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

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| UNITED STATES,<br>Appellee | **BRIEF ON BEHALF OF APPELLEE** |
| v. | Docket No. ARMY 20210662 |
| Sergeant (E-5)<br>**RYAN C. THOMAS,**<br>United States Army,<br>Appellant | Tried at Fort Stewart, Georgia, on 30 April, 30 June, 31 August, 1 September, and 13–17 December 2021, before a general court-martial convened by the Commander, Third Infantry Division, Colonel G. Bret Batdorff and Colonel Alyssa Adams, Military Judges, presiding. |

## Assignments of Error[1]

**I.**

**WHETHER THE MILITARY JUDGE ERRED BY FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL?**

**II.**

[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.

**WHETHER THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE UNDER MILITARY RULE OF EVIDENCE 801(d)(1)(B)(i) AND 801(d)(B)(ii)?**

**III.**

**WHETHER APPELLANT IS OWED RELIEF DUE TO THE GOVERNMENT'S DILATORY POST-TRIAL PROCESSING?**

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## Statement of the Case

On 31 August 2021 a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of failing to obey a general regulation and one specification of adultery, in violation of Articles 92 and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 892 and 934. (Statement of Trial Results [STR]; R. at 72). On 17 December 2021, contrary to his pleas, an enlisted panel found appellant guilty of two specifications of cruelty and maltreatment, and two specifications of sexual assault of a child, in violation of Articles 93 and 120b, UCMJ, 10 U.S.C. §§ 893 and 920b. (STR; R. at 589).[2] The panel sentenced appellant to confinement for eight years and a dishonorable discharge. (STR; R. at 688). On 26 January 2022, the convening authority took no action on the findings or sentence, and on 11 February 2022 the military judge entered judgment. (Action; Judgment).

## Facts

On 30 July 2018, appellant pressured his 10-year-old stepdaughter, Miss [redacted], to sleep with him in his bed on a night when Miss [redacted]'s mother was in the hospital. (R. at 306, 369). After falling asleep, Miss [redacted] awoke to appellant penetrating her vaginally with his penis. (R. at 307, 371).

[2] The panel found appellant not guilty of one specification of sexual assault of a child. (STR; R. at 589).

On 12 August 2018, appellant summoned Miss [redacted] into a bathroom and, under the guise of treating a hygiene issue, shaved her pubic area over her protest. (R. at 283). After appellant finished shaving her, he told her to bend over his bed. (R. at 286). There, he rubbed his penis on Miss [redacted]'s exposed buttocks. (R. at 286). He did so for five to ten minutes and then ordered Miss [redacted] to take a shower. (R. at 287).

Appellant had been Miss [redacted]'s stepfather since she was one year old. (R. at 264). In the year preceding the sexual assault, appellant made inappropriate sexual comments about Miss [redacted], describing her attractiveness, calling her a "whore," and a "good girl" or "good kitty." (R. at 269). Appellant further sexualized his relationship with Miss [redacted] by exposing her to pornography. (R. at 269). On one occasion, appellant handed Miss [redacted] a tablet that displayed a pornographic website and video, which he instructed her to watch. (R. at 269).

Additional facts are included below.

## Assignment of Error I

**WHETHER THE MILITARY JUDGE ERRED BY FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL.**

## Additional Facts

On 31 August 2021, the court held an Article 39(a), UCMJ hearing, where appellant entered a mixed plea. (R. at 44). Following appellant's guilty plea to

certain charges and specifications, the parties discussed renumbering the charges on the panel members' flyer for the contested portion of the trial; however, at no point did appellant object to the presence of the four specifications of Charge II concerning appellant's alleged use of racist and derogatory language around other soldiers. (R. at 45–48). On the same day, the court proceeded with panel selection and provided a revised flyer to the panel, which included Charge II and its four specifications. (R. at 90–91). Two specifications remained on the charge sheet that alleged the accused maltreated subordinates by making offensive statements concerning women and religion.

During panel selection, members were asked about their views on racist and derogatory language, and whether they had ever been affected by it. (R. at 108–09, 163). Colonel (COL) [redacted] and Lieutenant Colonel (LTC) [redacted] both expressed that they had been affected by such remarks. (R. at 117–18, 125–28). Colonel [redacted] stated during individual voir dire that he "was on the receiving end of racist comments," including a derogatory epithet often directed toward people of Chinese descent. (R. at 117–18). However, COL [redacted] elaborated further on the experience, explaining that it had last occurred when he was a teenager, over 32 years prior to trial, and expressly denied any lasting effect or inability to grant appellant a fair trial. (R. at 118). When asked if that experience would compromise his ability to be fair and impartial, COL [redacted] responded, "I will be fair and impartial.

Absolutely." (R. at 118).

During his individual voir dire, LTC [redacted], who described himself as "multiracial," was asked by defense counsel if he had ever "been subject to racism or racist comments." (R. at 125). LTC [redacted] stated, "I've had a couple of comments made in and around my presence during my life." (R. at 126). When asked about the comments on the flyer, and his experiences, LTC [redacted] responded, "No, I wouldn't say there are emotional responses when it's directed directly at me . . . nobody's ever looked at me dead in the eyes and said something like that." (R. at 126). When asked about comments or jokes made in his presence, LTC [redacted] responded, "I get charged. I say it comes down to not happy." However, when asked if those experiences would taint his perception of the person making the comment, when weighing if it were a "poorly phrased joke, or just motivated by cruelty," LTC [redacted] responded, "I don't believe so" and further explained that he did not believe a disinterested third party would harbor doubts about his ability to impartially serve on appellant's panel. (R. at 126).

When the time came to challenge panel members, appellant made four challenges for cause and a fifth peremptory challenge; none of these five members were COL [redacted] or LTC [redacted], who both remained on the panel. (R. at 198–206).[3]

[3] Notably, two of appellant's four challenges for cause involved LTC [redacted] and First Sergeant (1SG) [redacted]. (R. at 198–99). During individual voir dire, LTC [redacted] expressed that he believed that someone who would make a joke involving race,

Panel selection was concluded on the same day, and once civilian defense counsel had clarified with the court that the panel had been sworn in, he moved to dismiss Charge II, Specifications 1–4, arguing that they were preempted by Article 92, UCMJ.[4] (R. at 207–09; App. Ex. XV). After hearing some argument, the military judge recessed for the day. (R. at 213–14).

When court resumed the following day, on 1 September 2021, the government requested a continuance due to a witness's exposure to the Coronavirus and mandatory quarantine. (R. at 215–16, 225; App. Ex. VI). The parties argued the motion to dismiss further, but the military judge requested written motions on the matter. (R. at 224). On 8 September 2021, appellant submitted their written motion to dismiss Charge II, Specifications 1–4 for failure to state an offense. (App. Ex. XV). On 30 September 2021, the court issued its ruling, agreeing with appellant and dismissing the four specifications. (App. Ex.

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religion, or gender would automatically be hostile towards that particular group. (R. at 108). In response to a different defense counsel question, 1SG [redacted] expressed that he, a friend, or a family member had been a victim of a race or gender motivated crime. (R. at 167). Neither defense challenge was opposed by the government, and thus, neither prospective member was empaneled in appellant's court-martial. (R. at 206).

[4] "Yes, Your Honor. Quick question I had, and just to be transparent, so the panel is sworn in. It is my intent to raise a motion since jeopardy now attaches. That's why I'm asking. So, I want to make sure that you know I'm not doing this in a procedurally awkward point, which is why I'm asking if we are bringing them back to swear them, so if they're not, it is my intent to wait. I just want to make sure that they have now been sworn in and that jeopardy is now attached." (R. at 208).

XIX). Based on government's motion to continue, the military judge continued trial to a later date. (R. at 226).

On 5 November 2021, the government provided notice to the defense pursuant to Mil. R. Evid. 404(b) that it still intended to offer evidence that the accused made statements expressing contempt for women and racial minorities in order to show motive and intent behind the accused's maltreatment of his subordinates. (App. Ex. XXXVIII).

On 11 December 2021—more than three months after the 31 August session in which the parties discussed the contents of the flyer, conducted voir dire, and appellant thereafter successfully moved to dismiss the four specifications of Charge II—appellant filed a motion for mistrial, arguing he was entitled to a new panel due to the members' exposure to the inflammatory language on the previous flyer from the since dismissed specifications.[5] (R. at 237; App. Ex. XX). The military judge held an Article 39(a) hearing on 13 December 2021 to hear arguments from the parties (R. at 227, 237), and denied the motion for mistrial the following morning via email, immediately before the start of appellant's trial on the merits. (App. Ex. XXIII). A written ruling was provided after the trial's conclusion, on 10 January 2022. (App. Ex. XXVIII).

[5] Appellant's motion also missed the court's deadline of 17 June 2021 by nearly six months. (App. Ex. I).

## Standard of Review

An appellate court must not reverse a military judge's decision regarding a motion for mistrial absent clear evidence of an abuse of discretion. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "This standard requires more than just [this court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

## Law and Argument

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." *United States v. Short*, 77 M.J. 148, 150 (C.A.A.F. 2018) (citing Rule for Courts-Martial [R.C.M.] 915(a)). The discussion to R.C.M. 915(a) cautions that "[t]he power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons," including times "when inadmissible matters so prejudicial that a curative instruction would

be inadequate are brought to the attention of the members." *Id.* at 150; *see also United States v. Massey*, 50 C.M.R. 346, 347 (C.M.A. 1975).

However, the declaration of a mistrial is a drastic remedy which should be employed only upon a showing of manifest necessity. *United States v. Simonds*, 15 U.S.C.M.A. 641, 36 C.M.R. 139 (1966). "[A] mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial," *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). "[M]ilitary judges should explore the option of taking other remedial action, such as giving curative instructions." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).

In the case of appellant, no evidence had been admitted at the time of the motion for mistrial. On 31 August 2021, the prospective members were provided a flyer which included allegations that appellant made highly inflammatory racial remarks.[6] (R. at 153). Appellant made no objection at that time, and the court granted a motion to continue the next morning, before any evidence was presented on the merits. (R. at 153, 216).

In *Massey*, evidence was introduced at trial that the accused made a highly inflammatory racial remark.[7] *Massey*, 50 C.M.R. at 347. The court held that the

[6] The most inflammatory of which was appellant's use of the "n-word."
[7] The inflammatory comment in Massey was also the "n-word." *Massey*, 50 C.M.R. at 347.

military judge abused his discretion in declining to grant a mistrial because the remark was manifestly prejudicial and because the military judge did not issue a cautionary instruction. *Id*. On the other hand, the alleged remarks of appellant had not been admitted into evidence. Trial did not commence for another three months after the voir dire when defense counsel addressed the alleged remarks with the panel. (App. Ex. XXXVIII). As such, the military judge took the most appropriate precaution by issuing a curative instruction to the members:

> I would advise you that since our last session, the court dismissed four specifications that were on the original flyer, which alleged statements that were attributed to the accused. There was some discussion of those statements during voir dire. You are to disregard any recollection you may have of those specifications which no longer appear on the flyer. . . . You are instructed that the only. . . charges and specifications before you are the ones that are currently on your flyer. In determining the accused's guilt or innocence of those offenses, you may not consider any dismissed specifications and you may not consider any evidence that has not been admitted into court. Now, I will clarify that at this point, no evidence has been admitted into court. We have talked about matters during voir dire and none of that is evidence, okay? The government and the defense will be able to give opening statements and then we will proceed with evidence. Understood? Affirmative response from all members.

(R. at 248).

"Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions." *Short*, 77 M.J. at 122 (citing *Ashby*, 68 M.J. at 122). "Curative

instructions are the preferred remedy, and '[a]bsent evidence to the contrary, a jury is presumed to have complied with the judge's instructions.'" *United States v. Carter*, 79 M.J. 478, 482 (C.A.A.F. 2020) (citing *United States v. Barron*, 52 M.J. 1, 5 (C.A.A.F. 1999)) (additional citation omitted).

> Absent clear evidence of an abuse of discretion, this court will not reverse a military judge's determination on a motion for mistrial. "In determining whether the military judge abused his discretion by not granting a mistrial, we look to the actual grounds litigated at trial." The challenge is to assess "the probable impact of the inadmissible evidence upon the court members." That "judgment is rooted in a simple 'tolerable' risk assessment that the members would be able to put aside the inadmissible evidence."

*Short*, 77 M.J. at 150 (internal citations omitted).

At the time of the motion for mistrial, no evidence had been offered or admitted regarding the dismissed specifications. This makes the 'tolerable' risk analysis quite straight-forward, as there was no probable impact or prejudice to mitigate.

A military judge's determination on a mistrial will not be reversed absent clear evidence of an abuse of discretion. *Diaz*, 59 M.J. at 90. In *Diaz*, the Court of Appeals for the Armed Forces (CAAF) noted that this "deference to the military judge's decision on a mistrial is consistent with other federal practice." *Id.* The CAAF further explained that deference was warranted because an "appellate panel, informed by a cold record," usually does not have the "superior point of vantage" of the military judge. *Id.* (quoting *United States v. Freeman*, 208 F.3d 332, 339

(1st Cir. 2000)). Here, the military judge had the vantage point of being present before the panel during voir dire, able to hear their answers, able to draw conclusions on the tone and body language of those panel members who had been affected in some way by racist remarks. Further, the military judge read a thorough curative instruction to disregard the version of the flyer that prompted individual voir dire on this sensitive subject more than three months earlier, clarifying that the flyer and any discussion regarding any specification present on the flyer was not evidence to be weighed on the matter of appellant's guilt or innocence. (R. at 248). Appellant successfully challenged four panel members and used his peremptory challenge on a fifth, electing to not to challenge COL [redacted]'s or LTC [redacted]'s impartiality or ability to serve. Accordingly, deference to the military judge's decision to deny the appellant's motion for mistrial is warranted in this case.

## Assignment of Error II

**WHETHER THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE UNDER MILITARY RULE OF EVIDENCE 801(d)(1)(B)(i) AND 801(d)(B)(ii)?**

## Additional Facts

At trial, Miss [redacted] testified that appellant raped her once and sexually assaulted her on three occasions. (R. at 279, 283, 286, 306). On cross-examination, appellant's counsel extensively attacked Miss [redacted]'s credibility on a

number of inconsistencies drawn from her initial reports of the allegations to a social worker, a subsequent report to Army Criminal Investigation Division (CID), and more recent interviews conducted by government and defense counsel. (R. at 359–73).

First, defense took issue with Miss [redacted]'s in-court testimony that on 12 August 2018, appellant had rubbed his penis on her buttocks until he had "finished." (R. at 356–60). Defense impeached Miss [redacted] by pointing out that in her statement to the social worker on 13 August 2018, Miss [redacted] had said that appellant rubbed his penis on her buttocks until she elbowed him and pushed him away. (R. at 358–59). Also, in a statement made to defense counsel in August of 2021, Miss [redacted] had said that appellant had held her down by her shoulders, and that she "couldn't get him off because [appellant] was too big." (R. at 359–60).[8]

Another issue defense raised with Miss [redacted]'s testimony was the inclusion of a detail that had not been disclosed in her 13 August 2018 interview with a social worker. In court, Miss [redacted] stated that during the 12 August 2018 sexual assault, appellant had told her that he wouldn't put his penis inside of her. (R. at 287). Miss [redacted] initially disclosed this during her August 2021 interview with counsel, but it is unclear from the record if she had ever been asked any questions in

[8] These details raised by defense from the August 2021 statement were not inconsistent with Miss [redacted]'s in-court testimony.

previous interviews that would have led her to disclose this detail. (R. at 359–60).

On direct examination, Miss [redacted] had stated that she saw appellant's penis when he sexually assaulted her on 12 August 2018. (R. at 286). Defense cross-examined Miss [redacted] about this detail, since it contradicted her previous statements. (R. at 361). Prior to trial, Miss [redacted] had stated that she did not see appellant's penis, but she knew that he was rubbing his penis on her buttocks because she had heard his pants unzip. (R. at 361).

Defense counsel questioned Miss [redacted] about her testimony that appellant had offered her $100 after he sexually assaulted her on 12 August 2018. (R. at 362). Though Miss [redacted] had stated in her previous interviews that appellant had offered her money, she never gave a specific amount. (R. at 362–63). Defense honed in on the fact that she had been asked on several occasions how much money appellant offered her, but it wasn't until trial that she revealed it was $100. (R. at 362–63).

The next point of contention defense raised with Miss [redacted]'s testimony was over a verbal exchange that occurred while Miss [redacted] showered. (R. at 363). Miss [redacted] took a shower after appellant rubbed his penis on her buttocks and ejaculated. (R. at 287–88, 363).[9] Defense pointed out that during her earliest recorded

[9] "He zipped up his pants and told me to go shower. And when I went to go shower, he came into the bathroom and put away the razor and asked me if I hated

interview, 13 August 2018, Miss [redacted] stated that after appellant entered the bathroom and asked her if he hated him, she replied, "No, I'm just bothered by you." (R. at 363–64). When confronted with this discrepancy on cross-examination, Miss [redacted] explained that while the sentiment was accurate to how she was feeling at the time, she didn't believe that she actually verbalized it to appellant. (R. at 363).

Turning their attention to Miss [redacted]'s report of sexual contact that occurred on the couch,[10] defense asked Miss [redacted] if she remembered her earliest interview she gave on the subject to the social worker, TL, on 13 August 2018. (R. at 364). Defense then focused specifically on the description Miss [redacted] gave of where she was touched. (R. at 364–65). In her earlier statement, Miss [redacted] described being touched and rubbed on her thighs, while on direct examination in court, Miss [redacted] described being touched on her stomach, and resisting appellant as he pushed his hand down to her groin area. (R. at 280–81, 365–66). In her earlier statement, Miss [redacted] explained that she got up and walked away after he started rubbing her thighs, but in court, she stated that appellant got up and walked away after she had pushed his hand away three times. (R. at 281, 366).

Defense counsel then pointed out what he believed to be an inconsistency

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him. And I didn't respond to that. And he just left the bathroom and I heard him go into my room and take my tablet and left the house." (R. at 288).

[10] Appellant was found not guilty of this specification. (STR).

with Miss [redacted]'s testimony regarding her exposure to pornography. (R. at 366–67). However, the disagreement centered on whether Miss [redacted] played the video provided by appellant. (R. at 367–68). Miss [redacted] denied playing the video, but explained that she was able to see the contents of the video because the website media player displayed a preview clip, which played over the video's cover.[11] (R. at 367–68). She explained that she did not press play on the video, yet she was able to see two individuals engaging in sexual intercourse. (R. at 367).

Another point of contention defense raised with Miss [redacted] was her testimony that appellant had raped her on 30 July 2018. (R. at 370). Miss [redacted] had not revealed this incident until the eve of trial, and defense raised all of the previous opportunities she had to divulge this information. (R. at 370). Defense then asked Miss [redacted] specific details: the clothes she was wearing, where appellant positioned himself during the rape, and whether Appellant had ejaculated. (R. at 371–73).

After raising these specific inconsistencies, defense attacked Miss [redacted]'s general credibility, suggesting that she had a motive to lie, her memory was faulty, that she was influenced by others, and that she had a character for untruthfulness. (R. at 374–79). They first raised the possibility that Miss [redacted] had a motive to lie,

[11] It seems from this exchange that defense counsel conflated the distinction between "hitting play," and watching an automatically played video preview, similar to the auto-play feature on YouTube. (R. at 367). As such, this distinction did not amount to an actual inconsistency.

given that she once kept a list of people who slighted her or broke classroom rules. (R. at 375). Defense intimated that Miss [redacted] had been influenced by asking about all of the living arrangements she had endured since the reported sexual assault.[12] (R. at 376–79). Upon government objection on relevance grounds, defense explained that the purpose of this line of questioning: "I'll say it goes to potential influence, judge, that's all." (R. at 378). Defense also questioned Miss [redacted]'s memory in their cross examination by emphasizing the amount of time that had passed since the sexual assaults. (R. at 370). Miss [redacted]'s credibility was further attacked by defense when they brought up a poem Miss [redacted] had written with a classmate, which represented the author as Jewish.[13] (R. at 374). On a government objection on that line of questioning, also on relevance, defense argued that the classroom writing assignment reflected on Miss [redacted]'s credibility. (R. at 374). The military judge allowed it. (R. at 375).

On re-direct, government offered a forensic interview of Miss [redacted] as a prior consistent statement per Mil. R. Evid. 801(d)(1)(B)(ii), and the defense objected. (R. at 390). The government argued that the prior consistent statement would

[12] The sexual assault occurred at a time when appellant's relationship with Miss [redacted]'s mother was breaking down. Miss [redacted] lived in several arrangements with her mother and other families, until her mother re-married. (R. at 376–79).

[13] This was an extra credit writing assignment for her class. Miss [redacted] is not Jewish, but the poem represented the writer as Jewish and included the words, "I lied, I fucking lied." At trial, Miss [redacted] attributed the poem to herself and another student. (R. at 374–75).

address issues raised by defense's cross, specifically regarding whether Miss [redacted] did elbow appellant during the 12 August 2018 sexual assault, whether she was offered money, the conversation in the shower, and questions about the shaving incident. (R. at 394). Further, government argued that defense had challenged the general credibility of Miss [redacted], intimating that she was a liar based on the poem she had written, and suggesting that her testimony was due to the influence of others. (R. at 393). The military judge allowed only specific, limited portions of the forensic interview to be played. (R. at 406, 457).

The forensic interview was reduced to three clips. The clips portrayed the following exchanges between Miss [redacted] and TL:

> [Clip 1]
>
> TL: "Other than your private area, was any other part of your body shaved or touched in anyway?"
>
> [redacted]: "Um, no."
>
> TL: "Okay, and did your dad say anything to you during any of that time? Yes or no?"
>
> [redacted]: "The only thing he had said was to turn over."
>
> [Clip 2]
>
> [redacted]: "He was like after this I'm going to go to the bank to give you some money how much do you want?"
>
> TL: "And those were your dad's words?"
>
> [redacted]: "Mmmhmm."

[Clip 3]

TL: "Describe what he did and where you were and how you were positioned and where he was positioned the best you can."

[redacted]: "I was basically bent over with my knees on the floor, with my stomach on the bed."

TL: "So your stomach was on the bed, your knees were on the floor, and where were your arms?"

[redacted]: "My arms were on the bed as well"

TL: "And at what point… did your dad unzip his pants?"

[redacted]: "After I turned over"

TL: "And how did you know that your dad had unzipped his pants?"

[redacted]: "I heard it."

TL: "Okay. And did he say anything during that time?"

[redacted]: [shakes head indicating negative response.]

TL: "Try to describe as best you can what your dad was doing at the point he unzipped his pants and after that."

[redacted]: "Just inappropriate things."

TL: "Okay, as best you can, describe what you're calling inappropriate—take your time."

[redacted]: "Uh, he basically just rubbed me with it."

TL: "He rubbed you?"

[redacted]: "Basically, yeah."

TL: "What did he rub you with?"

[redacted]: "His [unintelligible] the no-no square."

TL: "Do you have another name for that other than the no-no square?"

[redacted]: "I would like—I'd rather not say but, uh, basically the part like—the front."

TL: "Do you have a name for that part of the body? If you don't, that's okay."

[redacted]: "Basically the wenis. Except that this is a wenis [points at elbow] except without the 'w'—'p'."

(R. at 451; Pros. Ex. 16).

## Standard of Review

This court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Frost*, 79 M.J. at 109. "This standard requires more than just [this court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

## Law

Hearsay—an out-of-court statement offered to prove the truth of the matter asserted—is generally not admissible in courts-martial absent an exclusion or exception. Mil. R. Evid. 801(c); Mil R. Evid. 802. A prior consistent statement is "not hearsay" under certain circumstances. Mil. R. Evid. 801(d)(1)(B). Provided (1) the declarant of the out-of-court statement testifies, (2) the declarant is subject to cross-examination about the prior statement, and (3) the prior statement is consistent with the declarant's testimony, the statement is admissible as substantive evidence under two scenarios. Mil. R. Evid. 801(d)(1)(B); *United States v. Finch,* 79 M.J. 389, 396 (C.A.A.F. 2020). The first scenario is when the prior statement is offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." Mil. R. Evid. 801(d)(1)(B)(i). Under the second scenario, the prior statement must be offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Mil. R. Evid. 801(d)(1)(B)(ii).

The division of Mil. R. Evid. 801(d)(1)(B) into two subsections is a result of a 2016 presidential revision. *See* Executive Order 13730, 81 Fed. Reg. 33331, 33355 (20 May 2016). The rule mirrors "an identical change to Federal Rule of Evidence 801(d)(1)(B)." Mil. R. Evid. 801(d)(1)(B)(ii) analysis at A22–61. The first subsection, Mil. R. Evid. 801(d)(1)(B)(i), merely restates the well-established

rule. The second subsection "extends substantive effect to consistent statements that rebut other attacks on a witness – such as the charges of inconsistency or faulty memory." *Id*. "[P]rior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well." *Id*.

*Finch* summarized the additional requirements for a prior consistent statement to be admissible under Mil. R. Evid. 801(d)(1)(B)(ii) by supplementing the three threshold prerequisites as follows: "(4) the declarant's credibility as a witness must have been 'attacked on another ground' other than the ones listed in Mil. R. Evid. 801(d)(1)(B)(i), and (5) the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." 79 M.J. at 396.

"A prior consistent statement need not be identical in every detail to the declarant's . . . testimony at trial. Rather, the prior statement need only be for the most part consistent and in particular, be consistent with respect to . . . facts of central importance to the trial." *Id.* at 395 (internal quotations and citations omitted). The military judge must make a determination that each prior consistent statement is relevant to rehabilitate the witness on one of the grounds cited in M.R.E. 801(d)(1)(B). *Id.* at 396.

## Argument

**A. The military judge did not err when admitting Miss [redacted]'s statements to TL.**

Appellant appears to only contest the fifth *Finch* factor and thus, implicitly concedes the first four. (Appellant's Br. 22.). The military judge correctly determined that Miss [redacted]'s statements to TL met all five *Finch* factors and were admissible.

**1. Miss [redacted]'s statements to TL met the first two threshold requirements for admissibility under Mil. R. Evid. 801(d)(1)(B).**

The first two threshold admissibility issues are easily satisfied in this case. Miss [redacted] testified and was subject to cross-examination. (R. at 262–389). As appellant conceded in his brief, Miss [redacted]'s statement to TL met these threshold requirements for admissibility under Mil. R. Evid. 801(d)(1)(B) and the first two *Finch* factors. 79 M.J. at 396. (R. at 608; Appellant's Br. 22).

**2. Miss [redacted] was attacked "on another ground."**

Appellant's theory of the case emphasized the only evidence of sexual assault was Miss [redacted]'s in-court testimony. In opening statement, defense counsel highlighted Miss [redacted]'s alleged lack of consistency and credibility over the course of the investigation. Counsel stated:

> What I want you to listen to are the distinctions in the story she tells and the changes that occur in that story. In other words, internal consistencies in a story matter. At one point, what happened? You'll hear that she told a story to [TL] on day one in 13 August. She tells a slightly different

> story -- or more than slightly different story a year and half to two years later to CID. She tells another story to myself and my staff right before the trial had convened in September with other details. And what we're talking about is how the incident occurred. What she did, what she didn't do, what he allegedly did during the course of this, there's other distinctions that matter as well.

(R. at 258). Counsel further asked the panel to consider Miss [redacted]'s general credibility:

> And I want you to try and think about why almost three years later, when asked, did anything else happen? Did he ever touch you anywhere else? Did he ever do this? Did he ever do that? Two years of living with mom, two years of living with mom's now new husband, that she married within of month of the divorce being final. . . . Think about the impact that has on the credibility of this child and her motivations in saying this.

(R. at 256).

Defense counsel cross-examined Miss [redacted] on her reports to TL, CID, and the medical examiner. (R. at 488–90). Defense focused on Miss [redacted]'s purportedly inconsistent retelling of the events, specifically that she had never disclosed to TL or CID that Appellant had raped her. (R. at 369–73). Before asking about the reported rape, defense asked Miss [redacted], "[t]he first time this came out and you first told somebody was Sunday of this week. Right?" (R. at 370). Counsel went further with this theme, asking, "you've been interviewed about this seven to ten times and you never said before, 'hey he actually raped me,' did you?" (R. at 370). Defense harped on the same theme when asking Miss [redacted] why she had not

previously disclosed that she had seen appellant's penis during the assault: "[s]o about three years after the incident is when you're positive that you saw his penis? Fair to say?" (R. at 362).

This line of questioning is a clear attack on Miss [redacted]'s consistency and that her original statements to TL, CID, and counsel were the truth. *See Finch*, 79 M.J. at 395 (noting that attacks of inconsistency and faulty memory are two bases for admission under 801(d)(1)(B)(ii) and citing the analysis of the rule).[14] Additionally, defense attacked Miss [redacted]'s credibility by alleging a recent improper influence or motive in testifying—specifically, her mother's divorce from appellant and the presence of a new step-father in her life. (R. at 259, 376–79). Thus, as appellant conceded at trial and here again on appeal, the fourth factor—that Miss [redacted]'s credibility was attacked on another ground (i.e., inconsistency)—is satisfied. (R. at 378;[15] Appellant's Br. 22).

**3. Miss [redacted]'s prior statements to TL are consistent with, and rehabilitate, her in-court testimony.**

Miss [redacted]'s in-court testimony that appellant had touched her groin and shaved her pubic area over her objection, had rubbed himself on her buttocks until

[14] *See also United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 2021), noting that an allegation of government coaching may meet the *Finch* factor for the witness' credibility being attacked on another ground.

[15] Upon a relevance objection on the line of questioning regarding the presence of other people in Miss [redacted]'s life, and her living situation, defense counsel responded, "[W]hat I'll say is it goes to potential influence, judge, that's all." (R. at 378).

ejaculation, and had offered her 100 dollars, were all consistent with the account she provided to TL. (R. at 612–13). Miss [redacted] was attacked for inconsistency by telling TL that appellant had assisted Miss [redacted] with shaving her groin for a hygiene issue, and that Miss [redacted] had elbowed appellant while he was rubbing his penis on her buttocks. (R. at 356, 359–60; Pros. Ex. 16). Additionally, defense raised omissions from Miss [redacted]'s statement to TL, specifically, that she did not bring up the rape, she only said appellant offered money without going into a specific amount, and that she had seen appellant's penis during the sexual assault. (R. at 361, 362, 370).

To determine if the prior statements are consistent and rehabilitative, it is important to note exactly how Miss [redacted] described the events in her forensic interview. Miss [redacted] described the shaving incident, explaining that no other part of her body had been touched, and that appellant had instructed her to "turn over" during that time. (Pros. Ex. 16). This was a subject that defense counsel scrutinized on cross-examination, and Miss [redacted]'s description in the forensic interview was consistent with her in-court testimony. (R. at 354).

Further, Miss [redacted] explained in her forensic interview that appellant had told her that he was going to go to the bank to get her some money after he had sexually abused her. (Pros. Ex. 16). This statement was not inconsistent with Miss [redacted]'s testimony in court, that he had offered her "100 dollars." (R. at 362).

Defense counsel attacked Miss [redacted]'s credibility on cross-examination for giving a specific amount in court, "But you never said he offered you $100, did you?" (R. at 362). Counsel pressed further: "And you never told anyone else that until yesterday, did you?" (R. at 362). This line of questioning implied that this was the first time Miss [redacted] had asserted that she had been offered money by appellant, and that her story was constantly changing. However, Miss [redacted]'s forensic interview, given one day after the described events, is consistent on the point of appellant offering her money after sexually assaulting her. (Pros. Ex. 16).

Lastly, Miss [redacted]'s forensic interview portrayed her consistent testimony regarding how appellant had sexually assaulted her by rubbing his penis on her buttocks. (Pros. Ex. 16). In court, Miss [redacted] was attacked by defense counsel for saying that she saw appellant's penis,[16] but explained why she had not previously revealed this detail: "I remember turning around and seeing something, but I wasn't 100 percent sure until lately that it was in fact his penis that I had saw." (R. at 361–62). In the portion of Miss [redacted]'s forensic interview that was admitted at trial, Miss [redacted] describes appellant's penis in several naïve and childish ways: "the no-no square," "the front," and "basically the wenis." (Pros. Ex. 16). Granted, at no time during that portion of the interview is she directly asked if she had seen

[16] "Okay. So about three years after the incident is when you're positive that you saw his penis? Fair to say?" (R. at 361).

appellant's penis. (Pros. Ex. 16). Whether or not Miss [redacted] knew that appellant was rubbing his penis against her buttocks was a point of contention in defense counsel's cross-examination, and the forensic interview, again given the day after the sexual assault, was consistent with Miss [redacted]'s in-court testimony regarding the assault. (R. at 361).

Even more important was how Miss [redacted]'s credibility was attacked by defense as they questioned her about lying on a school assignment, and the presence of other influences in her life. (R. at 374, 376–78). Thus, the question of consistency was not merely whether Miss [redacted] said she was offered an undisclosed amount of money, or 100 dollars, or whether she saw appellant's penis directly. Rather, it was whether Miss [redacted]'s statements to TL were consistent with her testimony that she had been sexually assaulted by appellant on a number of occasions. To agree with appellant's narrow characterization of "consistency" would be to find that Miss [redacted], a 10-year-old, must have told TL about each encounter, with precision and detail unfitting for her young age. Such a high bar goes far beyond the requirements of M.R.E. 801 (d)(1)(B)(ii). Contrary to appellant's apparent argument (Appellant's Br. 23), the prior statements need not be identical to her in-court testimony for them to be consistent. *See Finch*, 79 M.J. at 395 ("A prior consistent statement need not be identical in every detail to the declarant's . . . testimony at trial. Rather, the prior statement need only be for the

most part consistent and in particular, be consistent with respect to . . . facts of central importance to the trial.").

The minor discrepancies between prior statements and in-court testimony in this case are similar to *United States v. Fleming*, 2022 CCA LEXIS 661 (Army Ct. Crim. App. Nov. 15, 2022) (rev'd on other grounds). In *Fleming*, this court found the military judge did not err in admitting a text message from the victim to rehabilitate her testimony regarding the severity of a slap and forcefulness of choking. There, the defense attacked the witness' "credibility based on the inconsistencies between her trial testimony and statements she made prior to trial." *Id.* at *23. At trial the victim testified that the slap was "stiff" and powerful" and the choking made it "difficult to breathe." *Id.* at *5. On cross-examination, she admitted she minimized the severity of both to investigators, calling the slap a "love tap." *Id.* The military judge in *Fleming* determined that a text message sent ten hours after the alleged assault, stating the appellant "forced" the victim to have sex with her by "chok[ing] the fuck outta [the victim] and . . . slapping [her]," was consistent and rehabilitative to her in-court testimony. *Id.* at *22–23. This court agreed.

As in *Fleming*, the attack on Miss [redacted]'s credibility was rehabilitated by the consistent, near-in-time statements made to a third party shortly after the sexual acts. TL's recorded statement of Miss [redacted], the forensic interview, is much more

similar to Miss [redacted]'s testimony than the text message was to the *Fleming* victim's testimony. Simply because Miss [redacted] told TL about hearing appellant's pants unzip, knowing that he was rubbing his penis on her body, and afterwards being offered money, does not mean those disclosures are not consistent with her in-court testimony, or are not rehabilitative to her credibility after being attacked on that inconsistency on cross-examination. What is consistent and rehabilitative is that the sexual encounters occurred in a manner generally consistent with her prior statement. The military judge correctly determined that the prior consistent statement could rehabilitate an attack on grounds of inconsistency.

**4. The military judge's ruling warrants deference because she placed her reasoning on the record and her findings were supported by the evidence.**

In response to an objection to admitting TL's recorded interview with Miss [redacted], the assistant trial counsel outlined the basis as follows:

> I point the court to *United States versus Finch,* 79 MJ 389. It's a CAAF case out of 2020 . . . it talks at length about 801(d)(1)(B)(ii), as providing an additional basis outside of his motive to bring in a prior consistent statement. [T]he defense . . . in their opening statement . . . they said that you'll hear about the changes that occur, internal inconsistencies, you'll hear she told stories [TL] on day one, a different story later to CID another story to me and my staff in September. . . . Additionally, at the end of defense's cross-examination, they laid out that she had improper influences on her testimony by who she moved in with, with her mother. Finally, they recited from her poetry that an intimation that she was a liar, based on what was in that -- that poetry, they consistently stated throughout their cross that you've changed your story with

> government counsel. You've changed it with me. The government's position that this prior consistent statement of what [Miss [redacted]] told [TL] the day after this happened relates to just the shaving, and just to the assault in the bedroom.

(R. at 392–93).

After hearing from both parties, the military judge took a recess to review the cited case law and TL's interview of Miss [redacted]. (R. at 405). She then ruled in favor of admitting a tailored version of the video interview. (R. at 406). She later explained:

> The court has considered the case law and considered the clips that the government wants to offer into evidence. The court finds that the defense, through cross-examination, has attacked [Miss [redacted]'s] credibility and raised questions of improper influence upon her testimony from others in her life, as well as potential motive to fabricate, one of which may be a recent motive based on what appears to be her current comparatively stable home life.

and

> Defense also raised the question whether [Miss [redacted]'s] memory is faulty as to the alleged offenses which occurred more than three years ago, and as to whether she recalls correctly what she said in various statements prior to trial. As it is within the panel members purview to determine whether [Miss [redacted]] is credible and if she's testifying honestly, the government may introduce excerpts of a prior statement that she made to TL concerning the offenses in question. The excerpts are consistent with [Miss [redacted]'s] testimony in court. They've been marked as PE 16 for ID. And I'm going to admit this evidence under both MRE 80l(d)(1)(B)(i) and (ii).

(R. at 450–51).

Appellant contends this case is analogous to *United States v. Lopez*, an unpublished opinion, because the military judge there simply held "I believe that there has been a sufficient attack of the victim's credibility to put her credibility at issue." ARMY 20200642, 2022 CCA LEXIS 46 (Army Ct. Crim. App. 19 Jan. 2022) at *12. That cursory statement was deemed to be an insufficient finding of fact. *Id.* at *13. In the present case the military judge's ruling is far more specific, as she found that Miss [redacted] had been attacked on inconsistencies regarding the shaving incident as well as the ensuing bedroom sexual assault. The military judge elaborated on the record: "the government may introduce excerpts of a prior statement that she made to TL concerning the offenses in question. The excerpts are consistent with [Miss [redacted]'s] testimony in court," in reference to the forensic interview. (R. at 450–51).[17]

[17] Appellant's argument that the military judge erred in not conducting a Mil. R. Evid. 403 balancing test on the record is misplaced. (Appellant's Br. 14-15). *Finch* lists the admissibility requirements for evidence under Mil. R. Evid. 801(d)(1)(B)(ii), and a Mil. R. Evid. 403 balancing test is not one of them. 79 M.J. at 396. The court's only mention of Mil. R. Evid. 403 is in quoting the drafter's notes to Mil. R. Evid. 801(d)(1)(B)(ii): "as before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of MRE 403." *Id.* The CAAF did not add any additional analysis or discussion beyond this. Thus, while relevant evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion, etc., it is implied that the military judge, as the gatekeeper, will apply the *Finch* factors with Mil. R. Evid. 403 in mind in determining a prior consistent statement's admissibility. Appellant conflates this duty with a requirement that such analysis

By placing her reasoning on the record, the military judge's ruling deserves deference from this court. *See Finch*, 79 M.J. at 397, n.1 ("Where an evidentiary issue is complex and/or merits a written filing by a party, we deem it appropriate for a military judge to place on the record his or her reasoning behind the resolution of that issue. As we have noted, 'it is difficult to defer to a decision when the record does not reflect what the basis of the decision was.'") (quoting *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993)). With that deference, this court can be assured that the ruling was not an abuse of discretion.

**B. Assuming, *arguendo*, the military judge erred, appellant suffered no prejudice.**

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. Article 59(a), UCMJ; 10 U.S.C. § 859(a). "For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *United States v. Frost,* 79 M.J. 104, 111 (C.A.A.F. 2019) (cleaned up). In determining the prejudice from an erroneous

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be done on the record. (Appellant's Br. 22). Furthermore, the probative value of the evidence is high because it goes to the heart of the charged offenses: whether appellant rubbed his penis on Miss [redacted]'s buttocks. Appellant argues this evidence "unfairly bolster[s]" Miss [redacted]'s testimony. (Appellant's Br. 24). However, this ignores the fact that appellant attacked her credibility on grounds specifically rehabilitated by her contemporaneous statements to TL. Thus, this highly probative evidence is not substantially outweighed by the minimal danger of unfair prejudice.

admission of evidence, the court weighs: "(1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Here, even if this court determines the military judge erred in admitting the clips of the forensic interview, appellant suffered no prejudice and is therefore not entitled to relief. A review of the record shows that all four *Kerr* factors weigh against appellant. *Kerr*, 51 M.J. at 405.

First, the government's case was strong. Miss [redacted]'s credible testimony provided vivid accounts of multiple distinct sexual encounters. (R. at 269–71, 279–90). Miss [redacted] recalled in detail how appellant sexually assaulted her in the family home, at times when her mother was not present. (R. at 279–90). An enlisted panel saw and heard her testimony, and the members deemed her credible in the face of appellant's scrutiny at trial. *See United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995) (recognizing that where "witness credibility plays a critical role in the outcome of trial this Court should hesitate to second-guess the trial court's findings). Additionally, Miss [redacted] made outcry statements on the social media site Discord immediately after the shaving incident and sexual assault, corroborating her testimony. (R. at 296, 304). TL's testimony that she

interviewed Miss [redacted] the day following the sexual assault further strengthened the government's case. (R. at 452–57). The testimony of a law enforcement agent who obtained a warrant and searched the family home corroborated Miss [redacted]'s testimony by locating the razor she described appellant using on her genital area (R. at 464–70), and a forensic biologist testified that the razor had DNA from both appellant and Miss [redacted], further corroborating Miss [redacted]'s statement. (R. at 480).

Appellant argued that the shaving incident was not sexual in nature, that it was purely for the sake of caring for his 10-year-old stepdaughter's hygiene. (R. at 536). This explanation was rejected by the panel, as it was absurd on its face that Miss [redacted], who had already dealt with the same personal hygiene issue in the past, would require her step-father's intervention. (R. at 283–85). Further, the presence of women in the household suggests more logical options than her step-father for addressing any genital hygiene issues Miss [redacted] encountered. (R. at 267).

Conversely, appellant's case was weak even without the admission of Miss [redacted]'s prior statements to TL. Appellant relied mostly on attacking Miss [redacted]'s credibility, but this strategy proved ineffective as the panel heard corroborating evidence from more and more witnesses. Moreover, insofar as appellant's theory of the case partially turned on establishing Miss [redacted]'s motive to fabricate, the motive was weak and only tenuously established at trial. Miss [redacted] denied lying about her heritage on a school assignment. (R. at 374). Further, appellant failed to

establish that Miss [redacted]'s allegations were due to other influences in her life, namely her mother's new husband. (R. at 376–78). However, the sources of this phantom influence were not present in Miss [redacted]'s life at the time she made her statement to TL.

Finally, the quality and materiality were low. Miss [redacted]'s statements to TL were not the only source of disclosures that she had been sexually assaulted by appellant. (R. at 262–308, 349–89). Miss [redacted]'s outcry statements made on Discord had already been described to the panel. (R. at 304).

Given that the content of Miss [redacted]'s statements to TL contained no new information that the panel had not already heard from the more powerful direct examination of Miss [redacted]—where she described the sexual assaults—and from TL, the inconsequential statements at issue were immaterial to the government's case. Accordingly, any error in permitting these portions of Miss [redacted]'s forensic interview to be played had little bearing on the outcome of appellant's trial.

## Assignment of Error III

**WHETHER APPELLANT IS OWED RELIEF DUE TO THE GOVERNMENT'S DILATORY POST-TRIAL PROCESSING?**

## Additional Facts

The court-martial adjourned on 17 December 2021. (R. at 690). On 5 January 2022, the defense requested a 20-day delay to complete R.C.M. 1106

matters. (Email from Major Heather Martin, to Captain Andrew Whitlock III, Subject: US v. SGT Thomas- Post-Trial Matters Extension Request (December 21, 2021, 1052). The court entered judgment on 11 February 2022. (Judgment). The trial counsel pre-certification was completed on 15 December 2022 and the military judge completed the authentication on 23 January 2023. (Pre-Certification; Authentication). The court reporter certification was completed on 26 January 2023. (Certification). The record of trial was forwarded to this court on 3 February 2023, and the case was docketed 6 March 2023. (Chronology; Referral and Designation of Counsel). Including defense delay, the total elapsed time from adjournment to docketing was 444 days, and from entry of judgment to docketing was 388 days.[18]

On 27 November 2023, the government submitted a memorandum for record (MFR) outlining the reasons for delay. (Post-Trial Delay MFR). The MFR documented court reporter shortages, a substantial trial backlog, and docketing issues which plagued the Fort Stewart Office of the Staff Judge Advocate (OSJA) at the time of the trial. (Post-Trial Delay MFR). The MFR goes on to detail the particular staffing issues and challenges faced by the court reporters who assisted with appellant's courts-martial. (Post-Trial Delay MFR). While the Fort Stewart

[18] Appellant mistakenly claims that 444 days elapsed from judgment, rather than adjournment, to docketing. (Appellant's Br. 25).

OSJA did make attempts to contract out their transcription needs as well as acquire additional court reporters, their attempts were not successful. (Post-Trial Delay MFR).

## Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *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

### A. Fifth Amendment Procedural Due Process.

Servicemembers convicted at courts-martial have a due process right, under the Fifth Amendment, to post-trial processing without unreasonable delay. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003). In order to analyze post-trial delays and due process, courts analyze four factors (*Barker* factors) that examine: "(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." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Moreno*, 63 M.J. at 135. Courts of Criminal Appeals will also further examine prejudice in light of three primary sub-factors: (1) prevention of oppressive incarceration; (2) minimization of appellant's anxiety and concern while awaiting the outcome of the appeal; and

(3) limiting the possibility of impairment of the grounds for appeal and defense at a possible rehearing. *Moreno*, 63 M.J. at 139–40. The four *Barker* factors must be balanced, and "no single factor [is] required to find that post-trial delay constitutes a due process violation." *United States v. Toohey*, 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). However, the *Barker* analysis is not required if this court determines that any due process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

In situations where the appellant is unable to show they have suffered prejudice, the court will find a due process violation only when, "in balancing the other three factors, [the post-trial] delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 88. If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Ashby*, 68 M.J. at 125. This analysis is "separate and distinct from the consideration of prejudice as one of the four *Barker* factors." *Id.* Under this review, the court considers "the totality of the

circumstances" based on the "entire record." *Id.* The court "will not presume prejudice from the length of the delay alone," but instead requires "evidence of prejudice in the record." *Id.*

**B. Sentence Appropriateness and Excessive Delay.**

Absent a due process violation, this court next considers whether relief is warranted "on the basis of the entire record" under on the Courts of Criminal Appeals' (CCA) sentence appropriateness authority pursuant to 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." Since 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." *United States v. Winfield*, 83 M.J. 662, 66 (Army Ct. Crim. App. 27 Apr. 2023). Even if there is excessive delay, "Article 66(d)(2) dictates [that 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." *Id.*

## Argument

The government did not violate appellant's due process rights. Even if the government did, under the totality of the circumstances, appellant deserves no relief under a sentence appropriateness analysis; relief is inappropriate in this case because appellant did not suffer prejudice and because there is no harm to correct. Therefore, this court should affirm the findings and sentence as adjudged.

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

From the date appellant's court-martial adjourned to the date of docketing with this court, 444 days elapsed. (R. at 146; Referral and Designation of Counsel). Given the length of the delay, the first factor weighs in appellant's favor.

There is no question that the Fort Stewart OSJA was struggling with a large backlog of cases requiring post-trial processing. (Post-Trial Delay MFR). Further, appellant's case posed particular challenges as the OSJA dealt with court reporter shortages. (Post-Trial Delay MFR). Attempts to triage the delay in appellant's and other cases were largely unsuccessful. While mitigating, this factor weighs in appellant's favor.

### B. The remaining *Barker* factors weigh in favor of the government.

Appellant never demanded speedy post-trial processing. While this does not waive appellant's speedy post-trial rights, the third *Barker* factor nevertheless

favors the government. *Moreno*, 63 M.J. at 138. The Supreme Court in *Barker* succinctly 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 531.

Turning to the fourth *Barker* factor, Appellant fails to establish prejudice, or rather, fails to argue that factor.[19]

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

Appellant argues that his delay was egregious and warrants relief under *Toohey*. Appellant has failed to show that the delay was so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system" and overcome the absence of prejudice. *Toohey*, 63 M.J. at 362.[20] Under the "difficult and sensitive balancing process," the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

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

Even if the delay was excessive, relief is not warranted because appellant's

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[19] There is no evidence in the record—nor does appellant allege—that he has suffered any particularized anxiety and concern "distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* at 140. Second, appellant makes no suggestion that the delay impairs appellant's ground for appeal or defense, in case of retrial, have been impaired.

[20] In *Toohey*, 2,240 days had elapsed between trial and review by the CCA. *Id.* at 356.

sentence was appropriate and setting aside any term of confinement would be an undeserved windfall to appellant.

Appellant's sentence is appropriate in light of his crime and the maximum allowable punishment for his conviction. *Manual for Courts-Martial*, *United States* (2019 ed.) [*MCM*], App'x. 12; *see United States v. Hemmingsen*, ARMY 20180611, 2021 CCA LEXIS 180, at *9 (Army Ct. Crim. App. 15 Apr. 2021) (mem. op.) (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 contested all charges relating to his repeated sexual assaults against his 10 year-old stepdaughter, Miss [redacted]. (R. at 49). At court-martial, the enlisted panel found Appellant guilty of two specifications of sexual assault of a child. (R. at 589). His crimes inflicted lasting emotional damage upon Miss [redacted]. (*See* App. Ex. XXXVII). Miss [redacted] explained that in the years since the assault, she has trouble making friends, she abhors paternal figures. (App. Ex. XXXVII). The actions of Appellant have given Miss [redacted] a deep-seated fear and distrust of others. Further, Miss [redacted] explained that she has a tendency to withdraw from others when someone or something reminds her of Appellant. (App. Ex. XXXVII). She characterized herself as "tough to be around most of the time." (App. Ex.

XXXVII). A feeling of hopelessness permeates her entire statement: "I typically don't see a future for myself due to these past dilemmas." (App. Ex. XXXVII). It goes without saying that appellant's misconduct robbed Miss [redacted] of her childhood, her dignity, and caused lasting trauma that may persist through her lifetime.

Based on his pleas and the findings of the panel, appellant faced a maximum possible punishment of a dishonorable discharge and 69 years of confinement. (*MCM*, App'x. 12). The court-martial sentenced appellant to confinement for eight years and a dishonorable discharge—a small fraction of his total punitive exposure. (R. at 688; STR). During pre-sentencing argument, government counsel asked for no less than thirteen years of confinement and defense asked for three years. (R. at 659, 666). Appellant's sentence of eight years falls squarely in the middle of the parties' requests.

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. Appellant asks this court to grant relief by setting aside a period of confinement.[21] (Appellant's Br. 28).

[21] Though appellant makes no specific prayer for relief, he cites to a series of decisions in which this court has granted relief from sentences to confinement and concludes "appellant respectfully asks this honorable court to set aside the findings

However, such relief is not appropriate in this case. Appellant committed multiple sexual assaults against his stepdaughter, and he received a lenient sentence, well under his maximum punitive exposure.

Considering the seriousness of the offenses for which appellant was found guilty and was convicted and that appellant did not suffer any prejudice from the delay, this court should affirm appellant's sentence and find that relief is inappropriate in this case.

## Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

[redacted]
ALEX J. BERKUN
CPT, JA
Appellate Attorney, Government
Appellate Division

[redacted]
KALIN P. SCHLUETER
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]
JACQUELINE J. DEGAINE
LTC, JA
Deputy Chief, Government
Appellate Division

[redacted]
CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate
Division

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and sentence." (Appellant's Br. 27–28). Given the relatively modest post-trial delay in appellant's case, weighed against the gravity of appellant's sexual misconduct, appellee avers that no such relief is due appellant.

**Certificate of Filing and Service**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 1st day of December 2023.

[redacted]
Paralegal Specialist
Government Appellate Division

# APPENDIX

# *United States v. Fleming*

United States Army Court of Criminal Appeals

November 15, 2022, Decided

ARMY 20200721

**Reporter**
2022 CCA LEXIS 661 *; 2022 WL 17684889

UNITED STATES, Appellee v. Specialist JOSEPH L. FLEMING, United States Army, Appellant

**Notice:** NOT FOR PUBLICATION

**Prior History:** **[*1]** Headquarters, U.S. Army Alaska. Larry A. Babin, Jr., Military Judge. Colonel Susan K. McConnell, Staff Judge Advocate.

**Counsel:** For Appellant: Major Rachel P. Gordienko, JA (argued); Jonathan F. Potter, Esquire; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Julia M. Farinas, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Major Julia M. Farinas, JA (on reply brief); Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Julia M. Farinas, JA (brief on specified issue).

For Appellee: Captain Cynthia A. Hunter, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Jennifer A. Sundook, JA; Captain Cynthia A. Hunter, JA (on brief); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Cynthia A. Hunter, JA (brief on specified issue).

**Judges:** Before SULLIVAN, PENLAND, and ARGUELLES[1] Appellate Military Judges. Chief Judge SULLIVAN and Judge PENLAND concur.

**Opinion by:** ARGUELLES

## Opinion

MEMORANDUM OPINION

ARGUELLES, Judge:

A military judge sitting as a general court martial convicted appellant, contrary to his pleas, of one **[*2]** specification of sexual assault in violation of *Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2018)* [UCMJ].[2] The military judge sentenced appellant to a dishonorable discharge, confinement for three years, and reduction to the grade of E-1. The convening authority took no action on the findings and sentence.

Having fully considered all of the pleadings and the entire record, we find that the military judge erred in admitting appellant's confession and several hearsay text messages. Moreover, because the remaining record absent the involuntary confession and hearsay messages is factually insufficient to sustain appellant's conviction, the guilty finding and sentence must be set aside and ultimately dismissed.[3]

---

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

[2] Appellant was acquitted of one specification of abusive sexual contact, in violation of Article 120, UCMJ.

[3] In light of the relief provided, we need not reach appellant's other assignments of error.

**BACKGROUND**

On 27 July 2019, the victim, an airman stationed at Eielson Air Force Base ("Eielson AFB") in Alaska, invited appellant to an open-mic night after chatting with him for several days on the Snapchat social media platform. Appellant, a Soldier stationed at Fort Wainwright, Alaska, accepted the invite, and he and a friend attended the event, which lasted from approximately 1900-2100. Appellant and the victim chatted and got to know each other, and upon leaving, the victim told appellant she would let him know if she **[*3]** went out later that night.

Later that evening, the victim invited appellant to meet her at a bar in Fairbanks. Appellant had another Soldier, who was under 21 and not drinking, drive him to the bar at approximately 0100 and wait outside while he went in and met the victim. While at the bar, appellant and the victim interacted several times, and after declining a ride home from several of her friends who were leaving earlier, the victim accepted appellant's offer of a ride home with his friend.

On the ride back to Eielson AFB, appellant's friend drove, and appellant and the victim sat in the backseat. Appellant and the victim were cuddling and kissing, and at one point appellant tried to touch the victim's inner thighs but removed his hand after she squeezed them together. Although the victim testified at trial that this touching made her uncomfortable and indicated to her that appellant "[did not] respect [her] boundaries," she also admitted that she did not communicate those feelings to either appellant or the driver. Nor did she notify the gate guard that anything was wrong when they arrived at the air base.

At some point during the car ride, appellant indicated that he needed to use **[*4]** the restroom. After they arrived at the victim's barracks, both appellant and the driver testified that the victim was insistent that he come up to her room to use the bathroom. The victim, however, claimed that it was appellant's idea to come inside and use the restroom in her barracks room. In any event, the victim testified on cross-examination that she had no issue with him coming upstairs to use her bathroom.

While appellant used the bathroom, the victim got into bed. Although there is some dispute in the testimony, both appellant and the victim seemed to agree that they at least started talking, and that appellant took off his pants. In response, the victim did not get out of the bed, ask appellant to leave, or otherwise indicate her displeasure with his partial disrobing. At some point after appellant took off his pants, the victim stated that she did not want to have sex because she had just gotten off birth control and was very fertile, and did not have a condom. In response, appellant asked the victim if he could perform oral sex on her.

Although the victim claimed that she never consented to oral sex, she also admitted that she never said "no," and that she positioned herself **[*5]** at the end of the bed and removed her own top and bra. The victim also admitted that after appellant started performing oral sex, she did not ask him to stop, push him away, or try to get out of the bed.

Although appellant and the victim differed in their testimony about whether it occurred before or after the oral sex started, at some point the victim "move[d] back" and appellant slapped her on the cheek. The victim testified at trial that this was a "stiff" and "powerful" slap. On cross-examination, however, she admitted that she previously told investigators that the slap was not very "powerful." Appellant testified that, while the victim was giggling and moving around during oral sex, he gave her a "love tap" in an effort to "be a little freaky."

Appellant stated that he thought the victim was enjoying the playfulness and the slap, as she continued to be a willing participant in the oral sex.

Appellant then asked the victim to turn over on her hands and knees so that he could perform oral sex on her from that position, and the victim complied. Appellant then took off his own clothes and asked the victim to "come here," which she did by crawling backwards towards him. Appellant testified **[*6]** at that point he began to rub against her buttocks in order to get an erection, and based on the fact that the victim was moaning and said "you better not nut in me," he climbed up on the bed and had her arch her back so he could penetrate her from behind with his penis.

After engaging in sex in this position for a few minutes, the victim and appellant both got into the bed, where they performed simultaneous oral sex on each other. At appellant's request, the victim then climbed on top of him and they again engaged in penile penetration. While in this position, appellant put his hands on the victim's breasts and neck, which the victim described at trial as "choking." The victim also admitted, however, that she was able to speak, was never light-headed, did not think she would pass out, never told appellant to stop, and did not get off of him or out of the bed. Appellant testified that he placed his hand or her neck because he was trying to "add more pleasure to her orgasm," and thought she liked it because she "started to ride faster." Appellant and the victim changed positions two more times, engaging in intercourse in the "missionary position," and then with the victim lying on her **[*7]** belly, before appellant finally ejaculated into the sheets and went to the bathroom. When appellant returned from the bathroom, the victim performed oral sex on him one more time.

As appellant got dressed, the victim confronted him and said "that wasn't supposed to happen," and that "[she] didn't want to have sex with him." Appellant tried to comfort her by telling her that "everything was going to be okay," and that he would buy her "Plan B," a morning-after pill designed to prevent pregnancies. The next day when the victim texted appellant that she had not wanted to have sex with him, appellant replied "All right. I know, my fault."

Throughout her cross-examination, the victim conceded that, other than her initial statement about not wanting to have intercourse because she had just gotten off birth control, she did not tell appellant at any point that she did not want to have sex, and that she never gave him "any physical or verbal indication that [she] did not want to change positions." While appellant acknowledged that the victim initially made the birth control remark, he testified that he believed he "changed her mind" by getting her "turned on enough to want to have sex."

The victim, **[*8]** however, testified that once appellant slapped her, she felt like she "couldn't defend [herself]," and went along with the intercourse and all of the position changes because appellant ordered her to do so in a "demanding" tone. The victim further testified that she "froze up" after the initial penetration, and reiterated that she acquiesced to all of the position changes because she was scared and afraid of appellant.

## LAW AND DISCUSSION

### *A. Appellant's Second Interview with CID*

#### *1. Additional Facts*

On 26 September 2019, appellant voluntarily appeared for a second interview at CID, which consisted of a polygraph and post-polygraph

interview. The agent ("Agent") who conducted the interview, which lasted over eleven hours, had previously conducted over one thousand suspect interviews. He testified at trial that he was "probably one of the most seasoned investigators we have in the Army." Among other things, the Agent served as a case agent, evidence custodian, polygraph examiner, and team chief, and in addition to his extensive CID training, he also possessed a Bachelor of Science degree in psychology. The Agent was also eighteen years older than appellant, a high-school graduate with four **[*9]** years of service in the Army and a GT score of 91. Appellant told the Agent at the beginning of the interview that he only slept for three hours the night prior.

The first six hours of the interview were questions and answers, with significant periods during which the Agent spoke in a monologue. Despite having his story continuously challenged by the Agent, appellant maintained throughout the interview that the victim had consented to their sexual activity. Next, appellant spent approximately two and half hours typing up his statement. Appellant concluded the statement with assertions that he thought that after the oral sex the victim changed her mind about not wanting to have sex, that he "proceeded to act as everything was normal, thinking she changed her mind," and that "I was not aware that she was just listening to everything I told her because she just wanted it to be over."

After reading appellant's typewritten statement, the Agent became enraged and over the next hour berated appellant, saying among other things:

> Man, this is bullshit, I told you not to put this crap in here. This whole thing about super fertile. That I will talk . . . be careful. And she said okay. That's bullshit. **[*10]** You're fucking writing all this crap in here;
>
> Man, come on now, I told you to write that stuff in here. And you're in here writing fucking romance novels like you guys are buddies . . . man, why waste the fucking time and tell the same story that you've already told again? And then come back and put all that crap at the end;
>
> Get up [Agent makes Appellant leave the keyboard]. You make this sound like some sort of fucking romance novel;
>
> Why put this bullshit in here that that you already have that you already talked about? That you know is not the fucking truth. [Appellant stated in response to Agent "I'll delete it."];
>
> I'll go in here and I'll clean it up with some questions; I know that but why the fuck put this crap in here that you and I have already talked about? Didn't fucking happen;
>
> That's some bullshit, too. I know she didn't fucking tell you that . . . no, the fucking nut bullshit;
>
> You're not deleting this . . . you can add whatever you want down here;
>
> Why do I have to have this conversation again with you? I said make sure you put the fucking accurate stuff in this statement and then you come in here and type this shit. And it ain't fucking the truth. You wrote a goddamn love novel **[*11]** like you guys were just cuddling;
>
> It doesn't matter, man. Just type your shit, let's go. We've been here all fucking day, man. You took two and a half hours to write some bullshit . . . like I don't even know why;
>
> You're full of words [Agent responded in sarcastic tone after Appellant attempted to clarify his words]; and,
>
> I think you're full of shit. I think you're a fucking liar.

After this series of exchanges, the Agent wrote questions and typed down appellant's

responses. As part of those responses, appellant admitted that the victim "said that she did not want to have sex that night," and reluctantly answered "yes" to the subsequent question of "Did you sexually assault [victim]." At trial, appellant testified that he finally said "yes" to sexually assaulting the victim because after "10 to 11 hours" of "talking about 'no' . . . and what does 'no' mean," he essentially gave in and answered in a "hasty instead of relaxed and a thought [sic] answer." When asked at trial to clarify his "confession," appellant said that he did not sexually assault the victim because "after I gave her oral sex, her pleasure rose and that changed her mind and that led to sex. So as that led to sex, that **[*12]** — the form of consent changed. So, she wanted to have sex."

On cross-examination at trial, after first describing his conduct at the end of the interview as "overreaction," the Agent admitted that he "berated" appellant. Upon further questioning, the Agent also admitted that his behavior was not consistent with his CID training, "unnecessary," "uncalled for," and "*abusive*." The defense originally raised this issue in a motion to suppress, but after appellant elected trial by military judge alone, counsel indicated that they would "withdraw" the motion such that the military judge could hear the testimony of the agent and rule on the motion to suppress mid-trial

When he ruled on the motion, the military judge noted that appellant voluntarily met with the Agent, waived his rights, did not appear to be overly fatigued, and had water and food offered to him throughout the interview. The military judge also found that appellant appeared comfortable responding to and confronting the Agent, and that the Agent never invaded his personal space. Although the military judge noted that the Agent's actions were "demeaning and inappropriate," he ultimately concluded that because "they did not amount **[*13]** to an overtaking of the will of the accused . . . . [t]he accused's statement was voluntary and his will was not overborne."

*2. Analysis*

Military Rule of Evidence [Mil. R. Evid.] 304(a)(1) provides that an involuntary statement "obtained . . . through the use of coercion, unlawful influence, or unlawful inducement" is inadmissible at trial. Although we review a military judge's decision to exclude evidence for abuse of discretion, the voluntariness of a confession is reviewed *de novo.* United States v. Lewis, 78 M.J. 447, 453 (C.A.A.F. 2019), citing United States v. Bresnahan, 62 M.J. 137, 141 (C.A.A.F. 2005). *See also* United States v. Chatfield, 67 M.J. 432, 437 (C.A.A.F. 2009) (although on appeal a military judge's denial of a motion to suppress a confession is reviewed for an abuse of discretion, any conclusions of law supporting that ruling, including whether a confession is involuntary, are reviewed *de novo)* (citations omitted). Moreover, the government bears the burden of showing that a confession "is the product of an essentially free and unconstrained choice by its maker." United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996).

The voluntariness of a confession turns on whether appellant's "will has been overborne." Lewis, 78 M.J. at 453, citing Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). If appellant's "will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process." Bubonics, 45 M.J. at 95 (citing Culombe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961)). In determining whether an appellant's will was overborne, we look at **[*14]** the totality of the circumstances, to include the characteristics of the appellant

and the details of the interrogation. Lewis, 78 M.J. at 453. In making this assessment, the Court of Appeals for the Armed Forces (CAAF) has also deemed it appropriate to consider the appellant's age, education, experience, intelligence, whether he was advised of his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008) (citations omitted).

In ruling that appellant's confession was voluntary, the military judge relied primarily on Freeman, finding that although appellant was a young specialist, and the interview lasted more than ten hours, he voluntarily met with the Agent, waived his rights, indicated that he had a sufficient amount of sleep and was not hungry, never complained about the process, and never asked for a lawyer. The ultimate issue in Freeman, however, was *not* whether the accused was subject to inappropriate psychological coercion. Rather, the voluntariness of the confession in Freeman turned on the interviewers' threats to refer the case to civilian authorities and their false advisements that witnesses **[*15]** saw the accused at the scene and that they had his fingerprints. Id. at 455-56. After finding that an interviewer's false promises and lies were not necessarily determinative in a voluntariness inquiry, the CAAF in Freeman held that the confession was voluntary under all the circumstances. Id. at 456-57.

On the other hand, in *United States v. Martinez*, the Court of Military Appeals (CMA) held that the fact that appellant waived his rights or was "physically free to leave" was not "especially compelling under circumstances in which the claim is one of *psychological* coercion that caused the suspect to 'crack' and 'give up' *during* the session." 38 M.J. 82, 86 (C.M.A. 1993) (emphasis in original). The same court explained that "totality of the circumstances" does not necessarily equate to a "cold and sterile list of isolated facts," but rather requires a "holistic assessment of human interaction." Id. at 87. *See also* Bubonics, 45 M.J. at 95 ("The court's responsibility to consider the totality of the surrounding circumstances, however, does not translate into a prescription to weigh *all* such factors *evenly.")* (emphasis in original).

Along the same lines, in United States v. Planter, 18 U.S.C.M.A. 469, 470, 40 C.M.R. 181 (C.M.A. 1969), the interviewing agent told appellant that his prior denial in an earlier interview was "an outright lie," and that the agent **[*16]** was convinced that appellant stole the generators in question. The agent also admitted that by yelling at and berating appellant, he was "pushing [appellant] towards an emotional state." Id. at 471. In addition, the agent admitted that in getting appellant to confess, "I achieved what I started out to do." *Id.* In finding that the "method used by the investigator was patently coercive and that the statements were thereby involuntary," the CMA noted that "[t]he approach was not even subtle." The court further explained that:

> The tactics utilized were admittedly designed to push the accused "towards an emotional state," by attempting to "degrade" him. It can hardly be contended that a statement made in such circumstances is voluntary.

Id. at 472. Compare with Chatfield, 67 M.J. at 440 (holding that the conclusion that appellant's statements were voluntary was further buttressed by the fact that interviewer was "conversational" and not accusatory); United States v. Delarosa, 67 M.J. 318, 326 (C.A.A.F. 2009) (holding that appellant's statements were voluntary where the "atmosphere of the interrogation was not laced with coercion or intimidation," and the interviewer's tone was "never verbally abusive

or threatening").

In this case, we agree with appellant that the military judge put too much **[*17]** emphasis on the *Freeman* factors pertaining to his interaction with the Agent at the outset of the interview, as opposed to what happened approximately eight hours into the interview after appellant typed his statement and ultimately "confessed." While we are cognizant that the military judge also found there was "no evidence of psychological coercion," we note that most of the factors relied upon by the military judge in support of this finding pertained to *physical* as opposed to *psychological* factors, *i.e.*, appellant appeared alert, he moved around the room, his personal space was not invaded, and he was not threatened.

Rather, we find that this case is more analogous to *Planter*. First, as in *Planter*, the approach of the Agent in this case was "not even subtle." Indeed, the Agent admitted that he "berated" appellant by among other things repeatedly telling him that his version of the evening in question was "bullshit" and a "fucking lie." The Agent conceded at trial that his tactics in obtaining the confession were "abusive," "uncalled for," and not consistent with his CID training. Likewise, although the Agent did not admit as much, we have no doubt that his tactics were designed "to push the accused **[*18]** towards an emotional state by attempting to degrade him." *Planter, 18 U.S.C.M.A. at 472*.

Accordingly, the government has failed to meet its burden to show that appellant's confession was the "product of an essentially free and unconstrained choice by its maker." *Bubonics, 45 M.J. at 95*. To the contrary, after considering the totality of the circumstances, to include the characteristics of the appellant and the details of the interrogation, we find that because appellant's "will was overborne and his capacity for self-determination was critically impaired," his confession was not voluntary. *Id.* *See* *Miller v. Fenton, 474 U.S. 104, 109, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985)* (holding that statements extracted by psychological coercion are "revolting to the sense of justice").

Finding appellant's confession to be involuntary, we must set aside the finding of guilt unless the government can show that the admission was harmless beyond a reasonable doubt in that it did not contribute to the conviction. *Freeman, 65 M.J. at 453*; *Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)*. *See also* *United States v. Mott, 72 M.J. 319, 332 (C.A.A.F. 2013)* (holding that the erroneous admission of a confession is not harmless beyond a reasonable doubt if "there is a reasonable probability that the evidence complained of might have contributed to the conviction") citing *United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007)*.

Given the totality of the circumstances in this case, including the fact that the victim **[*19]** never said "no" or told appellant to stop, we are not convinced that the military judge would have rendered the same verdict absent appellant's tainted confession. *See* *Mott, 72 M.J. at 332* ("Erroneous admission of a confession 'requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless") (citing *Fulminante, 499 U.S. at 296*.).

*B. Admission of the Victim's Text Messages*

*I. Additional Facts*

The military judge found that the assault occurred sometime after 0400. At approximately 1442 that same day, the victim and a friend exchanged the following text

messages:

> Friend: You made it home?
> Victim: yeah but it was a bad night [First statement]
> Victim: To make a long story short. It was terrible [Second statement]
> Friend: What was terrible tho?
> Victim: He forced me to have sex with him this [n-word] choked the fuck outta me and started slapping me [Third statement]
> Victim: And after everything I was upset and crying cause he just would not leave [Fourth statement]

The victim testified that when she sent these messages to her friend, she had not made up her mind about whether she wanted to report the assault.

*2. Prior Consistent Statement*

With respect to the third statement, at **[*20]** trial the victim testified on direct that she complied with appellant's demands out of fear, that he gave her a "stiff smack" across the face that made it feel like she could not defend herself, and that he squeezed her neck "hard enough that it was difficult to breathe." On cross-examination, the defense repeatedly asked the victim about her failure to say "no," and also challenged her with earlier statements she had made to law enforcement agents that appeared to minimize the severity of both the slap and the choking. In overruling the defense objection to this statement, the military judge found that it was not hearsay because it was a prior consistent statement offered to rehabilitate the victim's credibility when attacked on another ground pursuant to Mil. R. Evid. 801(d)(1)(B)(ii).

The military judge explained that on cross-examination, the defense challenged the victim's trial testimony about the force of the slap and the alleged choking by asking her about statements she made before trial which appeared to minimize the severity of those events. In addition, the military judge noted that considering the cross-examination in its entirety, including the fact that the victim was repeatedly asked about her "lack **[*21]** of expression of nonconsent throughout the entire encounter [which] played into the attack on the declarant's credibility," the third statement was admissible to rehabilitate her credibility.

We review a military judge's decision to admit evidence under an abuse of discretion standard. *United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019)*. Military Rule of Evidence 801(d)(1)(B)(ii) provides that a statement that is consistent with declarant's testimony, and is offered to rehabilitate her credibility as a witness "when attacked on another ground," is not hearsay. In *United States v. Finch, 79 M.J. 389, 395 (C.A.A.F. 2020)*, the CAAF explained that the mention of "another ground" in Mil. R. Evid. 801(d)(1)(B)(ii) refers to one other than the grounds listed in Mil. R. Evid. 801(d)(1)(B)(i): recent fabrication or an improper influence or motive in testifying. Although the rule itself does not specify what types of attacks a prior consistent statement under (B)(ii) is admissible to rebut, the Drafters' Analysis lists "charges of inconsistency or faulty memory" as two examples. *Id.* (citing *Manual for Courts-Martial of the United States (MCM)*, Drafters' Analysis, App. 22 at A22-61 (2016)).

As such, for a prior consistent statement to be admissible under Mil. R. Evid. 801(d)(1)(B)(ii), it must satisfy the following: (1) the declarant of the out-of-court statement must testify, (2) the declarant must be subject to cross-examination **[*22]** about the prior statement, (3) the statement must be consistent with the declarant's testimony, (4) the declarant's credibility as a witness must have been attacked on a ground other than the ones listed in M.R.E. 801(d)(1)(B)(i), and (5) the

prior consistent statement "must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Finch, 79 M.J. at 396*.

Applied here, the victim testified and was subject to cross-examination. With respect to the third *Finch* prong, the victim's testimony on direct—that she complied with appellant's demands out of fear, that he gave her a "stiff smack" across the face, and that he squeezed her neck "hard enough that it was difficult to breathe"—were all consistent with her statements in the text that appellant "forced" her to have sex with him, "choked the fuck outta me" and "started slapping me." *See Finch, 79 M.J. at 395* (holding that a prior consistent statement need not be identical in every detail to the declarant's testimony at trial), citing *United States v. Vest, 842 F.2d 1319, 1321 (1st Cir. 1988)*.

During cross-examination, defense counsel did not appear to be challenging the victim's version of the events as a recent fabrication or the product of an improper influence or motive. Rather, because counsel was trying to **[*23]** impeach the victim based on the inconsistencies between her trial testimony and statements she made prior to trial, he attacked her credibility "on another ground." Indeed, the military judge made detailed findings explaining how the assertions in the third statement of the text were relevant to rehabilitate specific "inconsistency" attacks on the victim's credibility at trial. *See Finch, 79 M.J. at 397* ("[W]here the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted") citing *United States v. Flesher, 73 M.J. 303, 311 (C.A.A.F. 2014)*; *United States v. Livingston, ARMY 20190587, 2022 CCA LEXIS 145 at *20 (Army Ct. Crim. App. 8 Mar 2022)* ("A prior statement is relevant under the rule if it is mostly consistent with the declarant's testimony and sufficiently specific to respond only to the grounds upon which the declarant was attacked"). Accordingly, we find that the military judge did not abuse his discretion in ruling that the third statement was not hearsay and therefore admissible under Mil. R. Evid. 801(d)(1)(B)(ii).

3. *Then-Existing Mental, Emotional, or Physical Condition*

The military judge ruled that because the first two statements had "indicia of truth" and "sound[ed] like an outcry," they were admissible as exceptions to the hearsay rule as statements of a then-existing mental, emotional, or physical condition. Mil. R. Evid. 803(3). **[*24]** Likewise, the military judge ruled that the third and fourth statements were also hearsay but again admissible under Mil. R. Evid. 803(3).[4] Military Rule of Evidence 803(3) provides that the following is an exception to the hearsay rule:

> A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health) but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

In short, the first, second, and fourth statements relate to things that happened to the victim in the *past*, i.e., it *was* a bad night, it *was* terrible, he *forced* me to have sex with him, he *choked* and *slapped* me, and I *was* upset and crying. As such, because these statements do not show the victim/declarant's *present* state of mind, but rather are statements of memory describing past events,

[4] As we have already determined that the military judge properly admitted the third statement as a prior consistent statement, we need not determine whether that statement was also admissible as a hearsay exception under Mil. R. Evid. 803(3).

they do not qualify as hearsay exceptions under Mil. R. Evid. 803(3). *See* United States v. Shepard, 34 M.J. 583, 590 (A.C.M.R. 1992) (holding that "statements regarding past events are statements of 'memory or belief,' specifically excluded by Mil. R. Evid. 803(3)"); United States v. Elmore, 33 M.J. 387, 396 (C.A.A.F. 1991) (holding that statements citing prior threats and assaults are specifically not included under the Mil. R. Evid. 803(3) exception); **[*25]** United States v. Reyes, 78 M.J. 831, 833 (Army. Ct. Crim. App. 2019) (holding that statements about past events do not qualify as hearsay exceptions under Mil. R. Evid. 803(3)); United States v. Robles, 53 M.J. 783, 795 (A.F. Ct. Crim. App. 2000) (holding that because the victim's statement describing the abuse amounted to a memory, the military judge erred in admitting it under Mil. R. Evid. 803(3)) (citation omitted); Stephen A. Saltzburg, et. al., *Military Rules of Evidence Manual*, Rule 803(3), at 8-92 (7th ed. 2011) (Rule 803(3) "generally does not permit evidence of present memory or belief to prove the existence of a past condition or fact.").

As noted above, in ruling that the first two statements fell within the Mil. R. Evid. 803(3) hearsay exception, the military judge said that they "sound[ed] like an outcry." The military judge did not, however, make any other findings or record as to why he considered these first two statements to be an outcry, and indeed stated earlier on the record that he did not consider them to be the product of an excited utterance. Latching onto the military judge's reference to an "outcry," the government now cites to United States v. Black, ARMY 20140010, 2016 CCA LEXIS 278 at *10 (Army Ct. Crim. App. 29 Apr 2016) (mem. op.) for the proposition that "evidence of fresh complaint . . . is relevant and admissible." Although the term "outcry" does not appear in the Manual for Courts-Martial, as was the case in Black, we will find that the term "outcry" as used by the military judge in this case is **[*26]** synonymous with "fresh complaint." *Id.*

To the extent the government is asserting that we recognized an independent "fresh complaint" or "outcry" exception to the hearsay rule in Black, this argument misses the mark completely. To the contrary, in Black we held that "[e]vidence of [a] fresh complaint, which is either non-hearsay under Mil. R. Evid. 801 *or fits within an exception to the hearsay rule under Mil. R. Evid. 803*, is relevant and admissible." *Id.* (emphasis added), citing United States v. Smith, 14 M.J. 845, 847 (A.C.M.R. 1982). We further held that "reference to 'fresh complaint' should be avoided as confusing and unduly restrictive," and concluded that the military judge abused his discretion by allowing in hearsay statements through application of a stand-alone "outcry" evidence exception. *Id.* at 11 (citing Smith, 14 M.J. at 847 n.1)[5].

As we also noted in Black, the most recent MCM to define the term "fresh complaint" explained that "[t]his evidence is to be restricted to proof that the complaint, including the identification of the offender, was made. *A description of the details of the offense given during the course of making the complaint is not admissible under this rule*." 2016 CCA

[5] We are cognizant that the most recent Drafters' Analysis for Rule 803(3) notes that "[f]resh complaint by a victim of a sexual assault may come within" the 803(3) exception. *MCM*, Drafters' Analysis, App. 22 at 22-63 (2016). But the fact that a "fresh complaint" *may* fall within Rule 803(3) does not create a stand-alone exception to the hearsay rule, nor does it relieve a party seeking to admit a "fresh complaint" under Rule 803(3) from meeting his or her burden to show that the statement is not a statement of "memory or belief to prove the fact remembered." Moreover, to the extent there is any conflict between the Rule and the Drafters' Analysis, the language of the Rule is binding. *See MCM, Part I*, ¶4 Discussion (Drafters' Analysis and other supplementary materials in MCM do not constitute the official views of the Department of Defense, military departments, or CAAF, and they do not constitute binding rules); United States v. Fosler, 70 M.J. 225, 231 (C.A.A.F. 2011) (same) (citations omitted).

LEXIS at *9, citing MCM, ¶142c (1969) (emphasis added); *Cf.* United States v. Moore, ARMY 20190764, 2021 CCA LEXIS 24 at *8 (Army Ct. Crim. App. 24 Jan. 2021) (mem. op.) (holding that it would have been more appropriate **[*27]** for the military judge to allow victim's mother to testify "as to when her daughter made the initial disclosure, without getting into the particulars of the disclosure"), citing People v. Brown, 8 Cal.4th 746, 35 Cal. Rptr. 2d 407, 883 P.2d 949, 957-58 (Cal. 1994) ("Of course, only the fact that a complaint was made, and the circumstances surrounding its making, ordinarily are admissible; admission of evidence concerning details of the statements themselves, to prove the truth of the matter asserted, would violate the hearsay rule").

As such, we reject any contention that because either the first, second, or fourth statements were "fresh complaints," they fall within the hearsay exception set forth in Mil. R. Evid. 803(3). To the contrary, because all three statements still suffer from the fatal flaw that they are not expressions of the declarant's *present* state of mind, they do not fall within the hearsay exception of Mil. R. Evid. 803(3).

In sum, because the military judge improperly considered the first, second, and fourth hearsay statements for the truth of their matter, he abused his discretion in admitting these statements into evidence.

*C. Factual Sufficiency*

In pertinent part, the version of Article 66(d)(1), UCMJ, governing this appeal provides that we may "weigh the evidence, judge the credibility of witnesses, and determine **[*28]** controverted questions of fact." In doing so, we are required to undertake a de novo "fresh, impartial look at the evidence" and need not give deference to the findings of the trial court. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). On the other hand, our ability to conduct such a "factual sufficiency" review is not completely unfettered.

Rather, Article 66(d)(1), UCMJ, mandates that in conducting such an assessment, we must recognize "that the trial court saw and heard the witnesses." As such, 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," we are "convinced of the accused's guilt beyond a reasonable doubt. United States v. Turner, 56 M.J. 131, 134 (C.A.A.F. 2001).

Even after giving due consideration to the fact that the military judge saw the witnesses testify and we did not, absent the confession and improperly admitted text messages, we are not convinced of appellant's guilt beyond a reasonable doubt. Put another way, given the totality of the circumstances in this case, to include the conflicting nature of appellant's and victim's testimony, the dearth of any significant corroborating evidence, and the fact that the victim never said "no" or told appellant to stop, our review of **[*29]** the remaining record leaves us with a fair and rational hypothesis other than guilt, rendering the finding of guilt to be factually insufficient. *See* United States v. Billings, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003).

**CONCLUSION**

The finding of guilty and the sentence are SET ASIDE. Specification 1 of The Charge is DISMISSED. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Chief Judge SULLIVAN and Judge PENLAND concur.

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# *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)*

**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 ARGUELLES[1], 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

[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.

General of the Army for remand to this court for a new review and to specifically to 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

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

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. 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 Rheuark 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

[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.

post-trial delay." *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 appellant 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

[5] We recognize the panel also sentenced appellant to forfeiture of all pay and allowances and reduction to the grade of El. 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.

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." 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 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 parties[8], 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

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[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 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).

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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[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 were we may require affidavits from counsel in order to conduct a complete review.

# *United States v. Lopez*

United States Army Court of Criminal Appeals

January 19, 2022, Decided

ARMY 20200642

**Reporter**
2022 CCA LEXIS 46 *; 2022 WL 179234

UNITED STATES, Appellee v. Sergeant HECTOR L. LOPEZ, JR., United States Army, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Petition for review filed by *United States v. Lopez, 2022 CAAF LEXIS 216 (C.A.A.F., Mar. 17, 2022)*

Motion granted by *United States v. Lopez, 2022 CAAF LEXIS 457, 2022 WL 3216344 (C.A.A.F., July 5, 2022)*

Review denied by *United States v. Lopez, 2022 CAAF LEXIS 661 (C.A.A.F., Sept. 15, 2022)*

**Prior History:** **[*1]** Headquarters, Fort Bliss. Michael S. Devine, Robert A. Fellrath, Edwin B. Bales, Military Judges. Colonel Andrew M. McKee, Staff Judge Advocate.

**Counsel:** For Appellant: Captain Lauren M. Teel, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Thomas J. Darmofal, JA (on brief).

**Judges:** Before BURTON, DENNEY,* and PARKER Appellate Military Judges. Senior Judge BURTON and Judge PARKER concur.

**Opinion by:** DENNEY

* Judge Denney decided this case while on active duty.

## Opinion

MEMORANDUM OPINION

DENNEY, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault and one specification of forcible sodomy, in violation of *Articles 120* and *125*, Uniform Code of Military Justice [UCMJ], *10 U.S.C. §§ 920*, *925*. The military judge conditionally dismissed the *Article 120, UCMJ*, specification since the government charged the two offenses in the alternative. The panel sentenced the appellant to a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, appellant raised seven assignments of error, one of which merits discussion but no relief.

The military judge **[*2]** admitted Prosecution Exhibit (Pros. Ex.) 3, a text message from [TEXT REDACTED BY THE COURT] (the victim) to [TEXT REDACTED BY THE COURT] (her sister), reporting the sexual assault as an excited utterance and prior consistent statement. We find the military judge erred by admitting this text message as an exited utterance and prior consistent statement. However, this error was harmless based on the totality of the evidence presented at trial.

**BACKGROUND**

Appellant and the victim met over the internet via a dating application called Tinder. They later arranged to meet in person for a date that involved consensual oral sex and sexual intercourse. After this first date, appellant and the victim exchanged text messages discussing sex. Several weeks later, they agreed to meet a second time for more oral sex and sexual intercourse. However, the victim testified that after they had consensual sexual intercourse on the second date, appellant then penetrated her anus with his penis without her consent. She repeatedly told him "no" and to stop when he did this but he continued to penetrate her. After he penetrated her anally, he then ejaculated on her leg.

The victim reported the sexual assault **[*3]** was very painful and she was crying during the incident. She testified that she tried to get away by "flattening out" but the appellant held her from behind as he penetrated her (she testified that it "felt like he was ripping me apart"). The appellant asked her afterwards "if it was really that bad[?]" The victim promptly reported the sexual assault to [TEXT REDACTED BY THE COURT] (her cousin) by a phone conversation within minutes after leaving appellant's room. The victim also texted appellant that same evening (when she was in her driveway) and asked him "[w]hy didn't you stop when u [sic] said no?" Appellant responded: "I don't remember you telling me that[]? I would stop and go slow so I wouldn't hurt you. If u didn't like it, then we won't do it anymore[.]"

The following morning, the victim felt pain in her anus and noticed blood when she went to the bathroom. She contacted her sister, reported the sexual assault to her, and asked for advice. Prosecution Exhibit 3 is the text message the victim sent her sister about the sexual assault.

Prosecution Exhibit 3 states the following:

> [TEXT REDACTED BY THE COURT], I would call you but I can't say it. Last night when I went to see this **[*4]** guy yea it was for sex but after a while he wanted to do anal an [sic] I don't do that. But he kept trying I tried pushing him away an [sic] I said no a few times. He even held my hands down so I could push him anymore then he let them go I tried to push more an [sic] then just gave up. I cried the whole way home an [sic] I didn't want to say anything especially because he is in the military but I'm in pain an [sic] I needed to say something. What is the next thing I should do?

The military judge ruled at trial that the victim's text message was admissible as an excited utterance and prior consistent statement.

The day after the sexual assault, the victim was interviewed by El Paso law enforcement and a sexual assault nurse examination (SANE) was done. The SANE report noted four lacerations in the victim's anus, and the nurse expert opined these lacerations were from blunt force trauma. The nurse testified that these were the largest lacerations that she has seen in her twenty years of conducting SANE. The victim's injuries from the sexual assault required sutures.

At trial before members, defense counsel argued there was no sexual assault and that the conduct was consensual. Appellant **[*5]** testified in his defense. He testified that the victim consented to the anal sex after they had vaginal sex. He said they had "intense sex" and she wanted him to grab her hair and spank her buttocks. He also claimed the victim agreed to have anal sex, and he used spit as a lubricant. He alleged the victim grunted during the anal sex (which lasted five minutes) and

told him afterwards "I'm good, but, you know, it hurt."

During the victim's cross examination, defense counsel challenged the allegations by pointing out that the victim left out certain details of the sexual assault in her prior statements to law enforcement and the SANE. The victim testified that she reported the sexual assault details to law enforcement. She described that the appellant overpowered her and held her down during the forcible sodomy incident. The victim testified that she tried to flatten out on her stomach but appellant had hold of her by her hips and was holding her arms down during the sexual assault.

## LAW AND DISCUSSION

*Did the MJ abuse his discretion in admitting the victim's text message to her sister over the defense objection*?

*Standard of Review*

We review a military judge's decision to admit evidence for **[*6]** abuse of discretion. *United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019)*. "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Kelly, 72 M.J. 237, 242 (C.A.A.F. 2013)* (citation omitted) (internal quotation marks omitted). Findings of fact are "clearly erroneous" when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Martin, 56 M.J. 97, 106 (C.A.A.F. 2001)*.

*Excited Utterance*

Military Rule of Evidence (Mil. R. Evid.) 803(2) allows the admission of a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

A three-prong test is used to determine whether a statement qualifies under this exception. *United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987)*. First, the statement must be spontaneous, excited, or impulsive rather than the product of reflection and deliberation. *Id.* Second, the event prompting the statement must be startling. *Id.* Third, the declarant must be under the stress of excitement caused by the event. *Id.* In analyzing this third requirement, courts have considered several factors, including "the lapse of time between the startling **[*7]** event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." *United States v. Donaldson, 58 M.J. 477, 483 (C.A.A.F. 2003)*. However, "'[i] is the totality of the circumstances, not simply the length of time that has passed between the event and the statement.'" *United States v. Henry, 81 M.J. 91, 96 (C.A.A.F. 2021)* (quoting *United States v. Belfast, 611 F.3d 783, 817 (11th Cir. 2010)*).

In this case, despite a defense hearsay objection, the military judge admitted the victim's text message to her sister about the sexual assault as an excited utterance under Mil. R. Evid. 803(2). The military judge also admitted the text message as a prior consistent statement.

The evidence presented at trial was that the sexual assault occurred at approximately 2200. The following morning, the victim felt pain in her anus and noticed blood while

wiping herself in the bathroom. As a result, the victim texted her sister that morning about the sexual assault and sought advice on what she should do next. Her sister testified the victim was crying and distraught when they spoke by phone after she received the victim's text message. The military judge stated in his ruling that the victim's text message was sent "immediately following **[*8]** the incident within a number of hours, probably less than eight hours, eight to ten hours from the incident."

In *United States v. Feltham, 58 M.J. 470 (C.A.A.F. 2003)*, the Court of Appeals for the Armed Forces (CAAF) recognized the time between the startling event and the excited utterance is one factor to consider when determining whether a statement qualifies as an excited utterance. A lapse of time between the event and the utterance creates a strong presumption against admissibility. The court noted "[t]he critical determination is whether the declarant was under the stress or excitement caused by the startling event." *Id. at 475*. In *Feltham*, the victim's statements to his roommate about being sodomized by the accused were admissible under the excited utterance exception where there was less than one hour lapse of time between the startling event and the utterance. *Id.* The victim also made his statements at the first opportunity; the statements were not in response to questioning; and the victim was still under the stress of the excitement caused by the event. *Id.*

Under the totality of the circumstances in the present case, we find the text message was sent after the victim had sufficient time to reflect on the events from the prior night. The victim **[*9]** was no longer under the stress of excitement from the sexual assault which occurred the night before when she texted her sister on the following morning. The military judge erred in finding the victim's action of texting her sister eight to ten hours after the sexual assault was "immediately following the incident." This passage of eight to ten hours between the incident and text message was sufficient time for reflection and allowed for [TEXT REDACTED BY THE COURT] deliberation. The text message was not spontaneous or impulsive, While the events of the sexual assault were undoubtedly startling and upsetting when they occurred, the victim's text message to her sister did not occur until approximately eight to ten hours later after she slept and woke up the next morning when she was no longer under the stress of the startling event. The military judge abused his discretion in admitting victim's text message because it did not qualify as an exited utterance under Mil. R. Evid. 803(2).

*Prior Consistent Statement*

Hearsay is generally not admissible at trial. Mil. R. Evid. 802. A prior consistent statement is not hearsay under Mil. R. Evid. 801(d)(1)(B). The requirements are: (I) the declarant testifies and is subject to cross-examination about a prior **[*10]** statement; and (2) the prior statement is consistent with the declarant's testimony. If the requirements are met, the statement is admissible as substantive evidence under two scenarios. Mil. R. Evid. 801(d)(1)(B)(i)-(ii). The first scenario is when the prior statement is offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." Mil. R. Evid. 801(d)(I)(B)(i).

In *Frost*, the CAAF noted "two additional guiding principles" on this issue: (1) the prior statement . . . must precede any motive to fabricate or improper influence that it is offered to rebut; and (2) where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it

is offered to rebut." *79 M.J. at 110* (citing *United States v. Allison, 49 M.J. 54, 57 (C.A.A.F. 1998)*).

Under the second scenario, the prior statement must be offered *"to rehabilitate the declarant's credibility as a witness when attacked on another ground."* Mil. R. Evid. 801(d)(1)(B)(ii) (emphasis added). In *United States v. Finch, 79 M.J. 389, 395 (C.A.A.F. 2020)*, the CAAF noted the rule's mention of "another ground" refers to one other than the grounds listed in Mil. R. Evid. 801(d)(1)(B)(i): recent fabrication or an improper influence or motive in testifying. The rule itself does not specify what types of attacks **[*11]** a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)(ii) is admissible to rebut, but the Drafters' Analysis lists *"charges of inconsistency or faulty memory"* as two examples. *Manual for Courts-Martial*, Analysis of the Military Rules of Evidence app. 22 at A22-61 (2016 ed.) (emphasis added). The CAAF noted the "military judge must make a determination that each prior consistent statement is relevant to rehabilitate the witness on one of the grounds cited in M.R.E. 801(d)(1)." *Finch, 79 M.J. at 396*.

For a prior consistent statement to be admissible under Mil. R. Evid. 801(d)(1)(B)(ii), the following must be established: "(1) the declarant of the out-of-court statement must testify, (2) the declarant must be subject to cross-examination about the prior statement, (3) the statement must be consistent with the declarant's testimony, (4) the declarant's credibility as a witness must have been 'attacked on another ground' other than the ones listed in M.R.E. 801(d)(1)(B)(i), and (5) the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Finch, 79 M.J. at 396*. "The proponent of the evidence bears the burden of articulating the relevancy link between the prior consistent statement and how it will rehabilitate the witness with respect **[*12]** to the particular type of impeachment that has occurred." *Id.*

The military judge ruled that the victim's text message to her sister was also admissible as a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)(ii). In making his ruling, the military judge stated that he was admitting the text message because "the details of what was said during subsequent statements has been litigated extensively by both sides and whether or not it was consistent with her testimony at trial." The military judge earlier stated, "I believe that there has been a sufficient attack of the victim's credibility to put her credibility at issue."

The defense theory at trial and its cross examination of the victim argued that she fabricated the allegations of sexual assault by the accused and added to her story in an attempt to strengthen her allegations against the accused. Defense counsel emphasized this position about the victim lying about the allegations in cross examination and during the defense closing argument. The victim's text message to her sister the morning after the incident referenced the accused wanting to have anal sex and her trying to push him away. The victim told her sister that she was in pain and asked what she **[*13]** should do next. The Court of Military Appeals has previously recognized that "[m]ere repeated telling of the same story is not relevant to whether that story, when told at trial, is true." *United States v. McCaskey, 30 M.J. 188, 192 (C.M.A. 1990)*.

We find the military judge mishandled the prior consistent statement issue because he failed to provide specific findings of fact or particularized conclusions of law on the record as to what "other grounds" he was admitting the text message to rehabilitate [TEXT REDACTED BY THE COURT] on. The military

judge only provided a generic ruling that there was a "sufficient attack of the victim's credibility to put her credibility at issue." This fails to satisfy the requirements of Mil. R. Evid. 801(d)(1)(B)(ii). In every sexual assault case, the victim's credibility will always be at issue. More is needed to satisfy the requirements of Mil. R. Evid. 801(d)(1)(B)(ii), which requires a relevancy link between the prior consistent statement and how it will rehabilitate the witness. Due to the military judge's lack of analysis and generic ruling that the victim's credibility was attacked and at issue, we are left to speculate on the relevancy link. Instead, the text message appears to be a means to improperly bolster the victim's testimony of the sexual assault by **[*14]** showing she reported the forcible sodomy incident to her sister on the following morning.

The military judge also failed to conduct any Mil. R. Evid. 403 analysis with respect to admission of the victim's text message. Under Mil. R. Evid. 403, a military judge "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Where the military judge places his reasoning on the record, we review the military judge's decision to admit or exclude evidence for abuse of discretion. *United States v. McElhaney, 54 M.J. 120, 129-30 (C.A.A.F. 2000)*. However, where the military judge fails to make an adequate record of his Mil. R. Evid. 403 analysis, we give less deference. *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)*. Finally, where a military judge conducts no analysis, we give no deference to his ruling and must instead examine the evidence anew and conduct our own balancing under Mil. R. Evid. 403. *id.* For reasons stated above, the admission of the text message as a prior consistent statement was error since it was inadmissible hearsay evidence. Even assuming arguendo that the text message was relevant, the probative value was substantially outweighed by danger of **[*15]** unfair prejudice and presentation of cumulative evidence since it served to bolster the victim's testimony rather than rehabilitate her credibility.

*Prejudice*

When a military judge abuses her discretion by erroneously admitting hearsay evidence, the government bears the burden to demonstrate that the error was harmless such that it did not have "a substantial influence on the findings." *Finch, 79 M.J. at 398* (citations omitted). In determining whether the government has met its burden, we weigh the strength of the prosecution's case, the strength of the defense case, the materiality of the evidence in question, and the quality of the evidence. *Id. at 398-99*.

First, the government's case was strong. In addition to the detailed testimony of [TEXT REDACTED BY THE COURT] about the appellant's forcible sodomy, there was other corroborating forensic evidence from the SANE which revealed four lacerations of the victim's anus. One of the lacerations was so severe that it required stitches. The SANE nurse testified as an expert witness on sexual assault and testified that the victim's lacerations were the most severe that she had seen in twenty years of performing sexual assault examinations. Photographs of the victim's injuries **[*16]** were also admitted into evidence. Although the SANE nurse did not testify on the issue of consent, the severity and nature of the trauma corroborates the victim's testimony about the pain and injuries she suffered from the sexual assault

Additional corroborating evidence came from the victim's cousin who was contacted by the victim within minutes after she left the

appellant's residence to report the sexual assault. Finally, the appellant testified at trial and admitted that he penetrated the victim's anus with his penis. The defense case was not particularly strong since it relied primarily on the appellant's claim that the victim, despite her injuries, had consented to the anal penetration that resulted in her seeking medical treatment.

Based on the facts and circumstances of this case, we are convinced even if the military judge had not admitted the victim's text message to her sister, that the panel would have rendered the same verdict in this case. Accordingly, the government has met its burden to demonstrate that the evidence of the text message erroneously admitted by the military judge did not substantially influence the panel's findings.

**CONCLUSION**

On consideration of the entire **[*17]** record the findings of guilty and sentence are AFFIRMED.

Senior BURTON and PARKER concur.

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