

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20220125

Sergeant First Class (E-7)
JAMEL I. WALKER,
United States Army,
Appellant

Tried at Joint Base Lewis-McChord,
Washington, on 6 October and 9
November 2021, 28 February and 8–
11 March 2022, before a general
court-martial convened by
Commander, 7th Infantry Division,
Lieutenant Colonel Jessica Conn,
Military Judge, presiding.

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

Assignment of Error I¹

**WHETHER THE MILITARY JUDGE ABUSED
HER DISCRETION BY FINDING GOOD CAUSE
FOR THE GOVERNMENT’S DELAYED MIL. R.
EVID. 413 DISCLOSURE.**

Assignment of Error II

**WHETHER THE UNREASONABLE POST-TRIAL
DELAY WARRANTS RELIEF.**

¹ The government has reviewed appellant’s *Grostefon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court’s authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant’s *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Statement of the Case

On 11 March 2022, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification each of rape, sexual assault, aggravated sexual contact, and making a false official statement, in violation of Articles 120 and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 907 [UCMJ]. (R. at 800; Statement of Trial Results).² The military judge sentenced appellant to be reduced to the grade of E-4, to be confined for five years and thirty days, and to be dishonorably discharged. (R. at 860–61).³ On 7 April 2022, the convening authority denied appellant’s requests for deferment and waiver⁴ and took no action on the adjudged findings and sentence. (Action). On 21 November 2022, the military judge entered judgment. (Judgment).

² The military judge granted the government’s motion to conditionally dismiss Specification 2 of Charge I (sexual assault), contingent upon Specification 1 of Charge I surviving appellate review. (R. at 800–01).

³ The military judge sentenced appellant as follows:

Charge I, Specification 1 Rape	5 years	Concurrent with Specification 3 of Charge I, Consecutively with the Specification of Charge III
Charge I, Specification 3 Sexual Assault	12 months	Concurrent with Specification 1 of Charge I, Consecutively with the Specification of Charge III
Charge III, The Specification False Official Statement	30 days	Consecutively with Specification 1 of Charge I and Specification 3 of Charge I

⁴ Appellant requested a deferment of reduction in grade, deferment of adjudged forfeitures, deferment of automatic forfeitures, and a waiver of automatic forfeitures.

Statement of Facts

A. Appellant raped Staff Sergeant [REDACTED].

Staff Sergeant [SSG] [REDACTED] was stationed at Joint Base Lewis-McChord (JBLM) in March, 2019. (R. at 221). Accompanying her to JBLM was her spouse and their children. (R. at 222). Cost of living was much higher in Washington than it was in Georgia—where SSG [REDACTED]’s family was originally from—which put financial pressures on the family. (R. at 224). In March of 2020, SSG [REDACTED]’s family moved back to Georgia to be closer to extended family members who could help support them, while SSG [REDACTED] stayed in Washington. (R. at 224–25).

In late September, 2020, after completing a field exercise, SSG [REDACTED] went to Buffalo Wild Wings to grab dinner, relax, and watch a football game. (R. at 231). While there, appellant approached SSG [REDACTED], who was sitting alone at a table, and started a conversation with her. (R. at 231–32). He introduced himself as “Prince,” and they engaged in friendly small talk. (R. at 233–34). Appellant and SSG [REDACTED] exchanged phone numbers, and appellant immediately contacted her and they started to engage in conversation through text message. (Pros. Ex. 3).

Within the first few days after their initial meeting at Buffalo Wild Wings, appellant invited SSG [REDACTED] over for drinks, food, and to receive one of his “famous [m]assages.” (R. at 237–38; Pros. Ex. 3, pp. 3–4). Staff Sergeant [REDACTED] did not take appellant up on any of the first three invitations to hang out. (R. at 237–40; Pros.

Ex. 3, pp. 3–7). Staff Sergeant ■ testified that she thought these invitations and text messages were appellant being a “good friend” who was checking on her, as she was alone and away from her family. (R. at 240). Appellant outranked her, which made her feel protected and like she could trust him. (R. 241).

Furthermore, appellant knew that SSG ■ was married. (R. at 234).

On 3 October 2020, appellant invited SSG ■ to hang out later in the day. (Pros. Ex. 3, p. 15). Staff Sergeant ■ agreed to come over after an event she had in the evening. (Pros. Ex. 3, p. 15). That evening, after initially trying to reschedule for another day, SSG ■ decided to stop by appellant’s apartment briefly before she had to report for a detail at 0230. (Pros. Ex. 3, p. 15).

Staff Sergeant ■ arrived at appellant’s apartment shortly after midnight on 4 October 2022. (R. at 257). Appellant had been drinking alcohol when she arrived. (R. at 264). The two sat on his sofa and began talking about the game he was watching, the event SSG ■ was coming from, and other small talk. (R. at 265). After around fifteen minutes of talking, SSG ■ indicated that she should get going because she had duty soon. (R. at 265). Appellant told SSG ■ that he would let her go in a little bit, which left her feeling like he was in power and controlling the situation. (R. at 266). Thereafter, appellant grabbed SSG ■’s wrists and pulled her towards him. (R. at 266–67). Staff Sergeant ■ tried to push him away, but appellant was much more powerful and pulled her closer to him,

kissing her on the lips. (R. at 267–68). He then bit her lip and moved down her neck and towards her chest, removed her bralette, and started sucking on her right breast. (R. at 268–29). Staff Sergeant ■■■ told him to stop, but appellant was acting as if he did not hear her, as he kept kissing her body and nibbling her side on her ribs. (R. at 269). Appellant then pulled down SSG ■■■'s tights, pressed his heavier body against hers, lowered his pants, and put his penis in her vagina. (R. at 270–71). Staff Sergeant ■■■ told him to stop, but appellant did not listen and penetrated her multiple times. (R. at 271). It was not until appellant noticed SSG ■■■ crying that he stopped, releasing her from his weight. (R. at 272–73). Staff Sergeant ■■■ then pulled all of her clothes back on, ran out of the apartment quickly, and drove home. (R. at 273).

During the day after the assault, appellant text messaged SSG ■■■ three times and received no response. (Pros. Ex. 3, p. 23). The next day, 5 October 2020, appellant text messaged SSG ■■■, “Hope I didn’t scare you off” to which she replied, “U did way to[o] much...like you didn’t even ask permission...so I’m good[.]” (Pros. Ex. 3, p. 24). Appellant then sent a series of messages saying, “I was a[] little drunk so I’m sorry if I did”, “I felt it and by that time, it was to[o] late but I am really sorry and hope we can still be friends”, and “I’m so used to girl[s] doing whatever I want”. (Pros. Ex. 3, pp. 24–25).

B. The Investigation and Court-Martial.

Within days of the assault, SSG [REDACTED] outcried to her wife and mother-in-law and then reported the incident to her command and law enforcement. (R. at 277). Army Criminal Investigation Command (CID) interviewed SSG [REDACTED] and subsequently interviewed appellant on 8 October 2020 at the JBLM CID Office. (R. at 481). During the interview, CID sought and received appellant's consent to conduct an extraction of his cell phone, which included extracting a copy of all of his text messages. (R. at 499).

The government preferred charges on 12 August 2021, and the convening authority referred them on 22 September 2021. (Charge Sheet). On 6 October 2021, appellant was arraigned. (R. at 1). The trial was originally docketed for 8 November 2021. (R. at 15). The defense counsel requested a continuance on 22 October 2021, which was granted by the military judge, who set trial for 7 March 2022. (App. Ex. XIV; R. at 17). On 9 November 2021, appellant entered pleas. (R. at 18).

C. Mil. R. Evid. 413 Motions.

After the military judge granted the continuance, the government began thoroughly searching through the data extracted from appellant's phone to find any rebuttal witnesses to counter evidence the government believed the defense would present in an attempt to prove appellant's trait for "respectfulness towards

women.” (R. at 155). During the search, the government found text messages between appellant and a person named “[REDACTED]” that suggested she had had a negative sexual experience with appellant. (R. 155–56). Trial counsel noted that “the text messages alone did not rise to the level of being able to bring charges,” but they were suggestive that something happened and prompted the government to try and contact and interview “[REDACTED].” (R. at 155). That search proved to be very challenging for the government.

Once trial counsel identified “[REDACTED]” as a potential person of interest, he notified the paralegal, and they began attempting to contact the associated phone number throughout November 2021. (App. Ex. LVI, p. 1; App. Ex. XLII-A). Their efforts produced nothing, as no one answered the phone and the voicemail had not been set up. (App. Ex. LVI, p. 2). The government then tried an alternative method by searching the associated number in “LexisNexis person searches” but still found no responsive results. (App. Ex. LVI, p. 2). On 15 December 2021, the government contacted CID to have them use TransUnion TLOxp⁵ to find any leads on “[REDACTED]” and the associated number, which produced one result—a male individual who was unresponsive to investigators. (App. Ex.

⁵ TransUnion TLOxp is a program available to law enforcement that searches records contained in “a massive repository of public and proprietary data” TransUnion Risk and Alternative Data Solutions, Inc., *Our History*, <https://www.tlo.com/about-tloxp> (last visited 1 Aug. 2023).

LVI, p. 2). It was not until CID used the facial recognition technology, Clearview, that they were able to produce a list of potential women fitting “■■■■”s” description. (App. Ex. LVI, p. 2). On 18 January 2022, using the list, CID contacted Ms. ■■■■, who turned out to be the “■■■■” listed in appellant’s phone.⁶ (App. Ex. LVI, p. 1). They had a brief conversation over the phone where Ms. ■■■■ agreed to come for an in-person interview. (App. Ex. LVI, p. 1, 6).

CID conducted a recorded interview of Ms. ■■■■ on 18 January 2022. (App. Ex. LVI, p. 1, 6). During the interview, Ms. ■■■■ described being sexually assaulted by appellant only days before appellant raped SSG ■■■■. (App. Ex. LVI, p. 6–7). There were numerous similarities between the assaults on Ms. ■■■■ and SSG ■■■■, including appellant initiating relations with both around the same time, both sexual offenses occurring at the apartment of appellant within 24 hours of each other, both telling appellant “no” multiple times before appellant penetrated them, and appellant offering both women a massage, among others. (App. Ex. LVI, pp. 11–14; App. Ex. XLII). On 20 January 2022, the government provided the defense and the trial court with the evidence obtained during the interview and notified both that it intended to file a motion to preadmit the evidence under Mil. R. Evid. 413 or 404(b). (App. Ex. LVI, p. 10). The government filed its motion five days

⁶ “■■■■” is the latter part of Ms. ■■■■’s middle name. (App. Ex. XLII, p. 3).

later. (App. Ex. LVI, p. 1). The defense filed a response in opposition on 28 February 2022. (App. Ex. LI).

The military judge held an Article 39(a), UCMJ, session on the motion on 28 February 2022. On 1 March 2022, the military judge issued a written ruling on the motion. (App. Ex. LVI). The military judge first found good cause for the government's delayed disclosure of the Mil. R. Evid. 413 evidence, citing the government's "initially unsuccessful, yet diligent steps to locate and identify Ms. ■■■ to develop potential evidence in the case." (App. Ex. LVI, p. 10). The military judge then found the Mil. R. Evid 413 evidence involving Ms. ■■■ "admissible to show any relevant purpose, including propensity to commit sexual offenses, the state of mind of [appellant], intent of [appellant], and lack of mistake." (App. Ex. LVI, p. 13).

Assignment of Error I

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY FINDING GOOD CAUSE FOR THE GOVERNMENT'S DELAYED MIL. R. EVID. 413 DISCLOSURE.

Standard of Review

A military judge's "evidentiary decision on whether good cause was shown" is reviewed for an abuse of discretion. *United States v. Jameson*, 65 M.J. 160, 163 (C.A.A.F. 2007). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. McElhaney*, 54 M.J. 120, 130

(C.A.A.F. 2000). To find abuse, the judge’s decision must be “arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023). A military judge’s good cause determination is normally given “substantial deference,” at least where the justification for good cause is supported by more than an “unstated, *sub silentio* finding.” *United States v. Carista*, 76 M.J. 511, 516 (A.C.C.A. 2017).

Law

A. Mil. R. Evid. 413.

Mil. R. Evid. 413(a) provides, “In a court-martial proceeding 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.” This includes using evidence of another sexual offense to prove that an accused has a propensity to commit sexual offenses. *United States v. James*, 63 M.J. 217, 219–20 (C.A.A.F. 2006); *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). In general, there is a presumption in favor of admitting evidence offered under Mil. R. Evid. 413. *United States v. Berry*, 61 M.J. 91, 94–95 (C.A.A.F. 2005) (citing *Wright*, 53 M.J. at 482–83). The drafter's analysis of Mil. R. Evid. 413 provides that the Rule is meant to “provide for more liberal admissibility of character evidence in criminal cases of sexual assault where the accused has committed a prior act of sexual assault.” *Manual for Courts-Martial*,

United States (2019 ed.), Mil. R. Evid. 413 analysis, app. 22 at A22-42. The prosecution must disclose any Mil. R. Evid. 413 evidence it intends to offer, including “any witnesses’ statements or a summary of the expected testimony” at least five days before entry of pleas “or at a later time that the military judge allows for good cause.” Mil. R. Evid. 413(b).

B. Good Cause.

No military appellate court appears to have directly addressed the question of whether good cause existed for disclosure of Mil. R. Evid. 413 evidence after five days prior to entry of pleas; however, the courts have analyzed “good cause” under other rules that have similar filing or disclosure deadlines. For example, in *United States v. Coffin*, the Court of Military Appeals found the appellant showed good cause to file a motion to suppress after entry of pleas, despite the general requirement in Mil. R. Evid. 311 that such a motion be filed prior to entry of pleas. 25 M.J. 32 33. (C.M.A. 1987). The court cited two factors to support its finding of good cause: (1) the defense counsel’s belief, “based upon representation of [the] assistant trial counsel” that the charge to which the motion pertained “would be dropped”; and (2) that the “defense counsel did not learn that there was a possible objection to the evidence until after the pleas had been entered.” *Id.*

On the other hand, in *United States v. Jameson*, the defense counsel filed a motion to suppress evidence derived from a blood draw after the same deadline

contained in Mil. R. Evid. 311. 65 M.J. at 163. Appellant’s defense counsel argued that they had good cause for the delayed filing but cited only to the fact that defense counsel attempted twice to contact the witness involved in taking the blood draw. *Id.* at 162. CAAF distinguished *Coffin* and found that the “defense counsel knew about the evidence at issue and also knew the general circumstances surrounding Appellant’s signing the consent form.” *Id.* Furthermore, the prosecution did nothing to contribute to the decision of the defense not to file a timely motion to suppress the evidence at issue. *Id.* As such, CAAF found that the military judge did not abuse his discretion in determining that there was no good cause to permit the evidentiary challenge under the Military Rules of Evidence. *Id.*

In a slightly different context, CAAF recently considered whether there was good cause for filing a motion asserting defects in the preferral of charges after the entry of pleas—the deadline for such motions set by Rule for Courts-Martial 905(b)(1). CAAF reaffirmed the holding in *Jameson* that “good cause does not exist when ‘the defense knew or could have known about the evidence in question before the [relevant] deadlines.’” *United States v. Givens*, 82 M.J. 211, 216 (C.A.A.F. 2022) (alteration in original) (*quoting Jameson*, 65 M.J. at 163). In rejecting the appellant’s argument, CAAF found that the appellant had simply failed to carry its burden to demonstrate good cause at the trial court: “When given the opportunity by the military judge, the defense failed to address how it became

aware of the unlawful command influence issue or why it could not have been explored before the entry of pleas.” *Id.* Accordingly, the Court did not find the military judge abused his discretion when it denied the appellant’s motion for appropriate relief. *Id.*

Finally, at least one federal circuit court has squarely addressed the question of good cause for delayed disclosure of evidence under the federal counterpart to Mil. R. Evid. 413.⁷ In *United States v. Guidry*, the Fifth Circuit found that the government had good cause for not providing pretrial notice where “[i]t did not learn of [the witness’s] testimony until after the trial had already started[, t]he Government alerted defense counsel to [the] testimony on the same day it learned of it . . . [, and the] defense counsel had at least three days to prepare before the hearing on the matter.” 456 F.3d 493, 504 (2006).

Argument

A. There was good cause for the delayed disclosure of Mil. R. Evid. 413.

The military judge did not abuse her discretion in finding the government had good cause for providing notice of Mil. R. Evid. 413 evidence after entry of pleas. As the military judge correctly noted, the government took “diligent steps to locate and identify Ms. ■■■ to develop potential evidence,” and, once it discovered

⁷ Fed. R. Evid. 413(b) sets the deadline for disclosure of evidence the government intends to offer at “fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.”

the evidence, “notified the defense and [the trial court] in a timely manner.” (App. Ex. LVI, p. 10). Further, the notice provided adequate time for appellant’s defense counsel to review the evidence, litigate a motion to exclude the evidence, and prepare for trial once the evidence was admitted. Given the “substantial deference” due to the military judge’s detailed and thorough ruling, there simply was no error.

1. The government did not learn of the Mil. R. Evid. 413 evidence until after entry of pleas.

Appellant argues good cause does not exist in this case because “the government had the text messages from appellant for over a year before it decided to even look at them.” (Appellant’s Br. 12). While appellant is technically correct that the government was in possession of the text messages that led to the discovery of Ms. ■■■ and the subsequent discovery and disclosure of the Mil. R. Evid. 413 evidence at the time of appellant’s cell phone extraction, such an argument ignores the larger context in which the discovery was made. The argument likewise ignores the assiduousness of the government once it did review the messages between appellant and Ms. ■■■.

The military judge correctly found that the government took “diligent steps to locate and identify Ms. ■■■ and develop potential evidence in the case.” (App. Ex. LVI, p. 10). As trial counsel noted, appellant’s cell phone contained “numerous gigabytes of data.” (R. at 155.) The sheer volume of information

found in the cell phone takes time to sift through, which was certainly the case for the government when they were searching through appellant's phone. Trial counsel noted that a diligent attorney does read through all the contents of the cell phone, but rightfully indicated that "it would take weeks and months, and months to read through every single one with such detail as to locate these types of things." (R. at 155). After the defense-requested continuance, the government found a proverbial needle in a haystack—one that they were unsure would lead to anything, but nonetheless pursued to put its best case forward.

Connecting the dots in this case involved a few text messages in gigabytes of data on appellant's cellphone; a phone number that no longer belonged to the witness; and two individuals who knew each other by their nicknames rather than their birth names.⁸ The persistence and diligence of the government allowed the CID investigator to finally contact Ms. ■■■ on 18 January 2022. (App. Ex. LVI, p. 1). The recorded interview that resulted produced the Mil. R. Evid. 413 evidence that is at issue. Immediately after the interview on 20 January 2022, when trial counsel determined that the evidence in relation to ■■■ met the criteria for Mil. R. Evid. 413, the government provided the court and the defense with the relevant evidence it planned to use. (R. at 128). Given these facts, the military judge's

⁸ Ms. ■■■ was referred to only as "■■■" in appellant's phone, and she knew appellant only by his nom de guerre, "Prince." (App. Ex. LVI, p. 2).

finding of good cause simply cannot be said to be “arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *St. Jean*, 83 M.J. at 112. Accordingly, there is no error.

2. The timing of the notice provided appellant adequate time to litigate the admissibility of the evidence and prepare for its use at trial.

At the time government provided notice of the Mil. R. Evid. 413 evidence, defense counsel had forty-six days to review the evidence, litigate a motion to exclude the evidence, and prepare for trial once the evidence was admitted. This is eight days longer than defense would have had time to prepare if trial had proceeded on the originally scheduled date of 8 November 2021, with entry of pleas taking place on 6 October 2021, and the default deadline to disclose Mil. R. Evid. 413 evidence taking place on 1 October 2021. (App. Ex. XLII, p. 22). Giving additional time for the defense counsel to prepare their argument to exclude such evidence does not prejudice appellant.

The facts of this case are similar to—and even more favorable to appellant than—those in *Guidry*, where the Fifth Circuit found good cause when the government moved to admit Fed. R. Evid 413 evidence after trial and the accused “had at least three days to prepare before the hearing on the matter. 456 F.3d at 504 (5th Cir. 2006). Like in *Guidry*, the government in the present case only learned of the evidence after entry of pleas, notified defense counsel promptly after it learned of the Mil. R. Evid. 413 evidence, and the defense had ample time to review the

evidence, litigate a motion to exclude the evidence, and prepare for trial once the evidence was admitted. Appellant was not prejudiced and the military judge did not abuse her discretion in allowing in the Mil. R. Evid. 413 evidence.

3. The military judge’s decision should be given substantial deference and found to be reasonable under the circumstances.

As noted in *Carista*, this court gives “substantial deference” to a military judge’s good cause determination, absent a “*sub silentio*” justification for such a finding. 76 M.J. at 516. The military judge’s detailed and thorough ruling showed good cause in admitting the Mil. R. Evid. 413 evidence in this case. The military judge noted the diligent steps used by CID and trial counsel to locate and identify Ms. ■■■. She considered the various investigate efforts used in that endeavor, including facial recognition software. Her ruling noted the nickname used by Ms. ■■■, “■■■”, and the nom de guerre used by appellant, “Prince.” She took into account the government’s prompt notice to defense counsel once it was determined that Ms. ■■■’s interview qualified as Mil. R. Evid. 413 evidence—two days after she was interviewed by CID. The military judge’s decision must be “arbitrary, fanciful, clearly unreasonable, or clearly erroneous,” in order to find an abuse of discretion. *St. Jean*, 83 M.J. at 112. All of the considerations noted in the military judge’s ruling provided a thorough and detailed explanation for her good cause finding in admitting the Mil. R. Evid 413 evidence.

CAAF held in *Jameson* and *Givens* that failure to investigate was found not to be good cause for delayed disclosure. Appellant argues that the government failed to investigate the contents of appellant's phone which they had in their possession for over a year. (Appellant's Br. 12). This simply is not supported by the record. The government diligently reviewed the relevant text messages between appellant and SSG [REDACTED]. They had no reason to believe that appellant sexually assaulted a third party around twenty-four hours before he raped SSG [REDACTED]. Picking through gigabytes of data on appellant's phone in search for a text message from a third-party that could possibly lead to Mil. R. Evid. 413 evidence is an unrealistic expectation. But for appellant's requested continuance and the government's subsequent diligent and persistent efforts, this evidence would not have been discovered. The military judge's decision to admit the Mil. R. Evid. 413 evidence for good cause should be given "substantial deference." Considered in the light of that deference, her ruling was well within the "range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). Accordingly, there was no error.

B. Even if this court finds the military judge abused her discretion in finding good cause for the delayed disclosure, the evidence did not materially prejudice the substantial rights of the accused.

"A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial

rights of the accused.” UCMJ, art. 59(a). In determining whether an error in admitting evidence prejudiced an accused, appellate courts weigh: (1) the strength of the government 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. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). Taking each of those considerations in turn, it is clear that—even if there was error—the error was harmless.

1. The government’s case was strong.

The evidence produced at appellant’s court-martial overwhelmingly proved that he is guilty beyond a reasonable doubt. There was physical evidence that aligned with the victim’s testimony, including the SANE finding two separate abrasions—one on the victim’s lip and another on her labia majora. (R. at 467). The DNA profile found on the inside right bra cup on the victim was “at least 52 billion times more likely” to have originated from appellant and the victim than it would have been from an unknown individual and the victim. (R. at 523). Additionally, the text messages following the assault corroborate SSG [REDACTED]’s testimony. Appellant text messaged SSG [REDACTED], “Hope I didn’t scare you off,” to which she replied, “U did way to much...like you didn’t even ask permission...so I’m good.” (Pros. Ex. 3, p. 24). Appellant then sent a series of messages saying, “I was a[]little drunk so I’m sorry if I did”; “I felt it and by that time, it was to[o]

late but I am really sorry and hope we can still be friends”; and “I’m so used to girl[s] doing whatever I want.” (Pros. Ex. r, p. 24–25).

Staff Sergeant ■ provided powerful testimony that was corroborated by other witnesses who observed her noticeable different behavior after the rape occurred. The attack left her feeling traumatized, with the SANE finding SSG ■ huddled in a ball, in the fetal position, when she came to perform the exam. (R. at 396, 451; App. Ex. IV p. 2). In a phone conversation following the attack, SSG ■’s mother-in-law testified that she seemed to be “paralyzed with fear” and that she had never seen her daughter-in-law that upset before. (R. at 74–76).

Appellant’s arguments that the government’s case was weak ignore the great weight of the evidence proving his guilt. Appellant argues that a few flirtatious messages between SSG ■ and appellant demonstrate SSG ■’s lack of credibility; however, this argument ignores the multitude of corroborating evidence that supports her testimony. (Appellant’s Br. 16). Likewise, appellant’s argument that there was a lack of DNA evidence on other areas of her body fails to mention the possible reasons for that, including the time passing between the rape and the SANE examination and the fact that SSG ■ took a shower after the assault because she felt “disgusted.” (R. at 274). The overwhelming weight of the evidence, even without admitting the Mil. R. Evid 413 evidence, prove appellant guilty beyond a reasonable doubt.

2. The defense case was weak.

The defense counsel unsuccessfully attempted to ascribe a nefarious motive to SSG ■■■ in accusing appellant of rape—namely, that she was unhappy at JBLM and wanted an expedited transfer back to Georgia. (R. at 293, 330—31; Appellant’s Br. 17). Although it is true that SSG ■■■ missed her family greatly when they were in Georgia and the cost of living at JBLM was higher than Georgia, she made plans for all of them to move back to JBLM once she was granted affordable housing. (R. at 230). This decision was made the month before the rape and assault occurred. (R. at 230). Even after the rape occurred, SSG ■■■’s family planned to move back to JBLM and did in October 2020. (R. at 349—50). It was SSG ■■■’s Sergeant Major who convinced her to put in a transfer request to Georgia to be closer to her family to better deal with the “stressors” that resulted from being raped by appellant. (R. at 350—51). Simply put, appellant’s argument—both at trial and on appeal—has no merit.

The defense counsel then turned to SSG ■■■’s deleted text messages in an attempt to prove she was bolstering a false narrative. (R. at 711—15; Appellant’s Br. 18). Staff Sergeant ■■■ did delete a few messages in her phone before showing her texts to law enforcement. (R. at 711—15; *Compare* Fed. App. Ex. C with Pros. Ex. 3). However, the defense counsel failed to address several explanations provided by trial counsel as to why SSG ■■■ might have deleted the messages.

These explanations include being ashamed and embarrassed about what had happened to her, being afraid of what her wife would think if she saw the messages, or perhaps fear that the investigators would not believe her if they saw the messages. (R. at 793). However, despite what appellant might claim, a few deleted messages do not negate all the other evidence—the physical injuries on the lips and vulva of SSG ■■■, the DNA evidence, and the corroborating testimony. (R. at 794). Finally, appellant’s apologies to SSG ■■■ and lies to criminal investigators both demonstrate his consciousness of guilt. Appellant apologized to SSG ■■■ the following day through text message and tried to justify his actions by the fact that he was “so used to girl[s] doing whatever [he] want[ed].” (Pros. Ex. 3, pp. 24–25). When interviewed by CID, appellant lied to investigators when he was asked if anything sexual had happened between him and SSG ■■■. (R. at 498—99). Considering all of the above, appellant’s case was weak, especially in comparison to the significant evidence of his guilt.

3. Although the quality of the evidence was high, it was not material in determining the outcome of the case.

The government agrees with appellant that the quality of the Mil. R. Evid 413 evidence relating to Ms. ■■■ was high. However, the government disagrees that the evidence was material to the outcome of the case. In assessing the materiality and quality of the evidence in question, reviewing courts are “essentially assessing how much the erroneously admitted evidence may have

affected the court-martial.” *United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020). Some factors that the court might consider are “the extent to which the evidence contributed to the government's case,” “the extent to which the government referred to the evidence in argument,” and “the extent to which the members could weigh the evidence using their own layperson knowledge.” *Id.* at 111. These factors, taken together, demonstrate that the Mil. R. Evid. 413 evidence was not material to his conviction.

First, for many of the same reasons that the government’s case was strong discussed *supra*, pp. 18–19, the Mil. R. Evid. 413 evidence in this case contributed very little to appellant’s conviction. Second, despite appellant’s arguments regarding the number of times the trial counsel mentioned Ms. ■■■, the trial counsel did not “unduly exploit” the Mil. R. Evid. 413 evidence during his closing argument and only briefly mentioned Ms. ■■■ during his rebuttal argument. *Washington*, 80 M.J. at 11–12. Finally, because appellant’s case was tried by military judge alone, this court should be confident that she both knew and followed the law with respect to Mil. R. Evid. 413 evidence and “placed the evidence in its proper perspective and did not give it undue weight.” *Id.* at 112.

In weighing the *Kohlbeke* factors, even if the military judge abused her discretion in finding good cause for the delayed disclosure, the evidence did not

materially prejudice the substantial rights of the accused. Accordingly, appellant is entitled to no relief, and this court should affirm his findings of guilt.

Assignment of Error II

WHETHER THERE WAS UNREASONABLE POST-TRIAL DELAY THAT WARRANTS RELIEF.

Additional Facts

On 11 March 2022, appellant's court-martial adjourned. (R. at 861). The convening authority (CA) denied appellant's requests for deferment and waiver and took no action on the findings and sentence twenty-seven days later on 7 April 2022. (Action; Chronology). On 11 May 2022, the military judge entered judgment. (Entry of Judgement; Chronology). On 27 October 2022, the Chief of Military Justice signed the precertification review. (Certification; Chronology). On 31 October 2022, the court reporter certified the record of trial. (Certification; Chronology). On 21 November 2022, this court docketed appellant's case. (Referral). The total number of days between adjournment to docketing was 255 days.

Standard of Review

This court "review[s] allegations of unreasonable post-trial delay de novo." *United States v. Winfield*, __ M.J. __, 2023 CCA LEXIS 189, at *3 (Army Ct. Crim. App. 7 July 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135

(C.A.A.F. 2006); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011); *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022)).

Law and Argument

Appellate courts can grant relief for post-trial delay under the due process clause of the Fifth Amendment to the Constitution, the “should be approved” language in Article 66(d)(1), UCMJ, or Article 66(d)(2), UCMJ, which allows this court to “provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record” *Winfield*, 2023 CCA LEXIS 189, at *3–4. Even if the delay in this case was excessive, appellant suffered no prejudice, and the delay does not warrant relief under any of these analyses.

A. There was no due process violation.

Appellant does not allege that his due process rights to speedy post-trial processing were violated. This is for good reason: they were not. When balancing the four familiar *Barker* factors, it is clear that any delay did not rise to the level of violating appellant’s constitutional rights. Additionally, denying appellant relief in this case would do nothing to adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Anderson*, 82 M.J. at 87. Accordingly, appellant is entitled to no relief.

1. The first two *Barker* factors weigh in favor of appellant.

From the date of appellant's final adjournment to the date of docketing at the Army Court of Criminal Appeals, 255 days elapsed. (Chronology; Referral). The government recognizes that this court has indicated "some cases justifiably take longer than 150 days to process for appellate review," and respectfully agrees many circumstances exist that could warrant a longer post-trial delay, even exceeding the 255 days in this case. (See *Winfield*, 2023 CCA LEXIS 189 at *6-*7, overruling *United States v. Brown*, which established a presumption of unreasonable delay in cases eclipsing 150 days between final adjournment of the court-martial and appellate docketing. 81 M.J. 507 (Army Ct. Crim. App. 2021)). Under the particular facts of this case, the first factor weighs in favor of appellant.

The government attributed the delay to the "number of courts-martial pending transcription with JBLM court reporters and the high volume of audio to transcribe in this case." (Gov. App. Ex. 1). Portions of the audio were outsourced to court reporters at other installations as well as the JBLM court reporters. (Gov. App. Ex. 1). The government also notes that there was "reduced manpower causing an absence of resources." (Gov. App. Ex. 1). Furthermore, JBLM uses a first-in, first-out approach with transcription, and at the time this case was adjourned, sixteen cases were in queue before transcription for this case could be started. (Gov. App. Ex. 1). Although the government explains the delay, under the

facts of this case, the second factor also weighs in appellant's favor. *Moreno*, 63 M.J. at 137.

2. The third and fourth *Barker* factors weigh in favor of the government.

With respect to the third *Barker* factor, appellant never objected to any delay or demanded his right to timely review and appeal prior to reaching this court.

While this inaction does not waive appellant's post-trial rights, it does move the third *Barker* factor in favor of the government. *Moreno*, 63 M.J. at 138. In *Barker*, the Supreme Court explicitly stated, "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied speedy trial." 407 U.S. at 532.

With respect to the fourth *Barker* factor, appellant fails to establish prejudice and, in fact, does not even suggest that he suffered prejudice. When considering the framework adopted by CAAF to determine whether prejudice exists, nothing about the post-trial processing in this case risked exposing appellant to "oppressive incarceration pending appeal"; he suffered no particularized anxiety or concern awaiting the outcome of his appeal; and, even if this court were to set aside the findings or sentence, his "defenses in case of reversal and retrial" have not been impaired in any way. *Moreno*, 63 M.J. at 138–39. (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

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

Where there is no finding of *Barker* prejudice, courts “will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Toohey*, 63 M.J. at 362.

While the delay in this case may be regrettable, no member of the public would question the fairness or integrity of the military justice system as a result.

Accordingly, there is no due process violation.

B. Appellant does not merit relief under Article 66(d), UCMJ.

Absent a due process violation, this court also considers whether relief for excessive post-trial delay is warranted based on the Courts of Criminal Appeals’ (CCA) sentence appropriateness authority under Article 66(d)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA “may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record.”

Considering the totality of the circumstances, under the specific facts of this case, the delay in this may have been excessive. However, relief is not warranted

because appellant suffered no prejudice⁹ as a result of any delay, and his sentence was appropriate given the egregiousness of the offenses of which he was convicted.

Appellant's sentence was appropriate because the post-trial delay in no way affected the trial proceedings that produced appellant's sentence. Furthermore, appellant's sentence is appropriate considering his crime and the maximum allowable punishment for his conviction. *Manual for Courts-Martial, United States* (2019 ed.), App'x. 12; see *United States v. Hemmingsen*, ARMY 20180611, 2021 CCA LEXIS 180, at *9 (Army Ct. Crim. App. 15 Apr. 2021) (finding that, "despite the government's failure to meet its obligation to provide timely post-trial processing of the record, relief is not warranted" under this court's Article 66(d), UCMJ, authority because the appellant's sentence was appropriate).

Appellant was convicted of one specification each of rape, sexual assault, aggravated sexual contact, and making a false official statement. (R. at 800; Statement of Trial Results). The overwhelming weight of the evidence discussed above supports appellant's guilty findings. His acts resulted in pain, anxiety, and trauma affecting not just the victim, but the victim's family. (R. at 818).


⁹ *Winfield* did not address, and left open the question of, when relief is appropriate for "error or excessive delay." 2023 CCA LEXIS 189. However, the government contends that any relief without a showing of prejudice should be granted under this court's sentence appropriateness authority under Article 66(d)(1), UCMJ, rather than its Article 66(d)(2), UCMJ, authority.

Appellant's acts caused immeasurable impacts on the victim's children, with their mother having to fight through suicidal thoughts. (R. at 818). The government asked for fifteen years for the rape, eighteen months for the sexual assault, and thirty days for making a false official statement. (R. at 854). The military judge sentenced appellant to five years for the rape and twelve months for the sexual assault, to be served concurrently, as well as thirty days for the false official statement, to be served consecutively. (Statement of Trial Results). This is only a fraction of the maximum punitive exposure for the crimes of which appellant was convicted. As such, this court should not find any appropriate relief available.


Separate from its sentence appropriateness authority under Article 66(d)(1), UCMJ, if this court finds excessive delay, Article 66(d)(2), UCMJ, "dictates [this court] 'may provide appropriate relief' and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court's] discretion." *Winfield*, 2023 CCA LEXIS 189, at *9. In exercising that discretion, this court should find that relief is not appropriate in this case for the same reasons that his sentence is appropriate—namely, the egregiousness of his conduct and the fact that any delay in no way affected the trial proceedings that produced appellant's sentence.

Conclusion


WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence and deny relief.



ZACHARY M. GRIFFITH¹⁰
Law Student, Government
Appellate Division



TIMOTHY R. EMMONS
MAJ, JA
Branch Chief, Government
Appellate Division



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

¹⁰ On 21 June 2023, this panel approved the government's motion for leave to allow student representation in this case.

APPENDIX

[United States v. Hemmingsen](#)

United States Army Court of Criminal Appeals

April 15, 2021, Decided

ARMY 20180611

Reporter

2021 CCA LEXIS 180 *; 2021 WL 1511636

UNITED STATES, Appellee v. Sergeant GARY A. HEMMINGSEN, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by [United States v. Hemmingsen, 2021 CAAF LEXIS 474, 2021 WL 2411748 \(C.A.A.F., May 19, 2021\)](#)

Review denied by [United States v. Hemmingsen, 2021 CAAF LEXIS 652 \(C.A.A.F., July 12, 2021\)](#)

Prior History: [*1] Headquarters, U.S. Army Special Operations Command. Christopher E. Martin and Fansu Ku, Military Judges, Colonel Robert L. Manley III, Staff Judge Advocate.

United States v. Hemmingsen, 80 M.J. 203, 2020 CAAF LEXIS 344, 2020 WL 3790428 (C.A.A.F., June 29, 2020)

Case Summary

Overview

HOLDINGS: [1]-Findings of guilty and sentence for sexual assault were affirmed because despite the government's failure to meet its obligation to provide timely post-trial processing of the record, relief was not warranted where appellant did not submit any request for speedy post-trial processing, nor did he raise the issue in his clemency matters; [2]-Appellate defense counsel were not ineffective because even if appellate defense counsel were deficient when they elected to assign no errors on the first review, appellant failed to meet his burden of demonstrating that raising those issues would have led to a different result.

Outcome

Findings of guilty and sentence affirmed.

Counsel: For Appellant: Major Jodie L. Grimm, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Captain Allison L. Rowley, JA; Major Jonathan S. Reiner, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and ARGUELLES¹, Appellate Military Judges. Chief Judge (IMA) KRIMBILL and Judge ARGUELLES concur.

Opinion by: BROOKHART

Opinion

MEMORANDUM OPINION ON REMAND

BROOKHART, Senior Judge:

This is our second time reviewing this case under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [UCMJ]. In our first review, appellant submitted no assignments of error and no matters pursuant to *United States v. Grostefon*, 112 M.J. 431 (C.M.A. 1982). Pursuant to our legislative mandate, we held the findings of guilt and sentence, as approved by the convening authority, correct in law and fact, and affirmed.² *United States v. Hemmingsen*, ARMY 20180611 (Army Ct. Crim. App. 24 Apr. 2020).

After our initial review, appellant sought review of his case by the CAAF. As part of his second supplement to his petition for review, appellant presented four issues. The [*2] CAAF ultimately granted appellant's petition for review, set aside our prior decision, and returned the record to The Judge Advocate General of the Army for

¹ Chief Judge (IMA) Krimbill and Judge Arguelles decided this case while on active duty.

² In November 2018, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120, UCMJ. The conveying authority approved the adjudged sentence of a dishonorable discharge, confinement for 90 days, forfeiture of all pay and allowances, and reduction to the grade of E1.

remand to this court for a new review and to specifically address the following two issues:

WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF FOR THE UNREASONABLE 322-DAY POST-TRIAL PROCESSING DELAY BETWEEN SENTENCING AND INITIAL ACTION. WHETHER THE DETAILED APPELLATE DEFENSE COUNSEL'S FAILURE TO ASSIGN ANY ERRORS TO THE ARMY COURT DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL.

United States v. Hemmingsen, 80 M.J. 340, 340 (C.A.A.F. 2020).

On remand, appellant also raised two new assignments of error before this court: (1) whether the evidence is legally and factually insufficient to support the findings of guilty for sexual assault; and, (2) whether the military judge abused her discretion by preventing the defense from impeaching the victim's testimony with a prior inconsistent statement to a detective.³ The government contends that we should summarily reject the new assignments of error because appellant is entitled to only one plenary review pursuant to Article 66. [United States v. Smith](#), 41 M.J. 385, 386 (C.A.A.F. 1995). The government further argues that the new assignments of error exceed the scope of the remand. [United States v. Riley](#), 55 M.J. 185, 188 (C.A.A.F. 2001). However, we find [*3] that the specific language of the remand left open the possibility of new assignments of error. Moreover, even where new assignments of error might otherwise exceed the scope of a remand, we may still consider them if they are closely related to the issues remanded and there is an adequate record available to evaluate the newly raised errors. [Smith](#), 41 M.J. at 386 (citing [United States v. Jordan](#), 38 M.J. 346, 353 (C.M.A. 1993) (Wiss, J., dissenting)). In this case, both of those prerequisites are met. Accordingly, we have considered appellant's new assignments of error. Based upon the entire record of trial, and with the aid of briefs by both parties, we find that neither assignment of error warrants relief or discussion.

With regard to the specified issues, as discussed in detail below, we conclude appellant is not entitled to relief for the government's dilatory post-trial processing, nor did detailed appellate defense counsel's failure to raise any assigned errors to this court during our initial review of appellant's case deny appellant effective

assistance of counsel.

BACKGROUND

The panel announced appellant's sentence on 16 November 2018, and the two military judges who presided over the case authenticated the 664-page record 241 days later, on 15 July [*4] 2019. According to the Staff Judge Advocate's (SJA) memorandum explaining the delay, the primary reason for the delay was a lack of a court reporter to produce a transcription. The government ultimately contracted for additional court reporter services to transcribe appellant's record.

After the military judges authenticated the record, appellant's post-trial processing proceeded with minimal delay. The SJA completed his recommendation on 1 August 2019. Approximately two weeks later, the Office of the Staff Judge Advocate (OSJA) served the victim with the authenticated record of trial, and by 29 August 2019, the OSJA received the victim's matters under Rule for Courts-Martial (R.C.M.) 1105A. On 16 September 2019, the OSJA served appellant with the authenticated record of trial and the victim's matters. Appellant returned his matters on 25 September 2019. On 4 October, the convening authority took action.

In total, it took 322 days (from 16 November 2018 to 4 October 2019) to process appellant's case post-trial, 241 of which were spent pending transcription.

LAW AND DISCUSSION

Post-Trial Delay

Appellant asserts he is entitled to relief due to the government's dilatory post-trial processing of his case. We disagree.

This court [*5] has two distinct responsibilities in addressing post-trial delay. See [United States v. Simon](#), 64 M.J. 205, 207 (C.A.A.F. 2006). First, as a matter of law, this court reviews whether claims of excessive post-trial delay resulted in a due process violation. See [U.S. Const. amend. V](#); [Diaz v. Judge Advocate General of the Navy](#), 59 M.J. 34, 38 (C.A.A.F. 2003). Second, even if we do not find a due process violation, we may nonetheless grant an appellant relief for excessive posttrial delay under our broad authority of determining sentence appropriateness under Article 66(d), UCMJ. See [United States v. Tardif](#), 57 M.J. 219, 225 (C.A.A.F.

³ Appellant also raised these same two errors in the supplement to his initial petition at the CAAF.

[2002](#)).

We review de novo whether an appellant has been denied his due process right to a speedy post-trial review. [United States v. Moreno, 63 M.J. 129, 135 \(C.A.A.F. 2006\)](#). A presumption of unreasonable post-trial delay exists when the convening authority fails to take action within 120 days of completion of trial.⁴ [Id. at 142](#). In *Moreno*, our Superior Court adopted the four-factor balancing test from [Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 \(1972\)](#), which we employ when a presumption of unreasonable post-trial delay exists, to determine whether the post-trial delay constitutes a due process violation: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Id.* In assessing the fourth factor of prejudice, we consider three sub-factors: "(1) prevention of oppressive incarceration [*6] 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." [Id. at 138-39](#) (quoting [Rheurark v. Shaw, 628 F.2d 297, 303 n.8 \(5th Cir. 1980\)](#)).

In this case, the first factor weighs heavily in favor of appellant; 322 days from announcement of sentence to action by the convening authority is presumptively unreasonable, as it is more than two and a half times the authorized processing time. The second factor, too, weighs in favor of appellant. While the SJA does not attempt to excuse the delay in appellant's case, his chronology highlights that the most significant delay in appellant's case—241 days—was related to the government's inability to procure transcription services. As our superior court has previously noted, "personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay."

⁴ Had appellant's case been subject post-trial processing under the changes under the new procedures enacted in the [Military Justice Act of 2016 \(M.J.A. 2016\), Pub. L. No. 114-328, §§ 5001-5542 \(23 Dec. 2016\)](#) and implemented in the 2019 R.C.M.s by Executive Order 13,825, [83 Fed. Reg. 9889](#) (8 Mar. 2018), the framework through which we would analyze his claim of dilatory post-trial processing would be different. [United v. Brown, 81 M.J. 507, 2021 CCA LEXIS 111](#) (Army Ct. Crim. App. 8 Mar. 2021). However, because appellant's case pre-dates the applicability of the Military Justice Act of 2016, we stringently apply familiar framework articulated by the CAAF in *Moreno*. [63 M.J. at 142](#).

[United States v. Arriaga, 70 M.J. 51, 57 \(C.A.A.F. 2011\)](#) (citations omitted).

The third and fourth factors, however, favor the government. The third factor weighs in favor of the government because, appellant did not submit any request for speedy post-trial processing, [*7] nor did he raise the issue in his clemency matters.

Regarding the fourth factor, appellant asserts two reasons he was prejudiced by the delay. First, appellant asserts he was prejudiced by his inability to raise his other assignments of error before this court. However, as we discuss above, we find those issues to be without merit, and appellant has not identified how the delay would prejudice him at a rehearing, thereby forestalling any prejudice to appellant.

Second, appellant asserts—albeit in summary fashion in his reply brief—that he suffered "constitutionally cognizable anxiety" from "the requirement to register as a sex offender" before his record of trial was even transcribed. While appellant's anxiety related to sex offender registration is understandable, he has not demonstrated that he experienced the "particularized anxiety" that is "distinguishable from normal anxiety experienced by prisoners awaiting an appellate decision." [United States v. Merritt, 72 M.J. 483, 491 \(C.A.A.F. 2013\)](#) (quoting [Moreno, 63 M.J. at 139-40](#)). Furthermore, regardless of appellant's level of anxiety, he would have been required to register as a sex offender at the completion of his ninety-day sentence, regardless of the length of post-trial processing in this case, and will continue [*8] to be so registered because he remains convicted of a sexual offense. [United States v. Arriaga, 70 M.J. 51, 58 \(C.A.A.F. 2011\)](#); [Merritt, 72 M.J. at 491](#). Accordingly, appellant "cannot rely on the sex offender registration as cause for anxiety and concern related to the delay." [Merritt, 72 M.J. at 491](#). In the absence of any discernable prejudice, we conclude the fourth factor weighs in favor of the government.

Absent a finding of prejudice, we may find "a due process violation only when, in balancing the other three [*Moreno*] factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system." [United States v. Toohey, 63 M.J. 353, 362 \(C.A.A.F. 2006\)](#). Here, after balancing the four *Moreno* factors, we decline appellant's invitation to find a due process violation. However, this court's analysis does not end there.

In finding the post-trial delay was unreasonable but not unconstitutional, we turn to our discretionary "authority under Article 66[(d), UCMJ] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)." *Tardif*, 57 M.J. at 224 (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). Specifically, we next "determine what findings and sentence 'should be approved' based on all the facts and circumstances reflected in the record, including the unexplained [*9] and unreasonable post-trial delay." *Id.*

The post-trial processing in this case is not an example of diligence and efficiency expected of the military. Ensuring accurate and timely post-trial processing, regardless of the impediments to doing so, is the responsibility of all military justice practitioners. *United States v. Mack*, ARMY 20120247, 2013 CCA LEXIS 1016, at *5-7 (Army Ct. Crim. App. 9 Dec. 2013) (summ. disp.) (Pede, C.J., concurring). Nonetheless, we find on the basis of the entire record, appellant's sentence as approved by the convening authority and which included only 90 days of confinement, is appropriate and should be approved.⁵ Consequently, despite the government's failure to meet its obligation to provide timely post-trial processing of the record, relief is not warranted.

Ineffective Assistance of Appellate Counsel

Next, appellant asserts his appellate defense counsel were ineffective because they failed to file any assignments of error on his behalf. Again, we disagree.

We review claims of ineffective assistance of counsel de novo, including those claims raised against appellate defense counsel. *United States v. Adams*, 59 M.J. 367, 370 (C.A.A.F. 2004). "An accused has the right to effective representation by counsel through the entire period of review following trial, including representation [*10] before the Court of Criminal Appeals . . . by appellate counsel appointed under Article 70, UCMJ." *Adams*, 59 M.J. at 370 (quoting *Diaz*, 59 M.J. at 37). The test for ineffective assistance of appellate counsel is the same as the test for ineffective assistance of trial defense counsel. *United States v.*

Hullum, 15 M.J. 261, 267 (C.M.A. 1983); *Adams*, 59 M.J. at 370. In both instances, the test requires appellant to prove his counsel's performance was deficient, and the deficiency resulted in prejudice. *Adams*, 59 M.J. at 370 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). This Court may address these two components in any order, and "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.

To prove deficient performance, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (internal quotation marks omitted) (quoting *Strickland*, 466 U.S. at 687). In determining whether appellant counsel's performance was so deficient it fell below an objective standard of reasonableness, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (internal quotation marks omitted) (quoting *Strickland*, 466 U.S. at 688-689).

To prove prejudice, appellant must show "appellate counsel's [*11] errors were so serious as to deprive the appellant of a fair appellate proceeding whose result is reliable." *Adams*, 59 M.J. at 370 (internal quotation and punctuation marks omitted) (quoting *Strickland*, 466 U.S. at 687). Where appellant has been effectively denied appellate counsel, appellate courts presume prejudice. *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998). However, in cases where counsel is not "wholly absent," appellant is not entitled to the presumption of prejudice. *Adams*, 59 M.J. at 371 (citing *May*, 47 M.J. at 481). In cases where prejudice is not presumed, appellant bears the burden of demonstrating that had his counsel raised the issues before the service court, the result would have been different. *Adams*, 59 M.J. at 372 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (finding no prejudice where appellant failed to show a "reasonable probability" that a motion not filed would have been meritorious)).

In this case, appellant does not argue his counsel's actions were so egregious as to wholly deprive him of counsel. Rather, appellant argues his appellate defense counsel were deficient for failing to raise three issues before this court: "the sufficiency of the evidence, the military judge's ruling on a prior inconsistent statement, and the excessive and unreasonable post-trial delay."

⁵ We recognize the panel also sentenced appellant to forfeiture of all pay and allowances and reduction to the grade of E1. We note, however, this result would have occurred via operation of law had the panel not imposed such a sentence. See Articles 58a and 58b, UCMJ.

Moreover, we note that the record reflects that appellant was represented by [*12] appellate counsel detailed pursuant to Article 70, who ultimately submitted appellant's case on its merits in accordance with this Court's rules of practice. Appellant, who bears the burden under *Strickland*, does not allege that his appellate counsel failed to communicate with him or otherwise ignored requests to raise any particular matters. [Adams, 59 M.J. at 371](#); see also [Strickland, 466 U.S. at 687](#). Accordingly, we find appellant was not wholly unrepresented before this Court during his first Article 66 review. Appellant "is therefore not entitled to the presumption of prejudice that would follow when counsel is wholly absent." [Adams, 59 M.J. at 371](#) (citing [Penson v. Ohio, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed. 2d 300 \(1988\)](#); [May, 47 M.J. at 481](#)).

In the absence of a presumption of prejudice, appellant must demonstrate that had his counsel raised the issues before the service court, the result would have been different. [Adams, 59 M.J. at 372](#) (citing [United States v. McConnell, 55 M.J. 479, 482 \(C.A.A.F. 2001\)](#)). Here, appellant asserts he was prejudiced because he was deprived of the opportunity for relief before this Court based upon the errors appellate counsel failed to assign on this Court's first review of his case. Assuming without deciding that the failure to file a substantive brief before the Army court was deficient performance, we next assess whether appellant suffered prejudice. Applying *Adams*, if we determine [*13] the result of this Court's review under Article 66 rendered the same result as if appellant's counsel had raised on our first review the issues he now asserts, then we may conclude appellant has suffered no prejudice. [Id. at 372](#)

In accordance with our statutory duty, we reviewed the entire record of trial for legal and factual correctness the first time appellant's case was before this court.⁶ As part

⁶ This Court possesses an "awesome, plenary" authority of de novo review which permits us to weigh evidence, judge the credibility of witnesses, and decide contested issues of fact, while requiring us to substitute our own judgement for that of the military judge and trier of fact in determining on the basis of the whole record that the findings and sentence should be approved. [United States v. Kelly, 77 M.J. 404, 406 \(C.A.A.F. 2018\)](#) (quoting [United States v. Cole, 31 MJ 270, 272 \(C.M.A. 1990\)](#)). At the same time, we are acutely mindful of both the benefit and necessity of appellate counsel in this critical phase of the adversarial process and do not suggest that the court could unilaterally perform its function. [Hullum, 15 M.J. at 268](#). However, there will inevitably be cases where, based upon the facts and law, the court would reach the same result with or

of that review, we necessarily considered the claims appellant raises on remand, albeit without the benefit of briefs from the parties.⁷ On remand, we have considered the issues specified by our superior court, as well as those raised by appellant. Having considered each of the underlying issues appellant asserts his appellate counsel should have raised on initial review, with the benefit of briefings from the parties⁸, we determine that none warrant relief. As such, we conclude the result of this Court's review under Article 66 would have been the same even if appellant's counsel had raised these issues on our initial review. Accordingly, even if appellate defense counsel were deficient when they elected to assign no errors on our first review, appellant has still failed to meet his burden of demonstrating [*14] that raising those issues would have led to a different result. [Adams, 59 M.J. at 372](#). In sum, because appellant suffered no prejudice, he is entitled to no relief.⁹

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Chief Judge (IMA) KRIMBILL and Judge ARGUELLES concur.

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without input from appellate counsel. *Id.*; see [Adams, 59 M.J. at 372](#).

⁷ The prior inconsistent statement issue was raised and litigated at trial. That litigation, to include the judge's ruling occupied nine pages of the record which were before this Court on our first review of appellant's case. [Adams, 59 MJ at 371-72](#).

⁸ Neither party requested argument. See generally Joint Rules of Appellate Procedure of the Courts of Criminal Appeals 25, (1 Jan. 2019).

⁹ We understand, as our Superior Court did in *Hullum* and *Adams*, there may be a variety of reasons—possibly even unrelated to the merits of the case—that may lead appellate defense counsel to submit a case to this court without raising assignments of error. Because we decide this case on prejudice, we need not address those scenarios. We recognize, however, that in the future, a situation may arise where we may require affidavits from counsel in order to conduct a complete review.

United States v. Winfield

United States Army Court of Criminal Appeals

April 27, 2023, Decided

ARMY 20210092

Reporter

2023 CCA LEXIS 189 *; 83 M.J. 662

UNITED STATES, Appellee v. Private E1 KELVIN T. WINFIELD, United States Army, Appellant

Prior History: [*1] Headquarters, Fort Bragg. Fansu Ku, Military Judge. Colonel Warren L. Wells, Staff Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-Although appellant demonstrated excessive post-trial delay in the processing of his case under Unif. Code Mil. Justice art. 66(d)(2), 10 U.S.C.S. § 866(d)(2), there was no available appropriate relief under Article 66(d)(2), because appellant was sentenced to a punitive discharge, which the court found to be an appropriate sentence given appellant's misconduct in forcing his way, uninvited, into a female soldier's barracks room, destroying her property and physically assaulting her and physically assaulting the driver of vehicle when he fled.

Outcome

Findings of guilty and sentence affirmed.

Counsel: For Appellant: Major Rachel P. Gordienko, JA (argued); Lieutenant Colonel Dale C. McFeatters, JA; Jonathan F. Potter, Esquire; Major Rachel P. Gordienko, JA (on brief).

For Appellee: Captain Timothy R. Emmons, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Captain R. Tristan C. De Vega, JA (on brief).

Judges: Before the Court Sitting En Banc¹. PARKER, Judge. Senior Judge WALKER, Senior Judge BROOKHART, Senior Judge FLEMING, Judge HAYES, and Judge MORRIS, concur. SMAWLEY, Chief Judge,

concurring. PENLAND, Judge, joined by Judge ARGUELLES, concurring in part and dissenting in part.

Opinion by: PARKER

Opinion

OPINION OF THE COURT

PARKER, Judge:

The Office of the Staff Judge Advocate (OSJA) failed to honor appellant's rights under *Article 66(d)(2)*, in that appellant has demonstrated excessive post-trial delay in the processing of his case. However, we find there is no available appropriate relief under *Article 66(d)(2)* based on the facts of this case as discussed below.

BACKGROUND

This general court-martial is not complicated; it stems from a relatively short period of intoxicant-fueled [*2] violence. Appellant tried to plead guilty, but his intoxication at the time of his misconduct made it very difficult for him to reliably describe what he did. He also told the military judge he did not think he had the requisite state of mind to appreciate the wrongfulness of his conduct. Predictably, the guilty plea hearing unraveled, and a contested bench trial followed several months later.

On 3 March 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of assault consummated by a battery and two specifications of damage to non-military property, in violation of [Articles 109](#) and [128, Uniform Code of Military Justice, 10 U.S.C. §§ 909, 928](#) [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge on the same day.

Two days after trial, appellant declined to submit matters under Rule for Courts-Martial [R.C.M.] 1106. The convening authority took no action on the findings

¹ Judge ARGUELLES decided this case while on active duty.

or sentence, and on 23 March 2021, the military judge entered judgment. Nearly ten months later, on 18 January 2022, the military judge received the record of trial. The military judge authenticated the record of trial on 24 January 2022, only six days later. Yet, the court reporter did not certify the record, which only required correction [*3] of 23 errors noted in the trial judge's errata, until 24 June 2022, five months later. The OSJA mailed the record to this court on 27 June 2022, and we docketed the case on 11 July 2022. Nearly 500 days had elapsed since announcement of sentence.

Trying to explain the exceptionally slow post-trial processing, the OSJA submitted a memorandum attributing the delay to COVID-19 and a court reporter shortage. The Chief of Military Justice also offered, "[r]ecords are processed as expeditiously as possible *taking the accused's sentence into consideration*."² (emphasis added).

LAW AND DISCUSSION

We review allegations of unreasonable post-trial delay de novo. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011); *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022).

We are a court of limited jurisdiction; one such limit comes from *Article 59(a), UCMJ*: "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." See also *United States v. Cueto*, 82 M.J. 323, 334 (C.A.A.F. 2022); *United States v. Hamilton*, 78 M.J. 335, 342-43

²We are mindful of The Memorandum for Judge Advocate Legal Service Personnel, signed by the Judge Advocate General of the Army on 1 March 2022, titled "Policy Memorandum 22-08 — Court Reporter Regionalization," attached as an appellate exhibit, which blends a first-in, first-out procedure: "For cases not reassigned to a different installation or OSJA by the regional manager, the staff judge advocate or designee of the originating GCMCA determines priority." The record in this case does not indicate whether the regional court reporter assigned its transcription to another OSJA or installation, which would trigger the first-in, first-out policy, or whether it remained within the Fort Bragg OSJA for transcription. We are also left to wonder how an appellant's sentence affects its transcription priority in that OSJA, whether a discharge-without-confinement sentence receives lower priority, and whether the priority calculus for the post-trial transcription process is reduced to writing.

(C.A.A.F. 2019).

Despite the limiting function of *Article 59(a)*, multiple sources of authority grant an appellant the right to post-trial processing without unreasonable delay. One of them is the *Due Process Clause of the Fifth Amendment to the Constitution* that states, "No person shall be . . . deprived of life, liberty, or property, without due process of law" [*4] A second authority is *Article 66(d)(2), UCMJ*, which authorizes service courts of criminal appeals to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record"

Our superior court—and this court—have also contributed numerous decisions to post-trial delay common law jurisprudence. *United States v. Moreno* is one of the most influential military cases of our time, presuming reasonableness for post-trial processing where: convening authorities take initial post-trial action within 120 days of trial; appellate docketing occurs 30 days after that; and appellate review concludes within eighteen months of docketing.³ 63 M.J. 129, 142 (C.A.A.F. 2006). Our superior court grounded this reasoning in the Due Process Clause,⁴ quoting multiple Supreme Court and other federal court decisions: "[T]he procedures used in deciding appeals must comport with the demands of the Due Process and *Equal Protection Clauses of the Constitution*." *Evitts*, 469 U.S. at 393. "[A]n appeal that is inordinately delayed is as much a 'meaningless ritual,' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." *Harris v. Champion (Harris II)*, 15 F.3d. 1538, 1558 (10th Cir. 1994) (quoting *Douglas v. California*, 372 U.S. 353, 358, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)) (cleaned up).

Our superior [*5] court adopted (and adapted) the four factors from *Barker v. Wingo*, a *Sixth Amendment* speedy trial case, in order to provide a framework for analyzing post-trial delay and due process: (1) length of delay; (2) reasons for the delay; (3) appellant's assertion

³Colloquially known as Phases I, II, and III.

⁴*Diaz v. Judge Advocate General of the Navy* appears to mark the first time our superior court relied on the Due Process Clause in this field: "[a]dditionally, Petitioner has a constitutional right to a timely review guaranteed him under the Due Process Clause." 59 M.J. 34, 38 (C.A.A.F. 2003) (citing *Harris v. Champion (Harris II)*, 15 F.3d. 1538, 1558 (10th Cir. 1994)).

of the right to timely review and appeal; and, (4) prejudice. [407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 \(1972\)](#); [Moreno, 63 M.J. at 135](#). In *United States v. Toohey*, our superior court further held: "[N]o single factor [is] required to find that post-trial delay constitutes a due process violation." [63 M.J. 353, 361 \(Toohey II\) \(C.A.A.F. 2006\)](#) (quoting [Moreno, 63 M.J. at 136](#)) (citing [Barker, 407 U.S. at 533](#)).

Additionally, with the issuance of *United States v. Brown*, this court established a 150-day limit on the time lapse between final adjournment of the court-martial and appellate docketing, beyond which we would presume unreasonable delay. [81 M.J. 507 \(Army Ct. Crim. App. 2021\)](#). Consistent with its now-common request in post-trial delay cases, appellee again urges us to overrule *Brown*, asserting that Congress rendered its framework unnecessary with the passage of the new legislation found in *Article 66(d)(2), UCMJ. Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001-6642 (23 Dec. 2016)*.

Appellee also writes of the new Article 66 legislation's impact on [Moreno](#), arguing, "the justification for the judicially created presumptions in [Moreno](#) no longer exists." In *Brown*, we also questioned whether *Moreno*'s timing gates (e.g., convening authority [*6] action) remained enforceable with the legislative and regulatory revisions to post-trial processing. [Brown, 81 M.J. at 510](#) ("Given these changes, how then is a CCA supposed to apply *Moreno*'s phase I and phase II presumptions, both of which refer to the procedural relic of convening authority action?"). We leave the analysis and determination of the continued application of [Moreno](#) to our superior court, as only our superior court may alter its precedent and that decision is simply not ours to make.⁵

⁵We also recognize Judge Maggs's concurrence in *United States v. Anderson* questioning whether [Moreno](#) remains viable in the context of the amendment to *Article 66, UCMJ*, and after [Betterman v. Montana, 578 U.S. 437, 136 S. Ct. 1609, 194 L. Ed. 2d 723 \(2016\)](#). [82 M.J. 82, 88-90 \(C.A.A.F. 2022\)](#). We understand *Betterman*'s holding to mean that the [Sixth Amendment Speedy Trial Clause](#) does not entitle a criminal defendant to speedy post-trial processing. On the other hand, [Betterman](#) leaves undisturbed the due process right to sentencing—and appellate review—without inordinate delay:

Does the [Sixth Amendment's](#) speedy trial guarantee apply to the sentencing phase of a criminal prosecution? That is the sole question this case presents . . . For

At our level, the well-intended 150-day limit established by [Brown](#) has done nothing in appellant's case—and little, if anything, in far too many other cases—to accelerate the post-trial process. Therefore, [Brown's](#) 150-day timeline is overruled. Put simply, some cases justifiably take longer than 150 days to process for appellate review. Others should take significantly [*7] less time. Appellee should take no comfort from this development, for we will no longer presume reasonableness when a case takes less than 150 days between sentencing and appellate docketing. Instead, we will scrutinize even more closely the unit-level explanations for post-trial processing delays between final adjournment and appellate docketing, including those less than 150 days. Staff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units' cases on appeal. We do not presume to be prescriptive in this regard. Nonetheless, we are consistently interested to know about a case's transcript length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, court reporter availability and utilization for transcription, and resource shortfalls (e.g., insufficient throughput capacity despite court reporter regionalization).⁶

Turning to appellant's due process claim, we find no violation due to the lack of [Barker](#) prejudice resulting from the delay. Nor did we find, "in balancing the other three factors, that the [post-trial] delay was so egregious that tolerating [*8] it would adversely affect the public's perception of the fairness and integrity of the military justice system." [Anderson, 82 M.J. at 88](#). We therefore turn to the new *Article 66* legislation in deciding the merits of appellant's argument and whether the requested relief is appropriate.

Article 66(d)(2), UCMJ, provides this court the necessary authority and framework to decide this case. *Article 66(d)(2)* ("the Court *may provide appropriate relief* if the accused demonstrates . . . excessive delay

inordinate delay in sentencing, although the Speedy Trial Clause does not govern, a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and [Fourteenth Amendments](#). [Betterman, 578 U.S. at 439](#).

⁶In accounting for delays, we harken to our superior court's jurisprudence on the matter that "personnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post trial delay." [Arriaga, 70 M.J. at 56](#).

in the processing of the court-martial after the judgment was entered into the record") (emphasis added). Given that *Article 66(d)(2), UCMJ*, does not define "excessive delay", in considering whether a delay is excessive this court will broadly focus on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay. As for this case, we find that ten months to type a 603-page record, and five months to make 23 corrections is excessive. Moreover, the unit's provided explanation as to the reasons for the delay is simply not persuasive and does not justify the large periods of time appellant's record went [*9] untouched.

While we find that there is excessive delay in this case, *Article 66(d)(2)* dictates we "may provide appropriate relief" and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to our discretion. We determine that there is no appropriate relief available as appellant was sentenced to a punitive discharge, which we find to be an appropriate sentence and decline to set it aside. Appellant was convicted of forcing his way, uninvited, into a female soldier's barracks room, destroying her property and physically assaulting her. When law enforcement responded to the scene, appellant fled the area. Upon reaching a roadway, appellant flagged down a car and forced his way into the vehicle, physically assaulted the driver, and demanded the driver take him off-post. Despite excessive post-trial delay in the processing of appellant's court-martial, a bad-conduct discharge is a significant punishment and is an appropriate characterization of appellant's service given his misconduct. Therefore, we find there is no relief that is appropriate under the circumstances of this case.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the [*10] sentence are AFFIRMED.⁷

Senior Judge WALKER, Senior Judge BROOKHART, Senior Judge FLEMING, Judge HAYES, and Judge MORRIS, concur.

Concur by: SMAWLEY; PENLAND (In Part)

Concur

SMAWLEY, Chief Judge, concurring:

For the reasons set forth above, I agree with my colleagues in the majority. I write separately to highlight and expand upon the general factors mentioned in the majority opinion that this court may take into consideration when determining whether an appellant has demonstrated "excessive delay in the processing of the court-martial after the judgment was entered into the record. . . ." *Article 66(d)(2), UCMJ* (emphasis added). I also write separately to emphasize the importance of the chronological detail provided by installations during post-trial processing because it will allow this court to "weigh and balance [the reasons for delay] in determining whether they provide adequate explanation for any apparent post-trial delays." [*United States v. Canchola*, 64 M.J. 245, 247 \(C.A.A.F. 2007\)](#).

Given *Article 66(d)(2), UCMJ*, does not define "excessive delay," we will look to well-established jurisprudence from our superior court, which has "addressed appellate delay issues since 1974." [*Arriaga*, 70 M.J. at 56](#). Since that time, the CAAF has analyzed the "reason for delay" in numerous cases where an appellant has alleged unreasonable, [*11] or "excessive," post-trial delay. See [*United States v. Jones*, 61 M.J. 80, 83 \(C.A.A.F. 2005\)](#) (appellant alleged unreasonable post-trial delay where a span of 363 days passed between the date of trial and docketing at the Navy-Marine Corps Court of Criminal Appeals); [*Bush*, 68 M.J. at 97](#) (the CAAF analyzed appellant's assertion that his "due process right to speedy post-trial review was violated by a delay of more than seven years from the court-martial to docketing at the Court of Criminal Appeals."); [*Arriaga*, 70 M.J. at 57](#) (the CAAF analyzed the reasonableness of 243-day post-trial delay).

When analyzing post-trial processing as part of the *Barker* balancing test, the CAAF "look[s] at how much of the delay was under the Government's control . . . assess[ing] any legitimate reasons for the delay, including those attributable to appellant." [*Anderson*, 82 M.J. at 86](#) (citing [*Moreno*, 63 M.J. at 136](#)). We will continue to conduct the same assessment as part of our analysis to determine whether the post-trial processing in a case amounted to "excessive delay." We will do so on a "case-by-case basis," [*Toohey v. United States*, 60 M.J. 100, 102 \(C.A.A.F. 2004\)](#), taking into account the

⁷The Statement of Trial Results, as incorporated into the Judgment of the Court, is amended to reflect the response to block 29 as "Yes."

"totality of the circumstances" surrounding the post-trial processing timeline for each case. [United States v. Luke](#), 69 M.J. 309, 321 (C.A.A.F. 2011).

Bearing in mind that "[m]any factors can affect the reasonableness of appellate delay," [Toohey](#), 60 M.J. at 102, some of the circumstances [*12] we will take into account are the "detailed or specific reason[s] for the delay in creating the transcript or authenticating the record of trial," or lack thereof. [Anderson](#), 82 M.J. at 86. This will include an analysis of the "ministerial task[s]," such as the timetable for transmission of the record between various entities at installations prior to docketing at this court. [United States v. Simon](#), 64 M.J. 205, 208 (C.A.A.F. 2006); see [United States v. Oestmann](#), 61 M.J. 103, 104 (C.A.A.F. 2005). In our analysis of the post-trial processing timeframe, we will continue to closely scrutinize lengthy post-trial processing attributable to "personnel and administrative issues," mindful that our superior court has found such reasons are "not legitimate." *Id.* Similarly, "a general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay." [Canchola](#), 64 M.J. at 247.

Conversely, our analysis as to whether post-trial processing rises to the level of "excessive delay" will continue to take into account any "legitimate reasons or exceptional circumstances" provided by the government. [United States v. Dearing](#), 63 M.J. 478, 486 (C.A.A.F. 2006). We will consider whether a case is "unusually long [or] complex." *Id.*; [Toohey](#) at 102. Other legitimate reasons we will balance may derive from "the high demands placed upon military personnel . . . particularly in combat or hostile environments." [Canchola](#), 64 M.J. at 247 [*13]. In any event, the government should stand ready in every case to "provide any particularized reason for [a] delay." [Anderson](#), 82 M.J. at 87.

It is "[a]n SJA's responsibility to secure justice and fairness in every case . . . ensuring that every soldier receives 'a fair, impartial, and timely trial, to include the post-trial processing of his case.'" [United States v. Chisholm](#), 58 M.J. 733, 738 (C.A.A.F. 2003) (quoting [United States v. Collazo](#), 53 M.J. 721, 725 (Army Ct. Crim. App. 27 July 2000)). Accordingly, "staff judge advocates and convening authorities should ensure [the] reasons [for delay] are documented in the record of trial." [Canchola](#), 64 M.J. at 247 (emphasis added). Put simply, the chronology for each case should account for any lengthy processing period with a detailed, original account of all relevant circumstances. As detailed

above, these relevant circumstances may include, but are not limited to factors such as: length of the record; complexity of the case; unavailability of the military judge; or, any operational considerations, such as combat deployments. Staff judge advocates should avoid broad generalities that fail to inform the court of the specifics necessary to determine whether post-trial processing amounted to "excessive delay." See *Id.* Chronological detail is paramount to our assessment, and a "general explanation" for a prolonged post-trial [*14] processing timeline should not be expected to "withstand scrutiny." *Id.*

Dissent by: PENLAND (In Part)

Dissent

PENLAND, Judge, joined by Judge ARGUELLES, concurring in part and dissenting in part:

I agree with a significant part of the majority opinion, especially its decision to overrule *Brown*, in part, and its conclusion that the post-trial delay in this case was excessive under Article 66(d)(2). However, in my judgment, two additional bases for relief exist: the [Fifth Amendment's Due Process Clause](#); and, Article 66(d)(1). I also would set aside the adjudged sentence, as appropriate relief for the OSJA's triumvirate of failures.

The government deprived appellant of his constitutional and statutory rights to speedy post-trial processing. I am mindful that appellant has not demonstrated prejudice. However, in the context of a due process violation, *the burden shifts to the government to disprove prejudice beyond a reasonable doubt*. "If a constitutional error is nonstructural,⁸ then under our precedent, the Government *must* prove that the error was harmless beyond a reasonable doubt[.]" [Cueto](#), 82 M.J. at 334 (citing [United States v. Tovarchavez](#), 78 M.J. 458, 460 (C.A.A.F. 2019)) (emphasis added). Here, beyond the government's emphasis on what appellant has not shown, the record is silent on whether it has undertaken its own effort to assess prejudice. Arguing [*15] inferences based on what appellant has not shown is not the same as disproving prejudice beyond a reasonable doubt. In any event, the government has not

⁸ Leaving for another day the opportunity to analyze whether excessive post-trial delay is structural, requiring automatic relief, I assume for the purpose of this case it is not.

carried its burden.

Even if the government had proven beyond a reasonable doubt that the due process violation was harmless, I would reach the same result—and grant the same relief—under our sentence appropriateness review authority in *Article 66(d)(1)*. [*United States v. Tardif*, 57 M.J. 219, 225 \(C.A.A.F. 2002\)](#). We correctly did this in *Brown*. We found no due process violation; instead, applying *Article 66(d)(1)*, we found appellant's sentence inappropriately severe, based on the government's similarly "flagrant" slow post-trial action, and granted relief. [*Brown*, 81 M.J. at 511](#).

We are ill-positioned to accelerate what continues to be very slow post-trial processing across the Army's military justice practice. Nonetheless, I commend the majority's effort to better secure all soldiers' rights under the Constitution and UCMJ. Still, I believe relief is available and appropriate — setting aside the sentence. I recognize - and do not minimize - the nature and effects of appellant's misconduct; however, it is similarly important to recall that the government pursued and obtained—with some relative speed—a punitive discharge at trial, one of the strongest **[*16]** punishments under the law. Then, the case simply stopped moving for nearly 500 days, a delay broken only by the military judge's authentication (ten months pre-authentication, and five months post-authentication). In the meantime, we were unable to deliver on appellant's statutory right to judicial review of the findings of guilty for factual sufficiency. This responsibility sets the service courts of criminal appeals apart from almost every appellate criminal justice system in the country, representing an uncommon *convergence of importance and urgency*. And, of course, the possibility of a punitive discharge hangs over appellant's head like a sword of Damocles. As one of the many stewards of a fair and swift justice system, I cannot tolerate that result.

CERTIFICATE OF SERVICE, U.S. v. WALKER (20220125)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
[REDACTED] on the 3rd day of August, 2023.

[REDACTED]
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