggressive – biting him repeatedly. (R. at 1251). Ms. [REDACTED] confirmed this in messages to him that she later deleted. (R. at 684).

D. Ms. [REDACTED] and Appellant Were Explicitly Planning a Sexual Relationship.

Just like Ms. [REDACTED], Ms. [REDACTED] testimony is not corroborated by any physical evidence or witnesses.

Appellant's belief that Ms. [REDACTED] would consent to a sexual relationship was reasonable which is why he touched her leg. Ms. [REDACTED] sent sexually explicit photos of herself to appellant – pictures of her backside in only leopard print short shorts. In return, she received sexually explicit videos of him, and after receiving them,

they planned on meeting. (R. at 959). Even more to the point, Ms. ■■■ inquired about appellant's STD. (R. at 927). There is no other explanation why Ms. ■■■ would have done these things other than her very clear desire to have a sexual relationship with appellant.

Like Ms. ■■■, Ms. ■■■ had a motive to fabricate. She was living with her boyfriend at the time she started pursuing a relationship with appellant. (R. at 930). When first interviewed by the government, Ms. ■■■ lied and said she was living with her sister. (R. at 930). This deception was to obscure the reason Ms. ■■■ lied. Ms. ■■■, also like Ms. ■■■, went so far as to delete messages between herself and appellant. In her case, to prevent a discovery by her boyfriend. (R. at 963). Perhaps most damning of all, Ms. ■■■ did not report the alleged assault until Ms. ■■■ asked her to – Ms. ■■■ and Ms. ■■■ were friends. (R. at 937).

The government did nothing to disprove appellant's reasonable mistake of fact as to consent either for touching her leg or receiving explicit videos. The weight of the evidence must be resolved in appellant's favor.

II. WHETHER APPELLANT WAS DENIED HIS RIGHT TO A UNANIMOUS VERDICT

At trial, appellant moved the court for a unanimous verdict, which was denied. (App. Ex. XII) Under both the Fifth and Sixth Amendments, as well as the UCMJ, service members have a constitutional right to a fair and impartial panel when charged with serious offenses. *United States v. Wiesen*, 56 M.J. 172, 174

(C.A.A.F. 2001). On 25 July 2022, the Court of Appeals for the Armed Forces granted review of the unanimous verdict for service members and continues to grant review on other cases. *United States v. Anderson*, 2022 CAAF LEXIS 529 (C.A.A.F. 25 July 2022). Therefore, the results of this unconstitutional process should be set aside.

III. WHETHER DILATORY POST-TRIAL PROCESSING WARRANTS RELIEF.

Relevant Facts

Appellant's trial concluded on 2 October 2021. (Chronology Sheet). Appellant submitted his post-trial matters on 25 October 2021 (Submission Under R.C.M. 1103 and 1006 in *United States v. SPC [REDACTED]*). The convening authority signed the Convening Authority Action on 9 November 2021. (Action). On 10 December 2021, the military judge entered judgment. (Judgment of the Court). On 23 May 2022, the trial counsel completed his precertification review. (Chronology) On 16 June 2022, the military judge authenticated the record of trial. (Authentication of the Record of Trial). On 11 July 2022, the legal administrative specialist certified the record of trial and transcript. (Chronology).

No explanation was offered for the extended delay. On 26 August 2022, this court docketed this case. (Referral and Designation of Counsel).

In total, 328 days passed between sentencing and docketing. (Referral and Designation of Counsel). Twenty- three days were used by appellant for post-trial matters. Thus, the total delay attributable to the government is 303 days.

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

A convicted soldier's right to due process includes a timely review and appeal of his conviction. *United States v. Toohey*, 63 M.J. 353, 356 (C.A.A.F. 2004). "[D]ilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice." *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38 at *4 (Army Ct. Crim. App. 10 Feb. 2020) (sum. disp.) (quoting *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001))

In *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the CAAF held there is a presumption of unreasonable delay if the convening authority does not take action within 120 days of the announcement of sentence. A presumption of unreasonable delay also arises when it takes longer than thirty days to docket the

case with this court once the convening authority takes initial action. *Id.* But see *United States v. Banks*, 75 M.J. 746 (Army Ct. Crim. App. 2016) (holding if the defense receives a twenty-day extension to submit post-trial matters that additional time is not attributable to the government under *Moreno*).

Moreno was decided before Congress shortened and streamlined the post-trial process with the Military Justice Act of 2016.⁹ Under the new post-trial process, this court has found delay presumptively unreasonable when 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 the 120-day and 30-day timelines from *Moreno*).

When there is a presumptively unreasonable delay, this court conducts a due process review by analyzing the four factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972): “(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. No one factor is dispositive. *Id.* at 136.

Even if this court does not find a due process violation, it also has the authority under Article 66 “to tailor an appropriate remedy, if any is warranted, to the circumstances of the case.” *United States v. Tardif*, 57 M.J. 219, 225

⁹ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

(C.A.A.F. 2002). Intervention is necessary when “the convening authority fails to grant relief in his action or the staff judge advocate fails to document an acceptable explanation for the untimely post-trial processing.” *Bauerbach*, 55 M.J. at 507.

Argument

All of the *Barker* factors weigh in appellant’s favor. If this court finds no due process violation occurred, *Tardif* relief is still appropriate in this case.

A. Post-trial relief is warranted under the *Barker* factors and *Moreno*.

1. Length of Delay.

The delay between final adjournment and docketing at this court was presumptively unreasonable, as 303 days attributable to the government elapsed, more than seventy days past the limit allowed under *Brown*, 81 M.J. at 510. This factor favors appellant.

2. Reasons for the Delay.

The government provided no explanation at all for the delay. Assuming that the delay is attributed to time required to generate the transcript, In *Banks*, this court explicitly rejected the argument that “court-martial volume, staff shortages, and scheduled leave and holidays” were acceptable reasons for post-trial delay. *United States v. Banks*, 75 M.J. at 751; *see also Arriaga*, 70 M.J. at 57 (“personnel and administrative issues . . . are not legitimate reasons justifying otherwise

unreasonable post-trial delay). Because the government did not even bother to give a reason. This factor favors appellant.

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

Appellant did not assert his right to a speedy trial. This factor favors the government

4. Prejudice.

In *Moreno*, the CAAF adopted a modification of the *Barker* speedy trial prejudice factor analysis for post-trial delay. Under this approach, prejudice is assessed in light of three interests: “(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted 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.” *Moreno*, 63 M.J. at 138-39 (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981)).

In this case, because of the government’s dilatory post-trial processing, appellant was forced to wait to bring the two meritorious assignments of error to this court. If successful, either one of these errors would result in a reversal of appellant’s most serious conviction, for sexual assault, which would have significantly reduced his sentence. (Findings Worksheet). Therefore, this factor heavily favors appellant.

Based on the *Barker* factors, appellant deserves sentence relief for the government's failure to timely process his case and the resulting due process violation.

B. Even if this court finds no due process violation occurred, *Tardif* relief is appropriate in this case

Alternatively, appellant requests this court exercise its power under Article 66 and *United States v. Tardif* to provide sentence relief. The government failed to provide "an acceptable explanation for the untimely post-trial processing." *Bauerbach*, 55 M.J. at 507. This court should not sanction this disregard for the post-trial processing timeline and should respond by granting sentence relief in this case.

IV . WHETHER A MAJOR DISTURBANCE TO THE CASE WARRANTED A MISTRIAL

During the testimony of Ms. ■■■, right at the moment she was describing the alleged sexual assault, an individual from the audience tried charging appellant. This person was stopped by a paralegal in the gallery and then moved to try to enter the court from the door located behind appellant. (R. at 665, 666). It took the combined effort of the trial and defense counsel to keep this person from entering the court. (R. at 668, 669). He was eventually removed by military police. (R. at 666). The military judge issued a curative instruction. (R. at 673). The defense counsel made this a basis for their motion for a mistrial. (R. at 1354).

This distribution occurring in front of the panel warranted a mistrial. How could they acquit him of these offenses after seeing the anger and outrage that the allegations caused?

V. WHETHER CHARGE II SPECIFICATION 1 FAILS TO STATE AN OFFENSE

Appellant was charged with rape of a child who had attained the age of twelve years but not sixteen years. (Charge Sheet) The specification as charged alleges unlawful force, but does not allege a modality. For example, by holding her down with his hand. By not alleging a modality Charge II Specification 1 fails to state an Offense.

VI. WHETHER IT WAS AN ABUSE OF DISCRETION TO ADMIT THE STATEMENT OF MS. CB OVER A HEARSAY OBJECTION.

Ms. ■ testified on direct examination that she did not recall anything physical happening between her and appellant. (R. at 1003). The government then called the responding officer. Who testified only that she appeared upset and had an abrasion on her face. (R. at 1020, 1021). The defense objected to hearsay and lack of foundation for an excited utterance and the military judge overruled the objection.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on January 20, 2023.



MICHELLE L.W. SURRATT
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