IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220022
Staff Sergeant (E-6) **SAMUEL E. FYE,** United States Army, Appellant	Tried at Fort Bragg, North Carolina, on 16 September, 6-9 December and 19-20 January 2022, before a general court-martial convened by Commander, Headquarters, First Special Forces Command, Colonel G. Bret Batdorff and Lieutenant Colonel Trevor I. Barna, Military Judges, presiding.

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

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Panel 4

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Statement of the Case

A panel composed of officer and enlisted members sitting as a general court-martial tried Staff Sergeant (SSG) Fye 6-9 December 2021 and 19-20

January 2022. Contrary to his pleas, the panel found him guilty of one specification of sexual assault, one specification of assault consummated by a battery, one specification of domestic violence, and one specification of drunkenness, in violation of Articles 120, 128, 128b, and 134, UCMJ, 10 U.S.C. § 920, 928, 928b, and 934 (2019). Upon motion by the defense, the Military Judge found the guilty findings for assault consummated by a battery and domestic violence to be an unreasonable multiplication of charges. (R. 1360). He conditionally dismissed the guilty finding for assault consummated by a battery, although he did not specify the condition. (R. 1361). Appellant was sentenced to three years total confinement and a dishonorable discharge from the United States Army. (R. 1361). The Military Judge entered judgment on March 4, 2022. (Judgment of the Court). The Convening Authority approved the findings and sentence. (Convening Authority Action).

Statement of Facts

SSG Fye and [redacted] started dating in March 2017. (R. 458). In November 2017, SSG Fye deployed to Syria until May 2018. (R. 470). While he was gone, [redacted] found a house for them to live in with her son and SSG Fye's twin sons. (R. 471-72) Upon his return, SSG Fye and [redacted] were married in June 2018. (R. 473).

By May 2019, the relationship had soured and SSG Fye moved out of the house. (R. 840). SSG Fye met with [redacted] at her attorney's office on 16 May 2019 to execute a separation agreement drafted by [redacted] attorney. (R. 841). As part of that agreement, [redacted] retained possession of the marital home. (R. 646). In

November 2019, [redacted] received a letter from SSG Fye's attorney stating that the separation agreement was no longer in effect. (R. 842). On 24 January 2020, SSG Fye filed a lawsuit against [redacted] for equitable distribution of the marital home and for the return of his separate property. (R. 851).

The following week, [redacted] went to the Army Family Advocacy Program, CID, and the local sheriff's office and made allegations of physical and sexual abuse against SSG Fye. (R. 844-45).

To support her allegations, [redacted] provided law enforcement with photos that she had taken purporting to show damage to her house and belongings, SSG Fye passed out in various places in the house, and bruises on her body. (R. 1032; Pros. Ex. 6, 17, 18). [redacted] also provided nine audio recordings that she claimed were made between she and SSG Fye and that she alleged occurred during physical assaults on her by SSG Fye. (Pros. Ex. 19-27). Despite the fact that she had taken the submitted photos and recorded the submitted audio recordings with her cell phone, she did not provide the phone to law enforcement to allow law enforcement to verify the dates the photos were taken, the dates the recordings were made, the completeness of the submitted recordings, or to locate any exculpatory materials. (R. 1033).

At trial, [redacted] alleged that SSG Fye physically abused her throughout her marriage. (R. 473). She also alleged that he sexually assaulted her in a rental cabin in October 2017 and again at their home sometime between December 2018 and February 2019. (R. 465-68, 555-56).

I.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN DENYING THE DEFENSE MOTION FOR A MISTRIAL?

Additional Facts

A. Mil. R. Evid. 404(b) Notice and Litigation.

Prior to trial, the Government notified the defense that it intended to introduce two types of evidence under Mil. R. Evid. 404(b): 1) testimony that SSG Fye had contacted [redacted] parents and threatened to disseminate nude photos of [redacted] if she did not recant her allegations; and 2) evidence that SSG Fye threatened [redacted] on multiple occasions that he would "set the house on fire" in retribution. (App. Ex. VIII at 2). The defense filed a motion in limine to exclude this evidence. (App. Ex. VIII). The Military Judge granted the motion to exclude evidence of threats to burn the house down. (R. 170).

B. Mil. R. Evid. 404(b) Evidence Testified to At Trial.

At trial, [redacted] responses frequently went beyond the scope of the question asked and into inadmissible testimony. (R. 456-894). The Military Judge warned her multiple times to wait for the question to be asked and only to answer the question asked. (R. 797, 799, 804, 806, 814, 825, 848, 864, 867, 879). [redacted] continued to testify in this manner. Due to her inability to focus on answering the questions asked, [redacted] testified to inadmissible information multiple times. (R. 459, 476, 514, 519, 528, 532, 648, 730, 731, 790, 867).

The improper testimony began immediately. Trial Counsel asked about her relationship with SSG Fye in 2017: "How would you describe your relationship? Was it good or bad?" (R. 458). [redacted]'s response included her suspicions that SSG Fye was homeless and her discovery that he was married. (R. 458-59). The defense did not object to the admission of this testimony concerning adultery. (R. 459).

Trial Counsel asked [redacted] about changes in the relationship after she and SSG Fye were married. (R. 476). He asked if, in addition to the physical abuse, there was a change in the way SSG Fye behaved towards her. (R. 476). She answered: "The drinking and drug use had a lot to do with—he would get very angry." (R. 476). The defense objected. (R. 476). Without ruling on the objection, the Military Judge excused the members and conducted an Article 39(a), UCMJ, hearing. (R. 476). In that session, Trial Counsel stated that his intent was not to elicit information about possible steroid use. (R. 478). The Military Judge gave Special Victim Counsel a moment to instruct [redacted] not to testify to alleged drug use. (R. 478, 484).

The Government introduced Prosecution Exhibit 6, a number of photographs depicting items in the house that [redacted] alleged SSG Fye broke during arguments. (R. 512). Page 8 of the exhibit showed damage to a wall. (Pros. Ex. 6 at 8). Trial Counsel asked [redacted] to explain the photo. (R. 514). She testified that it was where a liquor bottle had hit the wall. (R. 514). Trial Counsel asked how it hit the wall. (R. 514). [redacted] answered, "That's when he had threw it at me." (R.

514). Civilian Defense Counsel objected and the Military Judge sustained the objection under Mil. R. Evid. 404(b) as that was not conduct alleged in the assault specifications. (R. 514-15). He instructed the panel to disregard the answer. (R. 515).

Trial Counsel asked [redacted] to talk about times that SSG Fye was drunk around her where she was nervous. (R. 519). [redacted] testified that SSG Fye would "get mad, he would just press his forehead against [her] and was just looking at [her] and he would tell [her], 'no way to get out of this relationship. I'll kill you and myself.'" (R. 519). The defense objected to the admission of uncharged conduct under Mil. R. Evid. 404(b). (R. 519). The Military Judge sustained the objection but did not warn the panel to disregard the answer. (R. 519-20). The defense asked for an Article 39(a), UCMJ, session to further discuss the objection. (R. 521). The Military Judge noted that along with the threat to kill [redacted], her testimony about him pressing his forehead against hers was "awfully close" to describing an assault consummated by a battery. (R. 522). He raised the previous comment about the bottle being thrown at [redacted] as well. (R. 522).

The Military Judge again sustained the objection. In discussing a possible remedy to the situation, the Military Judge was reluctant to instruct [redacted] on proper testimony because he could not predict what she was going to say. (R. 526). Trial Counsel asked to ask leading questions in order to avoid specific acts of uncharged misconduct. (R. 525).

Almost immediately after the members returned and direct examination continued, Trial Counsel asked [redacted] whether there were times that SSG Fye got drunk, and his state made her worry "for the safety of the children in the house." (R. 528). [redacted] said "Yes." (R. 528). Trial Counsel then asked: "And give the panel a sense of exactly how pervasive that was throughout your time married to the accused?" (R. 528). [redacted] responded: "I was only worried about the kids. He would drink and drive with them." (R. 528). Again, Civilian Defense Counsel objected. (R. 528). The Military Judge sustained the objection and instructed the members to disregard the testimony. (R. 528-29).

Trial Counsel next asked [redacted], questions about the alleged physical assault that was the basis for Specification 3 of Charge II. (R. 529). In concluding that line of testimony, Trial Counsel asked her how the relationship was after they got back from their honeymoon. (R. 532). [redacted] responded: "After we got back, it just got so much worse the next day, the next business day. He was served papers saying he was not safe around the children and it was ---." (R. 532). Civilian Defense Counsel objected under Mil. R. Evid. 404(b) and R.C.M. 701. (R. 532). The Military Judge excused the members for an Article 39(a), UCMJ, session. (R. 533). The defense objected to the introduction of evidence that an outside agency had determined that SSG Fye's children were not safe in his care and expressed its concerns that it had received no documents related to such a court action from the Government in discovery. (R. 533). In light of the child endangerment charge in this case, this Mil. R. Evid. 404(b) violation was

especially problematic. (R. 534). The Government had not been made aware of the incident [redacted] was describing. (R. 535). During this Article 39(a), UCMJ, hearing, Civilian Defense Counsel also noted for the Military Judge that [redacted] had repeatedly referenced the involvement of Child Protective Services and their visits to their home. (R. 518, 610, 695, and 863).

The Military Judge noted that Trial Counsel's broad questions were allowing [redacted] to "offer and air all grievances as it relates to everything". (R. 536). Despite the frequent violations of Mil. R. Evid. 404(b), the Military Judge still would not instruct the witness to limit her testimony, again stating that he could not predict what she would say. (R. 536). He noted that he could prevent the witness from testifying but did not think they were at that point yet. (R. 537). Civilian Defense Counsel expressed frustration with [redacted] continued inadmissible testimony. (R. 537). The Military Judge asked if the defense would object to Trial Counsel using leading questions and Civilian Defense Counsel stated that he did not "know what else to do, because . . . the witness is – is uncontrollable at this point." (R. 537).

[redacted] testimony resumed. (R. 541). Trial Counsel asked [redacted] about an incident that caused her to leave her house on 22 July 2018: "What did you do with the three children that night after that point you came back and found them?" (R. 648). [redacted] responded: "After that, we went to [the neighbor]'s house. And I sent [[redacted] son] off with my mom. And then, me, [SSG Fye's son] and [SSG Fye's other son], we slept in [the neighbor] – well, we didn't sleep. We

laid down in [the neighbor]'s son's bed. And we just stayed up all night talking." (R. 648). Trial Counsel said, "Okay." (R. 648). Without being asked another question, [redacted] stated: "But Samuel called me. They did hear him threaten to kill me." (R. 648). Civilian Defense Counsel objected, and the Military Judge sustained the objection. (R. 648). He did not instruct the members to disregard this statement. (R. 648).

Trial Counsel asked [redacted] questions regarding audio recordings she made of alleged assaults by SSG Fye. (R. 722). In one such recording, SSG Fye was heard saying [redacted], his former wife's name. (R. 730). SSG Fye was saying things to [redacted] that he would normally argue with [redacted] about, as though she was [redacted]. (R. 730; Pros. Ex. 22). Trial Counsel asked [redacted]: "And you were saying in the audio recording that he had just punched you. Can you show the panel where – where he had punched you that you were talking about?" (R. 730). [redacted] responded: "This was the night he punched me in the side. And the reason why he punched me in the side of the stomach his because [redacted] was pregnant." (R. 730). Civilian Defense Counsel objected, and the Military Judge sustained the objection and instructed the members to disregard the answer. (R. 730).

Almost immediately after this exchange, Trial Counsel asked: "Then there was screaming later on after that in that video [sic]. Can you explain what that was?" (R. 731). [redacted] answered, "He was holding a knife." (R. 731). Civilian Defense Counsel objected and asked again for an Article 39(a), UCMJ, session. (R. 731). In that session, the defense raised another objection under Mil. R.

Evid. 404(b). (R. 731). The Military Judge expressed his concern with [redacted] response to multiple questions by "smuggling in" repeated references to uncharged misconduct. (R. 732). He noted that the issue of domestic violence against [redacted] and the assault with a knife were neither charged misconduct nor provided in a Mil. R. Evid. 404(b) notice to the defense. (R. 732). The Military Judge stated that he was contemplating a curative instruction. (R. 733). As he discussed how Trial Counsel might ask [redacted] questions without her providing inadmissible evidence, the Military Judge noted that she is "constantly offering information that is otherwise inadmissible." (R. 734). He stated again that he was considering a further curative instruction with respect to evidence that is nonresponsive and inadmissible that the witness was offering. (R. 735). Trial Counsel stated that he would lead her carefully to avoid that. (R. 735). When the members returned, the Military Judge instructed them to disregard the answer from [redacted]. (R. 735).

On cross-examination, Civilian Defense Counsel asked [redacted] if she had made a statement to SSG Fye about him killing his former wife, [redacted]. (R. 867). [redacted] responded: "I don't know if I've said that, but he said that. He said he was going---." (R. 867). The Military Judge jumped in to cut her off, but she continued, "---to cut my throat." (R. 867). The Military Judge again instructed [redacted] to answer the specific question asked and to wait for the next question. (R. 867). No objection was made to this statement by [redacted]. (R. 867).

C. Witnesses Comment on SSG Fye's Right Not to Testify.

On cross-examination, Civilian Defense Counsel was asking [redacted] about her report to a CID agent that the events underlying Specification 2 of Charge I occurred on 5 December 2018. (R. 789). He asked her: "Well, isn't it true that you told [the CID agent] that - what you believed the incident had occurred on 5 December 2018, the enema incident?" (R. 789). [redacted] responded:

> He said – Samuel Fye told me that I needed to know when it happened. And that it was in December, because I attacked him when I was naked. But then there was a time where he told me he was going to take my kid and that was in December. So I don't think they are the same at all, but that's what Samuel Fye says.

(R. 789). Civilian Defense Counsel asked if it would be a failure on the CID agent's part if his report made no reference to the information regarding the date coming from SSG Fye. (R. 790). In response, [redacted] testified:

> I think the confusion of Samuel Fye always confusing me about, "Oh, you don't know about this fight. And you don't even know when this happened. And that didn't happen to you." I think that's where the confusion came in. He can – if you get Samuel Fye up here and tell him….

(R. 790). Civilian Defense Counsel interjected his objection at that point but [redacted] continued, "----and he talked to you, he could convince me to believe anything." (R. 790). The Military Judge sustained the objection. (R. 790). He did not instruct the members to disregard the comment. (R. 790). After the ensuing Article 39(a), UCMJ, session, the Military Judge instructed [redacted] to "please only answer the question that the counsel are asking you. Don't offer any

explanations, unless asked to do so. So listen carefully to the question that is asked and do your best to answer just that question." (R. 797).

D. Government Failure to Disclose Evidence That Adversely Affects [redacted] Credibility.

Trial Counsel asked [redacted] about an alleged assault in a rental cabin in 2017. (R. 465). She described a physical assault where he was pushing her into a table and digitally penetrating her while she was screaming at him to stop. (R. 467). She testified that her son and SSG Fye's twin sons were only feet away in the same room. (R. 468-69). She testified that the children did not wake up. (R. 469). Trial Counsel asked: "Was there anything special in the room that was – that they used to sleep or was helping them sleep?" (R. 469). [redacted] responded that the children slept with a sound machine on that allows them to "sleep through anything." (R. 469). She described the machine as a white noise machine as loud as a vacuum and loud enough to prevent hearing someone talking in the same room. (R. 469).

During an Article 39(a), UCMJ, session, Civilian Defense Counsel noted that in none of her five previous interviews had [redacted] mentioned the use of a sound machine at the cabin. (R. 479). He also pointed out that the question asked seemed to indicate that Trial Counsel was aware of the sound machine. (R. 479). Civilian Defense Counsel objected to the failure of the Government to disclose this inconsistent statement to the defense under R.C.M. 701 (a)(6)(D). (R. 479-80).

Trial Counsel stated that he had learned of the sound machine when preparing the witness for testimony prior to trial. (R. 483). The defense asked that the members be instructed that the Government failed to turn over evidence adverse to a witness's credibility and that a negative inference may be drawn from the government not doing that. (R. 485). The Military Judge denied this requested remedy, only allowing the defense the opportunity to interview [redacted] at the conclusion of her direct examination in order to discuss any conversations she had with the Government counsel during her trial preparation. (R. 484). The defense argued that the introduction of this new detail now answered a question that her previous statements had not--why the children would not have witnessed this assault. (R. 489). The Government was aware of this new detail and asked a question intending to introduce it in order to answer that question. (R. 489). The defense argued that the granted continuance and interview was not a strong enough remedy to the harm created by withholding this information. (R. 490). The Military Judge again denied the defense request for a curative instruction. (R. 493).

E. The Military Judge's Restriction on Redirect.

As the defense neared the end of the cross-examination of [redacted], the Military Judge asked Trial Counsel if he intended to redirect [redacted]. (R. 883). Trial Counsel said that he did. (R. 883). The Military Judge said that he was "incredibly concerned" that [redacted] would continue to insert inadmissible material into her responses. (R. 883). He stated that he was "seriously considering not

allowing redirect." (R. 883). This was based upon the apparent inability of the witness to answer a direct question. (R. 883).

When the cross-examination concluded, Trial Counsel informed the Military Judge that he would use leading questions and only allow the witness to answer "Yes," "No," or "I don't know." (R. 890). The redirect proceeded in that manner. (R. 891-95). Trial Counsel asked [redacted] questions such as "Did you [record the audio files] because he would later deny that the fight or abuse had ever happened, or confuse you by saying it happened on a different date?" and "When you said those threats, were you simply voicing frustrations with the situation?" (R. 892-93).

F. Government Failure to Disclose Exculpatory Evidence.

The Government rested its case-in-chief at the end of the day on 8 December 2021. (R. 961). The next morning, the parties and the Military Judge met in an Article 39(a), UCMJ, session. (R. 967). The defense at that time raised an issue concerning a missing Digital Forensic Examination (DFE) report. (R. 969). CID had obtained a cell phone that belonged to SSG Fye from SM. (R. 973). CID conducted a digital forensic examination of the phone. (R. 969). The report was completed on 25 August 2020 and was placed on a disc and provided to the lead CID agent on the case. (R. 973). This disc was not provided to defense counsel. (R. 969).

When the defense interviewed the lead agent in preparation for its case-in-chief, they learned of the digital forensic examination and the disc with the

full report. (R. 969). The report included several voice messages that the defense had not previously received in which [redacted] discussed sexual activity that included humiliation and role playing. (R. 970, 973). It also contained several thousand other audio messages that the examining agent had not found to be relevant to the CID investigation, but which the defense had not received or reviewed for relevance. (R. 973). The parties and Military Judge agreed that the forensic examination report constituted exculpatory information within the control of the government. (R. 986).

Upon discovery of the failure to provide this report to the defense, the counsel and Military Judge discussed possible remedies. (R. 974). The Government argued that a continuance to allow the defense to review the newly discovered evidence was sufficient to remedy the violation. (R. 974).

The Military Judge provided the defense with only two possible remedies-an overnight continuance or a longer continuance to review the evidence and request a defense forensic expert's assistance. (R. 977). The defense argued that the appropriate remedy was a mistrial declaration. (R. 982-83). Defense Counsel stated that no other relief would properly remedy the situation. (R. 983).

During the discussion on the mistrial motion, Trial Counsel acknowledged a "less than ideal turnover of physical evidence" but argued that no legal standard had been breached by the Government. (R. 985). Trial Counsel also noted that one of the CID agents had copied the executive

summary of the DFE and inserted it in an Investigation Report. (R. 990). He also stated that the defense had received a copy of the request for a DFE. (R. 1003). Civilian Defense Counsel stated that the defense had seen the request for a forensic analysis and had asked the Government counsel for the DFE but was told that it did not exist. (R. 1004).

Trial Counsel admitted that the Government, like the defense, had been unaware that the report existed before trial. (R. 992). Civilian Defense Counsel noted that the Government disclosure notice had stated that it possessed no items of evidence seized from the person or property of the accused. (R. 994). The Military Judge also pointed out that the disclosure notice stated that there was no evidence known to the Government which tended to negate the guilt of the accused, reduce the degree of guilt of the accused, or reduce punishment of the accused. (R. 1005). Trial Counsel responded: "But I think more important is that the government didn't actually know about the DFE at that time. Still, defense was on notice of it." (R. 1005).

G. Defense Motion to Declare a Mistrial.

At the conclusion of [redacted] direct examination, the defense moved for a mistrial under R.C.M. 915. (R. 752). The motion was based upon "not any singular act, any singular phrase, or any singular thing that was said" but on a "combination of her entire testimony up to this point." (R. 752). The defense argued that because the date range of many of the offenses were so large, that no instruction could cure the harm. (R. 753). Defense Counsel argued that even

with the curative instructions already given by the Military Judge, there was a real possibility that the members would believe that SSG Fye has a character for assaulting his wife based upon uncharged misconduct. (R. 755). The defense argued that expecting the panel members to parse through the numerous objections that were made and remember which were sustained and which information to disregard was unreasonable. (R. 757). The defense also pointed to the disclosure issue regarding the sound machine as an additional basis for mistrial. (R. 757-58).

The Military Judge deferred his ruling on the defense motion and stated that at the conclusion of [redacted] testimony he would allow the defense to make a complete record of inadmissible evidence that went before the members and justified a mistrial. (R. 759).

After [redacted] commented on SSG Fye's right not to testify, the defense renewed their mistrial motion. (R. 791). Civilian Defense Counsel noted that the comment was, again, not responsive to the question asked and was an impermissible comment. (R. 791). Trial Counsel claimed that the comment came as the result of a confusing question, but the Military Judge found that it did not. (R. 792). The Military Judge again declined to rule on the motion but offered to instruct the panel that SSG Fye had the right not to testify. (R. 793). Civilian Defense Counsel argued that this proposed remedy harmed SSG Fye because a curative instruction would raise the issue again and replay it in the minds of the members. (R. 794). He argued that the bell could not be un-rung.

(R. 794). The Military Judge stated again that he would not yet rule on the mistrial motion, finding it not "ripe" for determination yet. (R. 795).

When the defense discovered the existence of a DFE report which they had not received, the Military Judge asked about the status of the defense's mistrial motion. (R. 978). The defense renewed its mistrial motion with the additional basis that the Government failed to disclose the contents of the DFE, which contained exculpatory statements. (R. 982-83). Defense Counsel argued that nothing short of a mistrial declaration would remedy the situation. (R. 983). Trial Counsel argued that mistrial was not appropriate because other measures could be taken to protect SSG Fye's rights, including a continuance. (R. 984). The Military Judge asked Trial Counsel to comment on the cumulative nature of the issues raised in this trial. (R. 987). Trial Counsel argued that despite the many instances of improper evidence and disclosure failures, a mistrial was still not warranted. (R. 990).

Civilian Defense Counsel argued that a continuance to review the newly discovered evidence was not sufficient to remedy the issue because the defense would likely be forced now to recall [redacted] to the stand in order to go over the new material and recordings. (R. 1006).

The Military Judge again declined to make a ruling on the defense motion for mistrial. (R. 1008). He required the parties to submit written pleadings and stated that he would make a ruling prior to the resumption of the court-martial.

(R. 1010). The Military Judge then continued the case until 4 January 2022. (R. 1010).

The court-martial resumed on 19 January 2022. (R. 1014). Neither the counsel nor the Military Judge addressed the mistrial motion on the record throughout the conclusion of the trial. (R. 1014-1363).

Standard of Review

An appellate court reviews a military judge's decision on whether to grant a mistrial for an abuse of discretion. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

Law

A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). "A declaration of mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial." R.C.M. 915(c). "The power to grant a mistrial should be used with great caution under urgent circumstances, and for plain and obvious reasons." R.C.M. 915(a) Discussion.

A mistrial is a "drastic remedy" that the military judge should order only when necessary to prevent a miscarriage of justice. *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991). "A curative instruction is the "preferred" remedy for correcting error when the court members have heard inadmissible evidence,

as long as the instruction is adequate to avoid prejudice to the accused." *Taylor*, 53 M.J. at 198.

> Assessment of the probable impact of inadmissible evidence upon the court members is always difficult. Sometimes an instruction to disregard the inadmissible evidence is sufficient assurance that it will not be weighed against the accused; other times the nature of the evidence is such that it is not likely to be erased from the minds of the court members. Each situation must be judged on its own facts.

United States v. Pastor, 8 M.J. 280, 284 (C.M. A. 1980). While the Court of Appeals for the Armed Forces has often held that a curative instruction can render an error harmless, the Court encourages voir dire to ensure the members not only understand but also will adhere to the curative instructions. *United States v. Diaz*, 59 M.J. 79, 92 (C.A.A.F. 2003). Where an instruction does not cure the prejudice toward the accused, the judge must grant a mistrial. *Id*. The failure to do so is an abuse of discretion. *Id*.

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Mil. R. Evid. 404(b)(1). This evidence might be admissible for another purpose, but the prosecution must provide reasonable notice before trial of the general nature of any such evidence that the prosecution intends to offer at trial. Mil. R. Evid. 404(b)(2).

R.C.M. 701 states that after the service of charges, and upon request of the defense, the Government shall permit the defense to inspect physical

evidence where the item is in the possession or control of military authorities and is relevant to the defense preparation or was obtained from or belongs to the accused. R.C.M. 701(a)(2)(A). Also after service of charges, and upon request of the defense, the Government shall permit the defense to inspect reports of any physical examinations and any scientific tests which are within the possession or control of military authorities if the item is relevant to defense preparation. R.C.M. 701(a)(2)(B).

Additionally, trial counsel has an obligation to, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to adversely affect the credibility of any prosecution witness or evidence. R.C.M. 701(a)(6). When a party fails to comply with R.C.M. 701 requirements, the military judge may "[e]nter such order as is just under the circumstances." R.C.M. 701(g)(3)(D). Crafting "the least drastic remedy" is not required, since "R.C.M. 701(g)(3)(D) authorizes broader inquiry into the 'circumstances' of the case and the discovery violation at issue." *United States v. Vargas*, 2023 CAAF LEXIS 146, *9 (C.A.A.F. Mar. 14, 2023) (citations omitted).

Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, or evidence derived therefrom, that it intends to offer into evidence against the accused at trial. Mil. R. Evid. 311(d)(1).

Commenting on the failure of an accused to testify violates the Self-Incrimination Clause of the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 613 (1965).

Argument

The defense raised a motion for mistrial on three separate occasions. (R. 752, 791, 982-83). On each occasion, the Military Judge "deferred" ruling on the motion and directed the court-martial to proceed. (R. 759, 795, 1010). This decision by the Military Judge not to grant the mistrial operated as a constructive denial of the motion on each occasion. The Military Judge's determination that the matter was not yet "ripe" was inaccurate. (R. 795). While he may have thought that a *declaration of mistrial* was not yet ripe, once the motion was made, his decision to proceed with trial was a denial of that motion. These denials were an abuse of his discretion.

The inadmissible evidence "smuggled" into the court-martial by [redacted] was sufficient grounds alone to grant a mistrial. While the power to grant a mistrial should be used with great caution, in this case the circumstances were urgent and the reasons plain and obvious. [redacted] impermissibly testified to SSG Fye's: 1) adultery, 2) drug use, 3) threats to kill her, 4) uncharged assault consummated by a battery by pressing his forehead against hers, 5) uncharged assault with a liquor bottle, 6) driving under the influence with children in his car, 7) uncharged child endangerment and the involvement of Child Protective Services, 8) additional threat to kill her overheard by his children, 9) intent to

punch his former wife, [redacted], in the side of the stomach while she was pregnant, 10) assault with a knife, and 11) threat to cut her throat. (R. 459, 476, 514, 519, 528, 532, 648, 730, 731, 790, 867).

Additionally, [redacted] told the defense counsel that if he wanted the answer to his question that he should have SSG Fye come up and testify. (R. 790). Although the Military Judge sustained the objection, he did not instruct the members to disregard this comment on SSG Fye's constitutional right not to testify. (R. 790).

As Civilian Defense Counsel commented, "I guess you can't tell when you're riding a bull, until you're on top of one." (R. 523). The Military Judge initially refused to even instruct [redacted] to limit her responses to the questions asked despite several answers that gratuitously offered inadmissible evidence. (R. 526, 536). When he finally did attempt to address [redacted] unabashed refusal to answer only the questions asked and to limit her testimony to charged offenses, his instructions to [redacted] and to the members were entirely ineffective in curing the prejudice to SSG Fye.

The Military Judge sustained objections to most of the defense objections when [redacted] provided this inadmissible evidence. (R. 514-15, 519-20, 528-29, 730, 735). While he never overruled the objections, on two occasions, the objection was never formally ruled upon. (R. 476, 532). The Military Judge instructed the members to disregard some, but not all, of the inadmissible statements after sustaining the defense objection. (R. 514-15, 528-29, 730, 735). Certainly, the

Military Judge did not voir dire the members even on the occasions in which he instructed them to disregard the testimony to ensure that they understood and would follow his instructions. *Diaz*, 59 M.J. at 92.

While a curative instruction is the preferred remedy for correcting error when the court members have heard inadmissible evidence, it is only preferred where it is adequate to avoid prejudice to the accused. *Taylor*, 53 M.J. at 198. The anemic instructions only sporadically given could not possibly cure the prejudice of the accumulation of improper testimony by [redacted]. The members were left to their own devices in remembering which objections were sustained, figuring out whether to disregard testimony when they were not directly instructed to, and remembering which evidence to disregard. The sheer volume of impermissible responses made this an impossible task. The continuance required to remedy the Government's discovery violation only exacerbated this problem, as the members now had to come back after a 41-day recess and try to recall what testimony to consider and which to disregard.

When the Military Judge took firmer steps to correct or limit the damage being done by [redacted] testimony, it was ineffective or prejudicial to SSG Fye. The Military Judge repeatedly warned [redacted] to listen to the questions asked, to answer only the questions asked, and to refrain from offering information that was not requested. (R. 797, 799, 804, 806, 814, 825, 848, 864, 867, 879). All to no avail, as [redacted] continued to interrupt counsel and to provide nonresponsive narratives. Having grown frustrated with [redacted] inability to testify in accordance with his

instructions, the Military Judge considered disallowing redirect examination by Trial Counsel. (R. 883). Ultimately, he allowed Trial Counsel to conduct redirect examination through leading questions. (R. 890). While this solved the problem of [redacted] introduction of inadmissible evidence, it allowed the Government to shape her responses and to essentially testify on her behalf. (R. 891-95). This "remedy" created more prejudice to SSG Fye. Without adequate instruction and voir dire of the members, and after the accumulation of so much inadmissible evidence, the only appropriate remedy was the "drastic" remedy of mistrial. The Military Judge abused his discretion in denying the mistrial motions on these grounds alone.

The motions for mistrial had additional bases that arose along the way. The Government had become aware of a change to [redacted] story regarding the alleged assault in the rental cabin. (R.483). [redacted] had been interviewed on five separate occasions and had never mentioned a sound machine. (R. 479). She had even been asked why the children did not wake up during the assault and had said that she did not know. (R. 832). Yet, during trial preparations, [redacted] now had a reason why the children would not have heard the assault and awoken. (R. 483). The introduction of a self-serving detail to a story that had been told many times before reasonably tends to adversely affect [redacted] credibility and therefore was required to be turned over as soon as the Government became aware of it. R.C.M. 701(a)(6).

The defense requested that the Military Judge instruct the members that the Government had withheld exculpatory evidence, but he did not. (R. 485, 493). Instead, the Military Judge granted the defense an interview with SM after her direct examination in order to discuss her conversation with Government counsel during trial preparations. (R. 493). The issue with the late disclosure of this new detail was not that the defense did not believe that she had said it, but that it prevented the defense from adequately preparing to exploit this self-serving change in her story. The appropriate remedy would have been the instruction requested by the defense. Without such an instruction, and when added to the other issues raised at trial, the Military Judge's decision not to grant the defense's second motion for a mistrial was also an abuse of his discretion.

Finally, the failure of the Government to disclose the existence of a digital forensic analysis of SSG Fye's cell phone that contained thousands of text messages and several voice messages left by [redacted] created a discovery violation that required the motion for mistrial to be granted. The Government was required to allow the defense to inspect documents, data, and reports of physical examinations upon request so long as those items were relevant to defense preparation. R.C.M. 701(a)(2). Civilian Defense Counsel stated that when the defense saw the request for forensic analysis, they inquired with the Government about the results. (R. 1004). They were told by the Government counsel, who themselves were unaware of the existence of this report, that it did

not exist. (R. 1004). While the Government argued that they had not violated R.C.M. 701 because the defense had notice of the DFE report through references in the investigation materials, this argument is disingenuous where the Government themselves did not realize such a report existed and even told the defense that it did not.

Although a continuance might be an appropriate remedy for a discovery violation in many cases, it was not in this one. First, the continuance created a six-week delay between the Government's case and the defense's, giving [redacted] time to prepare for the questions the defense was asked and to shore up any gaps in her story about the role-playing messages she exchanged with SSG Fye. Second, instead of incorporating the contents revealed in the DFE report into its initial cross-examination of [redacted], the defense was required to call her as a witness in its own case to ask her questions pertaining to the newly discovered text messages and voice messages. (R. 1019). Finally, the members had to come back after a six-week break to try to remember the details [redacted] testified to in the first portion of the court-martial. This made their ability to distinguish between admissible and inadmissible testimony all the more impossible.

The outrageous and continuous violations of Mil. R. Evid. 404(b) throughout [redacted] testimony, [redacted] comment on SSG Fye's right not to testify, and the Government's failure to comply with its discovery obligations on two occasions created circumstances during the proceedings which cast substantial doubt upon the fairness of the proceedings. R.C.M. 915(a). The only remedy

that could adequately address this avalanche of errors was mistrial. The Military Judge's failure to grant the three defense motions for mistrial was an abuse of his discretion. SSG Fye respectfully asks that this Court to set aside the guilty findings and sentence in this case.

II.

WERE THE FINDINGS OF GUILTY TO SPECIFICATION 2 OF CHARGE I, SPECIFICATION 2 OF CHARGE II, THE SOLE SPECIFICATION OF CHARGE III, AND SPECIFICATION 2 OF CHARGE IV FACTUALLY SUFFICIENT?

Additional Facts

A. Specification 2 of Charge I.

SSG Fye's sexual relationship with [redacted] involved experimentation with role-playing, fantasies, humiliation, dominant/submissive play, and anal penetration. (R. 461-64, 568, 776, 815; Pros. Ex. 2; Def. Ex. A, C). A frequently discussed fantasy involved SSG Fye giving [redacted] an enema as part of a sexual encounter. (Pros. Ex. 2, Def. Ex. A, C). The two fantasized in great detail about how SSG Fye would administer the enema and then prevent her from releasing her feces. (Def. Ex. A, C).

In October 2017, SSG Fye and [redacted] took their children to a rental cabin in Linville, North Carolina. (R. 465). While there, [redacted] alleged that she and SSG Fye were in an argument and that he pushed her and then digitally penetrated her. (R. 466-67). She testified that she screamed at him to stop and that

eventually he asked her if she was serious. (R. 467). When he saw that she was, he got up and left her alone. (R. 467). She testified that afterwards, SSG Fye apologized for his mistake. (R. 553). This incident led the couple to employ a safety word to be used when one person was uncomfortable with the sexual encounter. (R. 553). They selected the word "safety." (R. 554). Despite having arranged a safety word, [redacted] testified that the type of role play that she and SSG Fye engaged in was not of a violent nature. (R. 554). She also testified that these sexual adventures were never a surprise but were always discussed in advance and planned out. (R. 462). [redacted] testified that in certain scenarios, which she described as "spankings and stuff," "no" did not always mean "no." (R. 777).

[redacted] testified that sometime between December 2018 and February 2019, she and [redacted] had been in an argument a few nights before. (R. 555). She said that she had bruises from the fight and that SSG Fye saw them and looked sorry. (R. 555). [redacted] claimed that SSG Fye said he wanted to give her a massage and so she took her clothes off and laid on her stomach on the bed. (R. 555-56). She testified that he rubbed her shoulders for a bit and then got up to get something from the bathroom. (R. 556). She claimed that SSG Fye came back and sat above her buttocks and "jammed" something into her rectum. (R. 556). [redacted] testified that she was screaming at him to stop. (R. 556). When he got off of her, [redacted] testified that she turned and saw that he had an enema bottle in his hand. (R. 556). She claimed that she ran to the bathroom, but the area with the toilet was locked. (R. 556). [redacted] testified that SSG Fye would not let her run out of the

bedroom. (R. 556). She testified that as she ran back to the master bathroom, she was cussing at him and yelling "safety." (R. 556). She testified that she ended up in the shower emptying her bowels. (R. 556).

When [redacted] first reported these allegations to law enforcement, shortly after SSG Fye filed the lawsuit to recover the money he put into the house, she told CID that the incident with the enema had occurred on 5 December 2018. (R. 789). On 6 December 2018, SM sent SSG Fye a message that read, "I'm going to shave, I need some kinky butt sex, some kinky butt stuff – my butt." (R. 818). Further into the investigation, [redacted] changed the date for this allegation, expanding it to "somewhere between December and the end of March." (R. 799).

B. Specification 2 of Charge II and the Sole Specification of Charge III.

[redacted] alleged that she was physically assaulted from almost immediately after her wedding in July 2018 until her separation date in May 2019. (R. 473). Her friends and mother testified that she was around them throughout this time frame, including working with her mother and [redacted], one of her friends, several times a week. (R. 896, 927, 934, 957). All of the women saw bruises on [redacted], but [redacted] never indicated that they were from SSG Fye or that she was being abused. (R. 911, 929, 953). [redacted] never reported physical or sexual abuse to these women. (R. 911, 929, 957).

On 22 July 2018, [redacted] showed up at her friend, [redacted] house with her son. (R. 904). [redacted] lived around the corner from [redacted] and SSG Fye. (R. 898). [redacted] was

upset and crying when she arrived. (R. 904). [redacted] did not see any marks or bruises or other injuries on [redacted] that night. (R. 913). [redacted] did not tell her that SSG Fye assaulted her. (R. 914).

On 21 February 2019, SSG Fye contacted the police during an argument with [redacted]. (R. 762-63). When the police arrived, SSG Fye and [redacted] told the police that no assault or threats had been made. (R. 763).

[redacted] acknowledged that she had stated that she wanted SSG Fye's former wife, [redacted] "dead tomorrow" and had directed him to "cut her throat" in order to prove that he loved her. (R. 867). [redacted] admitted that she struck SSG Fye and told him, "Bitch, you don't deserve that kind of love." (R. 868). She admitted to hitting SSG Fye several times while calling him a "god-damn pussy" and, on another occasion, hitting him on the head after stating that she had come up with a perfect plan to kill [redacted]. (R. 877). [redacted] admitted that she told SSG Fye to "rip" a baby from [redacted] womb when she was pregnant. (R. 878). [redacted] admitted to striking SSG Fye and injuring his eardrum. (R. 879-80). [redacted] previously told CID that she had struck SSG Fye on one occasion and caused him a black eye. (R. 880). She told the agent that she did not hit him in the face after that because it had hurt her hand, leaving bruises on her knuckles. (R. 880, Def. Ex. AA).

[redacted] acknowledged as well that she would strike SSG Fye when she was sexually unsatisfied. (R. 888). She compared him unfavorably to her ex-husband and called him a gay slur. (R. 888-89). [redacted] also testified that she was frequently the dominant party to his submissive party when the two engaged in

sexual activity. (R. 569). [redacted] testified that she gave SSG Fye enemas on at least three occasions, including once before using a "strap-on" on him. (R. 567-68). She also testified that when the pair engaged in spanking, she "really pound[ed] him." (R. 814). She also acknowledged that she held him down while she spanked him. (R. 814).

C. Specification 2 of Charge IV.

[redacted] testified that when SSG Fye was drunk and the two would argue, SSG Fye would slam doors and damage their personal property inside their home. (R. 504). [redacted] claimed that SSG Fye broke a mirror and bench. (R. 497). She testified that he damaged items in a bathroom in their home and threw a bottle that damaged a wall in their home. (R. 504). [redacted] claimed that SSG Fye slammed a door and caused pictures on the wall in the home to fall. (R. 504).

[redacted] also testified that when SSG Fye was drinking, that she would find him passed out inside the house. (R. 542, 544, 610). The Government introduced Prosecution Exhibit 17, photos of him sleeping in areas of the home. (Pros. Ex. 17).

In his closing, the Trial Counsel addressed this charge. He opened his comments by acknowledging that "being drunk is not a crime." (R. 1138). He further acknowledged that "being very drunk is not a crime. Being drunk and annoying or a jerk, is not a crime." (R. 1139). He argued that "being drunk amidst a relationship of domestic violence and abuse, that's where it turns into a

crime." (R. 1139). He went on to state that the drunkenness was "underlying so many of the other charges on the charge sheet." (R. 1139).

Standard of Review

Each of the offenses for which SSG Fye was found guilty were alleged to have occurred before January 1, 2021. (Charge Sheet). Therefore, the pre-2021 standard for factual sufficiency applies to this Court's review of the findings in this case. [redacted] National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 § 542(b) (2021).

In accordance with Article 66(d), UCMJ (2019), this court reviews questions of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

In evaluating the factual sufficiency of a guilty finding, this court takes a "fresh, impartial look" at the evidence presented at trial, "giving no deference to the decision of the trial court on factual sufficiency" beyond the requirement in Article 66, UCMJ, to take into account that the trial court saw and heard the witnesses. *Id.* The test for factual sufficiency is "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [the Court is] convinced of [Appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The Government's burden is to present evidence that proves guilt to "an evidentiary certainty" and that must "exclude every fair and reasonable

hypothesis of the evidence except that of guilt." (Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, pg. 49 (29 Feb 2020)).

Argument

A. The Finding of Guilt to Specification 2 of Charge I is Not Factually Sufficient.

The evidence admitted at trial did not prove beyond a reasonable doubt that SSG Fye ever administered an enema to [redacted], let alone that he did so without her consent. The basis for the story that [redacted] told at trial was the detailed fantasies that SSG Fye and [redacted] engaged in via text while he was deployed. (Def. Ex. A, C). Beyond her account of this incident, which mirrored the encounter she had fantasized about with SSG Fye, no evidence supported a finding of guilt to this offense.

[redacted] provided the Government with voluminous text messages, audio recordings, and photos in this case. She thoroughly documented SSG Fye's alcoholism and the damage she claimed he inflicted upon their home and belongings while he was intoxicated. She provided photos of bruises she claimed he inflicted and of alcohol bottles she claimed he emptied. She provided audio recording that she claimed were taken while SSG Fye was physically assaulting her or discussing previous assaults. Yet, she had no photos documenting this alleged assault with an enema. She did not keep the enema bottle, she did not take photos of the bedroom or the bathtub after that alleged assault. She made no recordings of SSG Fye discussing this alleged assault.

Furthermore, her testimony that SSG Fye locked the bathroom door from the outside so she couldn't get in, is an unusual fact that defies logic.

The only evidence provided at trial to prove that SSG Fye ever administered an enema to [redacted] came from her testimony at trial. Given the hundreds of items she provided to support the other alleged offenses, the lack of any supporting evidence on this specification is remarkable and creates a reasonable doubt that the incident occurred at all.

Even if this Court is convinced beyond a reasonable doubt that SSG Fye did administer an enema to [redacted] at some point between December 2018 and March 2019, it cannot be convinced beyond a reasonable doubt that the encounter was not consensual.

[redacted] repeatedly claimed that her sex life with SSG Fye, while adventurous, was not violent and never involved being taken by surprise by a sexual act. Yet, she also described spanking SSG Fye while holding him down and "really pound[ing] him. She admitted that certain aspects of their sex life included scenarios where "no" did not mean "no." This was why after the October 2017 incident in which SSG Fye had not known that [redacted] protestations were serious, they developed a safety word. A safety word is for couples engaging in scenarios where one party saying "no" or "stop" might be part of the dominant/submissive or fantasy scenario. It allows both parties to understand that one person does not want to continue. The only way that SSG Fye might have misunderstood [redacted] position in October 2017, leading to the

development of a safety word is because their sex play involved these types of scenarios.

[redacted] testimony regarding the alleged assault with the enema was that she was screaming to stop during the insertion of the enema, but that she did not give the safety word until later. When trial counsel asked, "And, at what point did you start to yell you safety word that night?, [redacted] answered "It was when I was in the tub." (R. at 557). If this incident did occur at all, perhaps [redacted] agreed to the enema, but was angry with SSG Fye when he would not let her get to a toilet to relieve herself by locking the door. Her use of the safety word at this point reasonably could have been because she wanted him to unlock the bathroom. The couple had a safety word established, one she used at one point in the encounter, but not at the point of the penetration of her anus by the enema bottle.

This theory is also a reasonable alternative to one of guilt, given [redacted] engagement in anal penetration on several occasions previously. Although she said in a message in July of 2018 that she did not know if she wanted to have an enema in real life, this alleged incident would have occurred several months later. Perhaps her indecision waned and she decided to allow SSG Fye to give her the enema, but then disliked the experience. This became fodder for a sexual assault allegation once SSG Fye sued her for equitable distribution of her house.

When [redacted] first made the allegation, she reported it as having occurred on 5 December 2018. Her text messages from 6 December 2018 directly contradict

any claim of assault on that day, as she asks directly for "butt stuff." (R. 818). Upon the realization that this message contradicted her story, [redacted] claimed that SSG Fye had told her that date, but that it happened at some point in a four month period from December 2018 through March 2019. (R. 555, 789).

[redacted] had many opportunities to report this alleged sexual assault to family, friends, and the police. She did not. Her family and friends claimed that [redacted] demeanor changed after marrying SSG Fye, but she admitted to repeatedly striking SSG Fye, including in the face and head. She admitted to yelling at him to kill his former wife. She admitted to yelling degrading and emasculating names at SSG Fye. She was frequently the dominant partner in sexual activities that included spanking, inserting "strap-ons" and giving enemas. This behavior hardly paints the picture of a meek and submissive wife too afraid of her husband to tell the women she was closest to and saw nearly every day that he had sexually assaulted her.

After weighing the lack of supporting evidence that SSG Fye ever gave [redacted] an enema at all, the evidence that if the incident did occur, it occurred consensually, [redacted] overall lack of credibility, and her motive to fabricate an assault allegation, this Court cannot be convinced of SSG Fye's guilt beyond a reasonable doubt.

B. The Finding of Guilt to Specification 2 of Charge II and the Sole Specification of Charge III are Not Factually Sufficient.

The findings of guilty to Specification 2 of Charge II and the Sole Specification of Charge III are also factually insufficient. The relationship between SSG Fye and [redacted] appears to certainly have been volatile. However, the description of events by [redacted] shows that she was frequently the aggressor, hitting him on many occasions.

If the Government wanted to ensure sufficient evidence to convict SSG Fye on these charges, they could have asked to examine [redacted] phone. She provided audio recordings, text messages, and photos that were created on that phone, but none of the metadata to establish when they were created or whether they were modified from their original condition. [redacted] testified that the audio recordings in Prosecution Exhibits 19-27 were not the original recordings and that she had shortened each one in order to save it to her phone. (R. 854-56). A digital forensic analysis of her phone might have uncovered the rest of those recordings, and laid to rest any concerns about their accuracy and completeness. An examination of her phone would have established whether or not SM had photos and recordings and messages that would exculpate SSG Fye. Instead, the members, and this Court, are left to rely on [redacted] unsupported and uncorroborated testimony that the damage and the bruising shown in her pictures were caused by SSG Fye, that they were from nonconsensual assaults

and not from consensual sexual activity, and that they occurred within the charged time frames.

Without any corroboration, it is reasonable to believe that the bruising [redacted] mother and friends observed was from mutually consensual sexual activity. It is more reasonable to believe that [redacted] would not want to tell her mother and friends about rough sex play that left her bruised than that she would not tell these women she saw every day that she was being sexually assaulted.

[redacted] was not a shy, meek, or timid woman. Her testimony clearly established that, both in tone and content. She had access to women she trusted on a nearly daily basis without SSG Fye around. She had means to support herself and her son and supportive family nearby. She did not report physical abuse because it was not occurring. It was not until the motive to fabricate arose in the form of a lawsuit seeking to force the equitable distribution of the home where she was raising her son that she alleged physical abuse. These allegations, supported only by her testimony, should not convince this Court of SSG Fye's guilt beyond a reasonable doubt.

SSG Fye asks this Court to set aside the guilty findings to Specification 2 of Charge I, Specification 2 of Charge II, and the Sole Specification of Charge III and order them dismissed.

C. The Finding of Guilt to Specification 2 of Charge IV is Not Factually Sufficient.

In Specification 2 of Charge IV, SSG Fye was charged with a violation of Article 134, UCMJ, for drunkenness. (Charge Sheet). The specification alleged that SSG Fye was, "on divers occasions, at or near Fort Bragg, North Carolina, between on or about 1 July 2018 and 31 December 2018, drunk, such conduct being of a nature to bring discredit upon the armed forces." (Charge Sheet).

The specification did not allege any conduct beyond the drunkenness itself, nor did it allege the manner in which SSG Fye's conduct was of a nature to bring discredit upon the armed forces.

After weighing the evidence in the record of trial, this Court cannot be convinced beyond a reasonable doubt that SSG Fye is guilty of this crime. The Government presented no evidence showing that this alleged conduct was "of a nature to bring discredit upon the armed forces." While the Government was not required to introduce evidence that members of the public learned of his conduct and thought less of the armed forces, there must be some indication that this conduct was of a nature to bring this result.

Here, excluding the evidence that related to other offenses for which SSG Fye was tried, the evidence relating specifically to SSG Fye's conduct after he drank alcohol included damage to his home and belongings, done within the walls of his home, and passing out, also in his home. (Pros. Ex. 6, Pros. Ex. 17). Under the "circumstances" testified to at trial, the public was unaware of his

conduct within his own home. While drunkenness might have contributed to other offenses for which SSG Fye was tried and convicted, no evidence was introduced at trial that the drunkenness itself was of a nature to bring discredit to the armed forces. The Government's evidence on this specification did not meet its burden to prove guilt to "an evidentiary certainty" and is therefore factually insufficient.

III.

WERE THE FINDING OF GUILTY TO SPECIFICATION 2 OF CHARGE I AND SPECIFICATION 2 OF CHARGE IV LEGALLY SUFFICIENT?

Standard of Review

In accordance with Article 66(d), UCMJ, this court reviews questions of legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

Argument

A. The Finding of Guilt to Specification 2 of Charge I is Not Legally Sufficient.

The finding in Specification 2 of Charge I is also legally insufficient. Mistake of fact as to consent is a defense to this offense. (R. 1082). Where the evidence raises such a defense, the Government must prove beyond a reasonable doubt that SSG Fye did not have an honest and reasonable belief that [redacted] consented to the sexual conduct in question. (R. 1083).

Even if this Court were to believe [redacted] testimony that this event occurred, and further to believe that it occurred without her consent, the sexual history between this couple, her lack of use of the safety word established for just such an occasion, her text messages describing her willingness for anal penetration, enemas, and sexual activity supports a mistaken belief by SSG Fye that [redacted] consented to this conduct. The Government's evidence simply does not prove beyond a reasonable doubt that this mistaken belief was not honest and reasonable, given the circumstances of their relationship.

B. The Finding of Guilt to Specification 2 of Charge IV is Not Legally Sufficient.

The elements of the offense charged in Specification 2 of Charge IV are: 1) that the accused was drunk on board ship or in some other place; and 2) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. Manual for Courts-Martial, part IV, para 73(b) (2016).

"Discredit" means to injure the reputation of. Manual for Courts-Martial, part IV, para 91.c.(3). This clause makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Manual for Courts-Martial, part IV, para 91.c.(3). The focus of this element is on the nature of the conduct and whether it would tend to bring discredit on the armed forces, if known by the public. *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

The guilty finding to this specification is also legally insufficient. Even when viewed in the light most favorable to the prosecution, no rational trier of fact could have found that this offense was of a nature to bring discredit to the armed forces. Trial Counsel himself had trouble communicating what exactly was criminal about his conduct. He admitted that "being drunk is not a crime." (R. 1138). He also admitted that being "very drunk is not a crime." (R. 1139). Even being "drunk and annoying or a jerk, is not a crime." (R. 1139). Trial Counsel argued that it was a crime to be "drunk amidst a relationship of domestic violence and abuse." (R. 1139). He argued that the drunkenness was underlying the other charges on the charge sheet. (R. 1139).

This argument, that being very drunk, even to the point of being "a jerk" is legal, but when done "amidst a relationship of domestic violence and abuse" becomes a crime is contrary to the law. The elements of the offense are clear—1) being drunk; 2) conduct that, under the circumstances, is of a nature to bring discredit upon the armed forces. The second element of this offense is what

makes it criminal, not the act of being drunk "amidst" a troubled relationship. Trial Counsel did not introduce evidence that this conduct, occurring entirely in the privacy of SSG Fye's home, was of a nature to bring discredit upon the arme forces. He did not even argue that the conduct was of a discrediting nature. The standard for criminality the Government sought to apply to this offense was overly broad and too vague to put servicemembers on notice of what behavior is criminal.

Without some nexus to the terminal element, there is no criminal aspect to the charged conduct. Therefore, this guilty finding must fail as legally insufficient.

IV.

DID TRIAL DEFENSE COUNSEL'S FAILURE DURING THE POST-TRIAL PROCESSING OF APPELLANT'S CASE AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL?

Additional Facts

SSG Fye was sentenced to three years confinement and a dishonorable discharge on 20 January 2022. (R. 1361). During the defense sentencing case, SSG Fye testified to his cancer diagnosis. (R. 1332). He had had surgery to remove his prostate the year before the trial concluded. (R. 1334). SSG Fye was still undergoing treatment and had regularly scheduled blood tests. (R. 1335).

On 1 February 2022, Trial Defense Counsel submitted a request for clemency on SSG Fye's behalf. (Clemency Request). In his request, he

requested that the Convening Authority "disapprove the adjudged forfeitures and waive the automatic forfeitures in order to benefit SSG Fye's family." (Clemency Request). SSG Fye was engaged to his current wife at the time and had twin sons with his first wife. (R. 1322, 1327). In his advice to the Convening Authority, the Staff Judge Advocate noted that "the accused submitted information for transferring forfeitures for a non-authorized individual. After numerous attempts, the accused has not provided the necessary information for an authorized dependent." (SJA Clemency Advice). The Convening Authority disapproved the request for waiver of automatic forfeitures. (Convening Authority Action).

After his confinement on 20 January 2022, SSG Fye did not have any contact with Trial Defense Counsel until he initiated a telephonic appointment on 25 April 2022. (Affidavit of SSG Fye). When SSG Fye's fiancé attempted to contact Trial Defense Counsel in January and February 2022 to find out what the post-trial process entailed, he responded only by asking for her bank account information. (Affidavit of [redacted]). In March 2022, SSG Fye's fiancé asked him to contact SSG Fye to discuss the post-trial processing of his case. (Affidavit of [redacted]). Trial Defense Counsel did not reply. (Affidavit of [redacted]). SSG Fye's fiancé tried to reach Trial Defense Counsel again in April, letting him know that SSG Fye had specific matters he wished to have raised in the post-trial process and once again asking him to call SSG Fye. (Affidavit of [redacted]). Trial Defense Counsel responded to tell her that SSG

Fye should have called him if he had wanted anything addressed. (Affidavit of [redacted]). SSG Fye contact Trial Defense Counsel again in April and asked him to contact SSG Fye. (Affidavit of [redacted]). Trial Defense Counsel did not reply. (Affidavit of [redacted]).

Finally, on 25 April 2022, SSG Fye was able to set a telephonic appointment with Trial Defense Counsel. At that time, SSG Fye learned that the clemency request had been submitted and the Entry of Judgment finalized. (Affidavit of SSG Fye). Trial Defense Counsel stated that SSG Fye should have called him if he had any issues he wanted raised. (Affidavit of SSG Fye). SSG Fye was never notified by Trial Defense Counsel that he could not transfer his forfeitures to his fiancé or told how to establish a transfer to his sons. (Affidavit of SSG Fye).

Had he been contacted by Trial Defense Counsel, SSG Fye would have asked to include in his clemency request a deferment of his confinement based on his ongoing cancer treatment and a request that his forfeited pay and allowances be transferred to his dependents for six months. (Affidavit of SSG Fye). He would have included a personal statement and letters from his sons and family members to the Convening Authority. (Affidavit of SSG Fye). SSG Fye would also have submitted matters concerning the legal errors in his case raised in this brief. (Affidavit of SSG Fye).

Standard of Review

Members of the armed forces are entitled to the effective assistance of counsel. *United States v. Scott*, 24 M.J. 186, 187-88 (C.M.A. 1987). Appellate courts review claims of ineffective assistance of counsel *de novo*. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006).

Law

A. Ineffective Assistance of Counsel.

A claim of ineffective assistance of counsel has two components: 1) a showing of deficient performance by counsel at trial, and 2) a showing that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984). In order to show deficiency in performance, an appellant must show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688-90. Courts assessing counsel performance under this prong "examine whether counsel made an objectively reasonable choice in strategy from the available alternatives." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

When assessing the second prong, an appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 698.

The Sixth Amendment guarantee of effective assistance of counsel extends to post-trial processing. *United States v. Gilley*, 56 M.J. 113, 124

(C.A.A.F. 2001). Trial defense counsel must consult with the client regarding clemency and other matters, and must comply with the client's desires regarding submissions to the convening authority. *United States v. Peters*, 2017 CCA LEXIS 127 at *10 (Army Ct. Crim. App. Feb. 28, 2017) (citing *United States v. Hood*, 47 M.J. 95, 97 (C.A.A.F. 1997).

In the context of an allegation of ineffective assistance during the post-trial phase, an appellant meets his burden under *Strickland*'s second prong if he makes some "colorable showing of possible prejudice." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). When an accused specifies what he would have submitted, appellate courts will not speculate as to what the convening authority would have done. *Peters*, 2017 CCA 127 at *11. If an appellant makes a colorable showing of possible prejudice, a reviewing court should give the appellant the benefit of the doubt and not speculate on what action the convening authority might have taken. *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997).

B. Post-trial Submissions and Convening Authority Action.

A convening authority shall consider matters submitted in writing by the accused. Article 60a(e), UCMJ. In a case in which the accused is found guilty of a violation of subsection (a) or (b) of Article 120, UCMJ, the convening authority may not take action on findings or reduce, commute, or suspend a sentence of confinement greater than six months or a sentence of dishonorable discharge. Article 60a(a)(1) and (b). In a case involving an accused who has

dependents, the convening authority may waive any or all of the automatic forfeitures of pay and allowances set out in Article 58b, UCMJ, for a period of six months. Article 58b(b). Any waived forfeitures shall be paid to the dependents of the accused. Article 58b(b).

On application by an accused, the convening authority may defer the effective date of a sentence of confinement, reduction, or forfeiture. Article 57(b)(1). The deferment shall terminate upon entry of judgment. Article 57(b)(1).

Argument

Trial Defense Counsel was deficient during the post-trial phase of SSG Fye's court-martial. He submitted matters in clemency without discussing them with SSG Fye. While he asked for a waiver of automatic forfeitures (along with waiver of adjudged forfeitures despite none having been adjudged), he did not specify to whom his waived forfeitures should be paid and did not ensure that the beneficiary was SSG Fye's dependent. When the Staff Judge Advocate noted that SSG Fye's fiancé was not an authorized dependent, Trial Defense Counsel did not follow up with SSG Fye to make sure that the forfeited money could go to his children.

Trial Defense Counsel did not ask for a deferment of confinement to allow SSG Fye to continue his cancer treatment. SSG Fye was not able to include a personal statement and statements from his family regarding his

clemency requests. Further, Trial Defense Counsel did not ensure that the legal errors he raised included those that SSG Fye wished to raise.

Trial Defense Counsel's failures are clear in the Staff Judge Advocate's advice to the Convening Authority on clemency. He notes "numerous attempts" to get banking information for SSG Fye's authorized dependents. These attempts stand in stark contrast to the zero attempts Trial Defense Counsel made to coordinate the clemency request and banking information with SSG Fye or his fiancé.

SSG Fye has specified the items which he would have included in a clemency request, had he been consulted and has made a colorable showing of prejudice. This Court should now give the appellant the benefit of the doubt and not speculate on what action the convening authority might have taken. *Chatman*, 46 M.J. at 323-24. SSG Fye asks this Court to find ineffective assistance of counsel in the post-trial phase and order a new clemency submission, Staff Judge Advocate advice, and Convening Authority Action in his case.

V.

DOES THE GOVERNMENT'S DELAY IN POST-TRIAL PROCESSING OF APPELLANT'S CASE WARRANT RELIEF?

Additional Facts

SSG Fye was sentenced on 20 January 2022. (R. 1361). His defense counsel provided his clemency submission on 1 February 2022. (Clemency

Request). The Staff Judge Advocate provided his advice to the Convening Authority on 26 February 2022. (SJA Clemency Advice). The Convening Authority took action, approving the sentence as adjudged on 28 February 2022. (Convening Authority Action.) The Military Judge entered judgment on 4 March 2022. (Entry of Judgment). The testimony of the alleged victim, [redacted] given on 7 and 8 December 2021 took up 434 pages of the 1363-page transcription in the Record. (R. 456-889). SSG Fye requested a speedy post-trial review on 9 August 2022. (Speedy Trial Request). The Record of Trial was not authenticated and certified until 25 October 2022. (Court Reporter Certification of Record of Trial and Transcript). The case was forwarded to this Court on 31 October 2022. (Chronology Sheet). On 4 November 2022, this court docketed the case. (Referral).

Standard of Review

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

Law

A convicted service member has a due process right to timely post-trial review of court-martial convictions. *Moreno*, 63 M.J. at 135. Courts of Criminal Appeals have authority under Article 66(d)(2), UCMJ, to provide relief for excessive delay in the processing of a court-martial after the entry of

judgment. "[T]he Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record…." Art. 66(d)(2).

On review, appellate courts first examine whether the post-trial delay is facially unreasonable. *Id*. at 136. This Court no longer uses a specific number of days to determine presumptive unreasonableness in post-trial delay, but does consider the totality of the circumstances surrounding the post-trial processing timeline for each case. *United States v. Winfield*, 2023 CCA LEXIS 189 at *8 (Army Ct. Crim. App. Apr. 27, 2023). These considerations include the chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay. *Id*.

Upon finding the post-trial delay to be presumptively unreasonably, appellate courts then balance the following four factors to determine whether the delay violated appellant's due process right: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135. In assessing the fourth factor of prejudice, appellate courts consider three sub-factors: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id*. at 138-39 (internal citations omitted).

While the appellant's assertion of the right to timely review and appeal is a factor, the responsibility of the convening authority to promptly complete post-trial processing is not dependent upon a request to do so from the accused. *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004).

Intervention is also necessary when a SJA "fails to document an acceptable explanation for the untimely post-trial processing" and "the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006); *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001). In such cases, one need not find actual prejudice in order to grant relief for excessive post-trial delay. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). The court is empowered to decide what findings and sentences "should be approved" based on the record, which includes excessive post-trial delay. *Id.* "Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency." *United States v. Ponder*, 2020 CCA LEXIS at *3 (Army Ct. Crim. App 10 Feb. 2020) (quoting *Bauerbach*, 55 M.J at 507).

Argument

Because 288 days elapsed from the announcement of sentence to docketing by the reviewing authority, the post-trial delay in appellant's case is presumptively unreasonable. *Id*. at 510. As such, it triggers the full *Moreno* analysis. *See Arriaga*, 70 M.J. at 56.

A. Length of Delay.

The first factor weighs in favor of appellant. At 288 days, the delay in this case is far beyond the traditional 120 days. Additionally, [redacted] testimony from 7 and 8 December 2021 was transcribed before the trial resumed on 19 January 2022. (R. 1015). Approximately one-third of the transcript had been completed before the sentence was announced, yet the record still took 278 more days to be completed and certified. (Chronology Sheet).

B. Reasons for the Delay.

The government may overcome the presumption of unreasonableness by providing legitimate reasons for the delay. *Arriaga*, 70 M.J. at 57. Here, no explanation was offered for the 235 days the Government took to certify the Record of Trial after the Entry of Judgment. There is no provided information on chronology, complexity, or unavailability for this Court to weigh.

C. Assertion of the Right to a Timely Review and Appeal

This factor requires the court to examine whether appellant objected to the delay in any way or otherwise asserted his right to a timely review. *Arriaga*, 70 M.J. at 57. SSG Fye submitted a request for a speedy post-trial review on 9 August 2022.

D. Prejudice

To find prejudice in this case, the Court need not look any further than the government's violation of appellant's due process rights, that is, his "oppressive incarceration." *Moreno*, 63 M.J. at 139. Where an appellant's

substantive appeal is meritorious and he has been incarcerated during the appeal period, the incarceration may have been oppressive. *Id*. SSG Fye has been incarcerated during the appeal period and the errors raised in this brief are meritorious. Further, SSG Fye has had to deal with continued "anxiety awaiting the outcome of [his] appeal[]." *Arriaga*, 70 M.J. at 55, 57. He was found guilty of these offenses in January 2022. Yet, at this point in 2023, over a year later, he is still waiting for final resolution, and the government's inaction in this case is egregious enough to entitle some relief.

Even without prejudice, this court can grant relief for unreasonable post-trial delay. *Toohey*, 63 M.J. at 362; Article 66(d)(2). In the context of post-trial delay, this court has noted that incidents of poor administration reflect adversely on the U.S. Army and the military justice system. *United States v. Feeney-Clark*, ARMY 20180694, 2020 CCA LEXIS 256, slip op. at 5 (Army Ct. Crim. App. 29 July 2020) (internal quotation marks and citations omitted).

As the Court held in *Bodkins* and *Tardif*, "In performing its affirmative obligation to consider sentence appropriateness, the court must take into account 'all the facts and circumstances reflected in the record, including [any] unexplained and unreasonable post-trial delay.'" *Bodkins*, 60 M.J. at 324 (quoting *Tardif*, 57 M.J. at 224). Here, 288 days is an unacceptable denial of due process rights, especially in light of the government's unwillingness or inability to explain the reason behind the Government's delay in certifying the Record of Trial. *See Arriaga*, 70 M.J. at 56–58.

Lastly, relief is warranted when "[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system." *United States v. Carroll*, 40 M.J. 554, 557 n. 8 (A.C.M.R. 1994). This case is exactly the type of situation this court is empowered to address.

Conclusion

WHEREFORE, because of errors prejudicial to the substantial rights of appellant, he respectfully requests that the Court set aside and dismiss the findings of guilt to all specifications and charges.

[redacted]
FOR
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APPENDIX A

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

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

WHETHER THE MILITARY JUSTICE ERRED BY ALLOWING THE GOVERNMENT TO MAKE IMPROPER ARGUMENTS

Standard of Review

Improper Argument is a question of law that appellate courts review de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011).

Law

Improper argument is one facet of prosecutorial misconduct. *See United States v. Young*, 470 U.S. 1, 7-11 (1985). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Hornback*, 73 M.J. 155, 159-60 (C.A.A.F. 2014) (internal quotation marks omitted) (citations omitted) (alteration in original). In his arguments, trial counsel "may strike hard blows, [but] he is not at liberty to strike foul ones." *United States v. Berger*, 295 U.S. at 88 (1935). "An accused is supposed to be tried and sentenced as an individual on the basis of the offense(s) charged and the legally and logically relevant evidence presented. Thus, trial

counsel is prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence." *United States v. Schroder, 65 M.J. 49, 58* (C.A.A.F. 2007) (citing *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005); R.C.M. 919(b) Discussion). "Counsel should limit their arguments to 'the evidence of the record, as well as all reasonable inferences fairly derived from such evidence.'" *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009)(quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)).

If an objection is made at trial, appellate courts review improper argument for prejudicial error. *Fletcher*, 62 M.J. at 179. If no objection is made at trial, the government's argument is reviewed for plain error. *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013). To prevail under a plain error analysis, an appellant must show (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). "In assessing prejudice under the plain error test where prosecutorial misconduct has been alleged: '[W]e look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial.'" *Erickson*, 65 M.J. at 224. To determine prejudice from improper arguments, appellate courts consider: (1) the severity of the misconduct; (2) any curative measures taken; and (3) the strength of the government's case. *Fletcher*, 62 M.J. at 184.

Relevant Facts and Argument

The first prosecutorial misconduct occurred during an evidentiary ruling. Appellant objected to the recordings the government moved to admit, specifically under rule of completeness. (R. at 666; 675). The military judge noted, "the witness said so far, that in discussion with her attorney, 'that's why these are shortened this way.' And again, by her attorney, I presume it's not [redacted] the Special Victims' Counsel, but her divorce attorney in the family court proceeding." (R. at 675). The government conceded that was the case. However, the government vouched, "these are what the DFE [Digital Forensic Examiner] pulled off the phone" so remainder of these recordings "don't exist on the phone, or at least didn't at the time that CID did the pull." (R. at 676). However, when the CID agent took the stand, he testified that there was no DFE conducted on the victim's cellphone. (R. at 1034). Therefore, the government lied to the military judge when admitting evidence provided by the victim. This was an egregious error since the recordings contained appellant's former wife's name and the normal argument appellant had with her. (R. at 730; Pros. Ex. 22). Therefore, without the government's false statement that the recordings were pulled by DFE, the military judge may not have admitted these recordings. As such, Prosecutions Exhibits 19-27 were wrongfully admitted based on the government's false representation.

At closing, the government argued several facts not in evidence. The trial counsel mentions that there was a long break between when they heard in early December and now. Under the guise of reminding panel members of evidence introduced at trial, the government smuggled in facts not in evidence.

Next, the government counsel argued, "He held the door closed to the other bathroom. She started defecating in her underpants. And she ran into a tub finally where she stood alone with her own feces running down her legs, collapsing into a puddle of it, in cold water." (R. at 1122). However, nowhere in the record did the victim claim such an event took place. The trial counsel then read supposedly verbatim transcript from the record but changed key words to add to his version of the event. For example, the victim never said she was in her underpants, he held the door, and never said she was laying in her feces in a cold shower. These are all fabrications and additions. This was another misrepresentation of the facts. This was specifically prejudicial since the panel who had been away for over a month thought this was verbatim recitation from the transcript because the government is presented it as such. Such misrepresentation from the government to mislead the panel even in the slightest was highly inappropriate. It is indicative of the plain and obvious nature of the error in this case that trial counsel repeatedly misstated evidence and nature of the evidence. *See United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001) (finding prosecutor's misstatement of the evidence 'was not

only error but also was plain error," and quoting *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994), for the proposition that "'[i]t is a fundamental tenet of the law that attorneys may not make material misstatements of fact in summation.'").

These misconducts are in addition to government's failure to disclose DFE report and the noise machine that was thoroughly explored in appellant's first assignment of error. (Appellant's Br. at 14). The military judge refused to give curative instructions and declare mistrial due to these egregious misconducts. (R. at 485; 490).

These plain error misconducts were severe and there were no measures adopted to cure the effects. The military judge's bifurcating the trial after the introduction of evidence had the effect of panel members' relying on the government's articulation of the evidence. Therefore, the prejudice from the erroneous statements were enormous, given the weak credibility of the sole victim in this case. Therefore, this court should set aside the guilty findings and sentence in appellant's case.

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division, the Army Court of Criminal Appeals and the Defense Appellate Division on 17 July 2023.

[redacted]
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