

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF  
APPELLANT**

v.

Docket No. ARMY 20220160

Private First Class (E-3)

**STEFON M. REID,**

United States Army,

Appellant

Tried at Fort Polk,<sup>1</sup> Louisiana, on 9 and 30-31 March 2022 and 1 April 2022, before a general court-martial appointed by the Commander, Joint Readiness Training Center and Fort Polk, Lieutenant Colonel Scott Z. Hughes, military judge, presiding.

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

**Assignments of Error**

**I. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO INTRODUCE EVIDENCE OF PRIOR SEXUAL ACTIVITY BETWEEN [REDACTED] AND [REDACTED].**

**II. WHETHER THE GOVERNMENT COMMITTED PROSECUTORIAL MISCONDUCT BY REPEATEDLY ELICITING MISLEADING TESTIMONY BY [REDACTED] AND [REDACTED] ABOUT THEIR RELATIONSHIP.**

**III. WHETHER THE DILATORY POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 374 DAYS AFTER SENTENCING.**

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<sup>1</sup> Now named Fort Johnson.

## **Statement of the Case**

On 1 April 2022, a military judge sitting as a general court-martial convicted appellant, Private First Class Stefon M. Reid, contrary to his pleas, of Sexual Assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ] (The Charge, Specification 1).<sup>2</sup> (R. at 432; Charge Sheet). On the same day, the military judge sentenced appellant to a dishonorable discharge, reduction to E-1, and three years confinement. (R. at 480).

On 2 February 2023, the convening authority took no action on the findings and sentence. (Convening Authority Action). On 9 March 2023, the military judge entered Judgment. (Modified Judgment of the Court). This court docketed appellant's case on 10 April 2023. (Referral and Designation of Counsel).

## **Statement of Facts**

### **A. The Basis of the Charges**

Appellant and [REDACTED] were Soldiers in the same unit and lived near each other in the barracks of Fort Polk, Louisiana. (R. at 31). Appellant and [REDACTED] were not close friends but knew each from in-processing together in February 2021 and from unit activities. (R. at 29-30). On 13 June 2021, PFC [REDACTED] encountered appellant in the hallway as she was headed to retrieve her laundry. (R. at 32).

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<sup>2</sup> The military judge found appellant not guilty of Specification 2 of the Charge, which charged appellant with Rape, in violation of UCMJ, Article 120.

According to [REDACTED], appellant offered to help her carry laundry to her room. (R. at 32). After dropping off the laundry, [REDACTED] told appellant she was having friends over for a movie night and agreed for appellant to join them. (R. at 38).

Appellant left her room and [REDACTED] continued cleaning. (R. at 39). [REDACTED] testified appellant returned shortly thereafter. (R. at 39). Upon returning, he sat on [REDACTED]'s bed while she continued to clean. (R. at 47-48).

[REDACTED] then removed two giant teddy bears from her bed so appellant could make room for her to sit on the other side of the bed. (R. at 50, 52-53). [REDACTED] stated she turned on a show and appellant moved closer to her on the bed and tried to kiss her. (R. at 53). [REDACTED] testified she told appellant no and he asked "why not." (R. at 54). According to [REDACTED], appellant grabbed her face and tried to kiss her. (R. at 54). Appellant then rolled her over on her back as she tried to push him off using "all of [her] strength." (R. at 57). [REDACTED] testified appellant pinned her down with one hand while removing her shorts with the other hand. (R. at 58).

According to [REDACTED], she repeatedly told appellant to stop and tried to push his hand away. (R. at 58). [REDACTED] said appellant managed to remove her pants and forced his penis into her vagina. (R. at 59). [REDACTED] testified she tried to push appellant off again, but he flipped her on her stomach and put his penis back into her vagina and ejaculated on her back. (R. at 61-62).

## **B. Appellant's Case**

Appellant did not contest whether the sexual act happened. Instead, appellant, through his counsel, raised the defense of consent. Defense counsel asserted [REDACTED] and [REDACTED] were in an on-again off-again relationship at the time of the alleged assault, and [REDACTED] lied to [REDACTED] about the sexual assault. (R. at 346-47). The lie was either because she did not want to admit to consensual sex with appellant or, in an effort to further her relationship with [REDACTED], to gain sympathy and attention. (R. at 344-54). In support of this, appellant attempted to establish a romantic relationship between [REDACTED] and [REDACTED]. Appellant called [REDACTED], who was friends with [REDACTED], [REDACTED], and appellant. (R. at 346). [REDACTED] testified [REDACTED] and [REDACTED] were in a romantic relationship and the relationship started during in processing in February of 2021 and had continued ever since. (R. at 347).

According to [REDACTED], beginning in April of 2021, their relationship became more of an on again off again relationship with “no labels” leading up to the day of the alleged assault. (R. at 347, 354). [REDACTED] stated their relationship improved following the incident and it made them closer. (R. at 347). When asked about her source of knowledge about their relationship, [REDACTED] stated she knew from her observations of them and because [REDACTED] told her they were dating prior to the date of the alleged assault. (R. at 347).

Appellant elicited other circumstantial evidence of [REDACTED] and [REDACTED] being in a romantic relationship prior to the alleged assault. This included evidence [REDACTED] and [REDACTED] were together regularly and engaged in boyfriend/girlfriend behavior, such as [REDACTED] leaving a gym bag in P [REDACTED]'s room, regularly borrowing her car, and the two going out to dinner. (R. at 217-18). After the alleged assault, [REDACTED] also accompanied [REDACTED] to the hospital and stayed with her for over an hour. (R. at 161; 226). Finally, [REDACTED] and [REDACTED] testified they became engaged in December of 2021 and married right before the trial started on 30 March 2022. (R. 38-39; 216).

**C. [REDACTED] and [REDACTED] Repeatedly Denied Having any Type of Romantic Relationship Prior to the Events of 13 June 2021**

The nature of [REDACTED] and [REDACTED]'s relationship was a central focus of appellant's trial with the government, defense, and military judge regularly asking witnesses questions about the nature of their relationship. (R. at 38-39; 49; 208-209; 216; 232; 395). Despite the ample evidence of their relationship, [REDACTED] and [REDACTED] adamantly denied ever having a romantic relationship prior to December of 2021 – shortly before they became engaged. (R. at 171; 234).

Early in [REDACTED]'s direct testimony and before defense counsel gave an opening statement presenting their theory of the case, the government asked [REDACTED] about her relationship with [REDACTED]. (R. at 38). [REDACTED] stated [REDACTED] was a friend at the time, but he was now her husband as they had married

the day before the trial. (R. at 38-39). Trial Counsel confirmed their relationship a second time, stating “[w]here you dating at the time.” (R. at 39). [REDACTED] [REDACTED] said they were not dating on 13 June 2021. (R. at 39). Later, when [REDACTED] testified to appellant asking her questions about her relationship status shortly before the alleged assault, government counsel asked “[w]ere you dating any one at that time” and [REDACTED] replied, “[n]o I was not.” (R. at 49).

On cross examination, defense counsel was allowed to ask [REDACTED] if he was in a romantic relationship with [REDACTED]. (R. at 171). [REDACTED] answered “no” and said they did not develop a romantic relationship until “December of 2021,” around the time they became engaged. (R. at 171-72).

The government later called [REDACTED] to testify. (R. at 207). Near the beginning of his testimony, government counsel asked if on 13 June 2021 he was only friends with [REDACTED], and [REDACTED] responded “[y]eah, we were specifically just friends.” (R. at 208). Government counsel asked again, stating “[s]o for clarity, you weren’t dating [REDACTED]” and [REDACTED] responded “[n]o we weren’t in a relationship.” (R. at 208). Government counsel continued, “[a]t that time, 13 June 2021, were you in a relationship of *any type*,” to which [REDACTED] said he was dating other people and [REDACTED] was aware of this. (R. at 208). A few questions later, government counsel turned back to the nature of their relationship and asked

when they began dating. (R. at 216). [REDACTED] responded with December of 2021. (R. at 216).

On cross examination, defense counsel established that [REDACTED] and [REDACTED] maintained a relationship after she left Fort Polk following the alleged sexual assault in June of 2021. (R. at 219). [REDACTED] testified they kept in touch “as friends.” (R. at 219). After re-direct examination, the military judge asked [REDACTED] more about the nature of his relationship with [REDACTED]. (R. at 234). The military judge asked “[a]nd it’s your testimony that you didn’t start dating [REDACTED], I guess have a romantic relationship with her, until December of 2021?” (R. at 234). [REDACTED] responded “[c]orrect.” The military judge inquired further, asking “[a]nd prior to December it was just purely friends,” to which [REDACTED] said, “yes.” (R. at 234). The military judge confirmed, “[a]nd no romantic feelings prior to that?” (R. at 234). [REDACTED] stated “[n]o sir.”

During closing arguments, both parties referred to the nature of [REDACTED]’s relationship with [REDACTED] and framed the issue as central to the case and credibility of the witnesses. (R. at 395, 417). After stating the credibility of [REDACTED] was the “central issue to this case,” (R. at 395), government counsel asserted “[REDACTED] at the time was her friend, that’s the testimony of . . . [REDACTED].” (R. at 395). Government counsel then attacked the credibility of [REDACTED], who testified to [REDACTED]

█ and █ being in a romantic relationship, stating █'s testimony "was based on her belief, seeing them hanging out together." (R. at 395).

**D. Neither the Government nor Defense Disclosed the True Nature of █ and █'s Relationship to the Military Judge**

Even though █ and █ denied any type of romantic relationship or, in █'s case, any romantic feelings at all, the parties told CID, government counsel, and defense counsel they had a sexual relationship in the months leading up to the alleged sexual assault, to include the day prior to the events on 13 June 2021. In a 24 June 2021 statement to CID, █ stated he had been physically intimate with █ on multiple occasions, including "the night before the incident." (Def. App. Ex. A). In a 24 March 2022 interview conducted by defense counsel, █ stated beginning on 25 February 2021 and continuing until they were engaged, she maintained a sexual relationship with █. (Def. App. Ex. C). █ told government counsel on 21 March 2022 that he and █ were "not in a committed relationship until after the incident," and described their relationship as "friends with benefits." (Def. App. Ex. B).

As necessary, additional facts are incorporated below.



**I. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO INTRODUCE EVIDENCE OF PRIOR SEXUAL ACTIVITY BETWEEN PFC [REDACTED] AND PFC [REDACTED].**

**Standard of Review**

This court reviews claims of ineffective assistance of counsel de novo.

*United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

**Law**

The Sixth Amendment guarantees an accused the right to the “effective assistance of counsel.” *United States v. Cronin*, 466 U.S. 648, 653–56 (1984).

**A. Ineffective Assistance Generally**

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (quoting *Strickland*, 466 U.S. at 686).

“To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error.” *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland*, 466 U.S. at 698).

To prove deficient performance of counsel, appellant must overcome the presumption of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

This may be done by demonstrating specific errors outside of prevailing professional norms. *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Next, appellant must establish prejudice by showing “a reasonable probability that, but for counsel’s [deficient performance] the result of the proceeding would have been different.” *Captain*, 75 M.J. at 103 (citations and quotations omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694.

## **B. Ineffective Assistance for Failing to Introduce Evidence of Prior Consensual Sexual Activity**

### *1. Ineffectiveness for Failure to File a Motion*

Defense counsel’s failure to file a motion can satisfy *Strickland*’s deficient performance prong. *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018). “When a claim of ineffective assistance of counsel is premised on counsel’s failure to make a motion an appellant must show that there is a reasonable probability that such a motion would have been meritorious.” *Id.* at 236 (quotation omitted).

## 2. Admission Under Military Rule of Evidence 412

Evidence offered to prove an alleged victim engaged in other sexual behavior is, with limited exceptions, generally not admissible at a trial involving a sexual offense. Mil. R. Evid. 412(a)(1). One of the rule's three exceptions, relevant here, is “evidence the exclusion of which would violate the accused's constitutional rights.” Mil. R. Evid. 412(b)(1)(C). “The constitutionally required exception encompasses an accused's Sixth Amendment right to confront and cross-examine the witnesses against him, which includes the right ‘to impeach, i.e., discredit the witness.’” *Ellerbrock*, 70 M.J. at 318 (quoting *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)). To be admissible, the evidence is further subject to the balancing test of Mil. R. Evid. 412(c)(3), which requires the evidence to be relevant and for the “probative value of such evidence [to] outweigh[] the danger to the alleged victim’s privacy....” *Id.* The evidence is also subject to the balancing test of Mil. R. Evid. 403. *Id.*

Mil. R. Evid. 412(c)(1)(A) requires notice to be filed with the opposing party “at least 5 days prior to entry of pleas . . . .” The military judge may direct an alternative time for filing, or allow filing mid-trial for “good cause shown.” Mil. R. Evid. 412(c)(1)(A), (B). Good cause may include the government, through its own actions at trial, opening the door to otherwise inadmissible Mil. R. Evid. 412 evidence. *See United States v. Villanueva*, No. 201400212, 2015 CCA LEXIS 90

(N-M. Ct. Crim. App. Mar. 19, 2015) (unpublished). If the Government creates a factual inference through its presentation of evidence, “the defense must be allowed to rebut that inference. To do otherwise denies the appellant his right to mount a defense, and allows the Government to meet its burden based on an incomplete description of events.” *Id.* at \*9-10.

### **Argument**

Whether [REDACTED] and [REDACTED] were in a romantic relationship leading up to the alleged sexual assault was central to appellant’s defense. Despite government counsel repeatedly eliciting testimony from [REDACTED] and [REDACTED] that they were only friends at the time of the alleged sexual assault and had no romantic feelings whatsoever, defense counsel inexplicably did not attempt to introduce evidence of [REDACTED] and [REDACTED] being in a sexual relationship in the months leading up the alleged assault. If introduced, this evidence would have benefited appellant in two ways. First, the evidence would have supported appellant’s theory that the sexual act between appellant and [REDACTED] was consensual and [REDACTED] falsely told [REDACTED] she was sexually assaulted either to garner sympathy and further their on again off again relationship, or because she did not want him to believe her having sex with appellant was consensual. Second, and more importantly, if introduced the evidence would have directly impeached the two key witnesses against appellant.

**A. Evidence of [REDACTED] and [REDACTED]'s Sexual Relationship Would Have Supported Appellant's Defense**

Appellant's theory at trial, as explained during defense counsel's opening and closing statements, was that [REDACTED] lied to [REDACTED] when he arrived at her barracks room because she did not want to admit to consensual sexual activity with the accused. (R. at 342-43; 416-21.). Alternatively, defense counsel insinuated [REDACTED] may have lied about the sexual assault to gain sympathy from [REDACTED] and improve their relationship, which did in fact occur after the alleged assault according to [REDACTED]. (R. at 347). Key to this theory was the existence of a romantic relationship between [REDACTED] and [REDACTED]. Although defense counsel were correct to focus on this defense at trial, their failure to seek admission of evidence of [REDACTED] and [REDACTED] being in a sexual relationship in the months leading up to the alleged sexual assault fell outside the prevailing norms of the profession due to the importance of the issue at trial and the reasonable probability that such a motion would have succeeded. *Harpole*, 77 M.J. at 236.

Defense counsel introduced a substantial amount of evidence of a relationship. The defense called [REDACTED] to testify about [REDACTED] and [REDACTED]'s rocky romantic relationship before the alleged assault and how it improved after. (R. at 347). Defense counsel also introduced other evidence of their relationship, including [REDACTED] storing a gym bag in P [REDACTED]'s barracks room, (R. at 43), [REDACTED] regularly using [REDACTED]'s vehicle (R. at 218), and [REDACTED] and [REDACTED] going

out to dinner. (R. at 218). The defense was also furthered by [REDACTED] reporting the alleged assault to his supervisor and the military police on his own accord and without the request of [REDACTED]. (R. at 214).

In light of the effort the defense made to prove the existence of a romantic relationship, it is inexplicable why the defense did not attempt to introduce uncontroverted evidence of a romantic relationship that came directly from [REDACTED] and [REDACTED]. The evidence would have impeached [REDACTED] and [REDACTED] on the nature of their relationship and would have furthered appellant's theory of why [REDACTED] fabricated the allegations against him. The evidence would therefore fall squarely within appellant's right to confront and cross-examine the witnesses against him, as protected by the Sixth Amendment. The evidence would likely have passed the balancing tests of Mil. R. Evid. 412(c)(3) and MRE 403 because it related to [REDACTED] having sex with her now husband – hardly a line of questioning that would be harassing or amount to an undue invasion of [REDACTED]'s privacy. Without this evidence, appellant was left with only circumstantial evidence of [REDACTED] and [REDACTED]'s relationship.

Finally, to the extent defense counsel did not file a motion pre-trial pursuant to Mil. R. Evid. 412(c)(1) because they were surprised by the repeated denials of a relationship by [REDACTED] and [REDACTED], defense counsel should have moved mid-trial to admit the evidence. The government opened the door to the admission of this

evidence when [REDACTED], the government's first witness, stated [REDACTED] was only a friend on the date of the alleged assault. (R. at 38). Therefore, defense counsel likely had good cause to file the motion mid-trial due to the surprising testimony of [REDACTED] and [REDACTED] regarding their relationship.

**B. The Evidence Would Have Impeached [REDACTED] and [REDACTED]**

In addition to supporting appellant's defense, evidence of [REDACTED] and [REDACTED]'s sexual relationship would have impeached both witnesses. As government counsel stated in closing, [REDACTED]'s credibility was the "central issue to this case. . . ." (R. at 395). The government's case was almost entirely based on [REDACTED]'s allegation and statements she made to third parties following the alleged assault. The defense had direct evidence of [REDACTED] being, at a minimum, less than truthful on the witness stand about her relationship with [REDACTED] and failed to confront her with her own conflicting prior statements. The evidence would have also discredited [REDACTED] who was the first person to see [REDACTED] following the alleged assault. Certainly, individuals engage in a sexual relationship without being in a dating relationship. However, for [REDACTED] and [REDACTED] to state there was no romantic relationship or romantic feelings when they repeatedly engaged in sexual activities for months and then were engaged to be married six months later is illogical and, in all likelihood, a lie.

In the face of evidence to the contrary, [REDACTED] and [REDACTED] strangely adamant about having no romantic relationship prior to becoming engaged. Evidence of their sexual relationship would have raised the issue of the two colluding about their testimony. Defense counsel proposed this possibility during closing argument when discussing the true nature of their relationship, asking “why are they lying about this?” (R. at 417). However, without introducing the witnesses’ actual statements about their sexual relationship, appellant was left with circumstantial evidence and conflicting testimony the government counsel attempted to discredit in their closing argument. (*See* R. at 395 (government counsel arguing that [REDACTED]’s statements about [REDACTED] and [REDACTED]’s relationship was based on her observations and belief instead of actual evidence)). The defense’s failure to introduce this evidence therefore amounted to ineffective representation.

### **C. Prejudice**

Appellant suffered prejudice as a result of defense counsels’ failure to introduce evidence of [REDACTED] and [REDACTED]’s sexual relationship because the military judge was left with the false impression they were merely friends at the time of the alleged assault. Review of the record shows the military judge was interested in learning more about their relationship. During the examination of [REDACTED], the military judge asked if “it’s your testimony that you didn’t start dating



her, I guess have a romantic relationship with [REDACTED] until December of 2021” and “no romantic feelings prior to that.” (R. at 234). Despite the prompting by the military judge, defense counsel still did not seek to introduce evidence of their sexual relationship.

Appellant was further prejudiced because the evidence would have directly impeached the two key witnesses against him in a trial that hinged largely on [REDACTED]’s testimony. Review of the record shows the military judge did not entirely credit [REDACTED]’s testimony. In fact, the military judge acquitted appellant of the Rape charge contained in Specification 2 of the Charge, even though [REDACTED] testified to the use of force during the sexual assault. (R. at 432). During trial, [REDACTED] testified appellant pushed her body down as she used “defense tactics” learned from hand-to-hand fighting training. (R. at 58-59). [REDACTED] later described appellant “pushing [her] body into the bed” and forcing his penis inside of her. (R. at 60-62). During opening and closing statements, government counsel referred to the events of the night as a “violent rape.” (R. at 23; 396). Even with [REDACTED]’s testimony, the military judge acquitted appellant of rape. [REDACTED] also made conflicting statements after the alleged assault, such as initially telling witnesses she was manhandled, choked, and pulled back into her barracks room, which further raised credibility concerns. (R. at 227).

Evidence demonstrating two key witnesses in the trial were being, at a minimum, misleading on the stand and possibly colluding with each other, could have led to a different result at trial.

**II. WHETHER THE GOVERNMENT COMMITTED PROSECUTORIAL MISCONDUCT BY REPEATEDLY ELICITING MISLEADING TESTIMONY BY [REDACTED] AND [REDACTED] ABOUT THEIR RELATIONSHIP.**

**Standard of Review**

Questions of prosecutorial misconduct are reviewed de novo. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). If there is no objection at trial, the appellant has the burden of establishing prejudice. *See United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007).

**Law**

“Prosecutorial misconduct occurs when trial counsel overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.” *United States v. Hornback*, 73 M.J. 155, 159-60 (C.A.A.F. 2014) (cleaned up). Prosecutorial misconduct is “generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.” *Id.* at 160.

“The knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves ‘a corruption of the truth-seeking function of the

trial process.” *United States v. Thomas*, 22 M.J. 388, 392 (C.M.A. 1986) (quoting *United States v. Bagley*, 473 U.S. 667, 680 (1985)). “[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97 (1976). “The rule is the same regardless of whether the falsity was known by the government or, although not solicited by the prosecution, it ‘allows it to go uncorrected when it appears.’” *United States v. Logan*, 14 M.J. 637, 638 (C.M.R. 1982) (quoting *Napue v. Illinois*, 360 U.S. 264 (1959)). An accused is entitled, as a matter of due process, to present his case to a trier of fact “that is not laboring under a Government-sanctioned false impression of material evidence. . . .” *United States v. Logan*, 14 M.J. 637, 638 (A.C.M.R. 1982) (citing *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979)).

The rules of professional responsibility require statements made in open court to be factual. “A lawyer shall not knowing[ly] . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Rule 3.3(a)(3) (28 June 2018).

In *Logan*, a military judge convicted the appellant of, among other things, assault with intent to commit rape and indecent exposure, in violation of UCMJ, Articles 130 and 134. 14 M.J. at 638. The appellant's defense at trial was that the victim consented to the sexual intercourse. *Id.* During his direct examination, appellant testified he and the victim smoked marijuana together prior to having sex. *Id.* The victim, on the other hand, denied smoking marijuana with the appellant and testified she had never smoked marijuana. *Id.* During cross examination, the victim's roommate corroborated the testimony of the appellant by testifying the victim smoked marijuana "quite often" and had smoked it in their room on the evening in question. *Id.*

During a recess, government counsel discussed the inconsistency with the victim and the victim admitted she had smoked marijuana before but not with the appellant. *Id.* The trial counsel "did nothing to rectify her false testimony" and in fact "perpetuated the false testimony by asking . . . another roommate, on cross-examination after [trial counsel] knew of the falsehood, whether she had ever seen the victim use marijuana." *Id.* The roommate answered "no." After the military judge closed the court for deliberation, the government counsel informed defense counsel of the false testimony. *Id.*

The court found the misrepresentation to be material because "[t]he case was closely contested" and "the credibility of . . . [the victim] became the key in

resolving the issue of guilt or innocence.” *Id.* The court noted while the “falsity of the victim’s testimony did not relate to the issue of consent, it did relate to her credibility, on which [the] case turned.” *Id.* The court further stated “[i]t is clear both counsel considered the issue of the victim’s marijuana use to be important” because “[s]everal witnesses testified concerning it and the conflicting evidence was commented on in argument by both counsel.” *Id.* Therefore, the court found “there was a reasonable likelihood that the false testimony affected the decision of the military judge.” *Id.*

Despite the defense counsel failing to bring the matter to the military judge in a timely manner, the court set aside the findings of guilt and the sentence because “the trial counsel did more than allow the false testimony [to] go uncorrected when it appeared” and instead “perpetuated the falsehood by questioning” the testimony of the roommate who testified to the victim’s marijuana use and referencing the issue in closing argument. *Id.*

### **Argument**

As in *Logan*, government counsel perpetuated [REDACTED] and [REDACTED]’s misleading testimony regarding their relationship, by repeatedly eliciting testimony of them being only friends and having no romantic feelings prior to December of 2021. Counsel for the government should have alerted the military judge to this issue when, during cross examination, [REDACTED] testified she was not in a romantic

relationship with [REDACTED] at the time of the alleged assault, but government counsel allowed the misleading testimony to stand uncorrected. (R. at 171.) This became even more troubling when [REDACTED] denied having any type of romantic relationship with [REDACTED] at the time of the alleged assault and stated there were “no romantic feelings” between them. (R. at 234). Instead of correcting the record, government counsel furthered [REDACTED] and [REDACTED]’s misleading testimony by asking more questions about their relationship and referring to their false and misleading testimony in closing argument. (R. at 38-39; 49; 208-209; 216; 232; 395).

Undoubtedly all counsel believed the issue of [REDACTED] and [REDACTED] to be important to the case. Four witnesses testified to the nature of their relationship. In total, government counsel asked [REDACTED] and [REDACTED] about the nature of their relationship on approximately seven occasions. Defense counsel cross examined four witnesses about the status of [REDACTED] and [REDACTED]’s relationship. Government counsel and defense counsel each argued about the status of their relationship in closing arguments. In other words, like in *Logan*, [REDACTED] and [REDACTED]’s relationship became a central issue of the case, both as a motive to fabricate and the credibility of the two main witnesses.

Just as appellant was prejudiced by his counsel’s failure to introduce [REDACTED] [REDACTED] and [REDACTED]’s admissions regarding their sexual relationship at the time of the alleged assault, appellant was prejudiced by government counsel’s perpetuation of

their misleading testimony. The military judge never learned [REDACTED] and [REDACTED] were not forthcoming about their relationship on the date of the alleged sexual assault. The misleading testimony permeated the whole trial, including the direct and cross examinations of multiple witnesses and closing arguments. Finally, as in *Logan*, the testimony went to the credibility of the main witness, on which the case turned. For these reasons, appellant was prejudiced by government counsel's unwillingness to correct the record by alerting the judge to the issue of [REDACTED] and [REDACTED]'s misleading testimony and government counsel's perpetuation of their false testimony.

### **III. WHETHER THE DILATORY POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 374 DAYS AFTER SENTENCING.**

#### **Facts Relevant to Assignment of Error**

Appellant's court-martial adjourned on 1 April 2022. (R. at 481). Following adjournment, and without explanation, the convening authority did not take action until 2 February 2023; 307 days later. (Action). The military judge entered judgment thirty-five days later, on March 9, 2023. (Judgment).

Prior to this, trial counsel completed his precertification review of the record on 16 December 2022. (Precertification). After the trial counsel completed his review, it took 73 days for the military judge to receive the pre-certified record of

trial on 27 February 2023. (Authentication). The military judge authenticated the record of trial on 7 March 2023 and the court reporter certified the record on 13 March 2023. (Authentication, Certification). The Army Court of Criminal Appeals docketed the case 374 days after sentencing, on 10 April 2023. (Referral).

The SJA's office did not include a letter of lateness or any other document to explain the 307-day delay between adjournment and action by the convening authority or the 73-day delay between precertification and delivery of the record to the military judge.

The transcript in this case is 481 pages long. (R. at 224.)

### **Standard of Review, Law, and Argument**

Allegations of unreasonable post-trial delay are reviewed de novo. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). An appellant's right to post trial processing without unreasonable delay derives from the following sources: (1) the Due Process Clause of the Fifth Amendment to the Constitution which states "[n]o person shall be . . . deprived of life, liberty, or property without due process of law . . ."; (2) Article 66(d)(1), UCMJ, which holds that this court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved"; and (3) Article 66(d)(2), UCMJ, which allows service courts of criminal appeals to "provide appropriate relief if the accused demonstrates error or



excessive delay in the processing of the court-martial after the judgment was entered into the record . . . .”

Where post-trial delay is found to be unreasonable, this court has “authority under Article 66 to grant relief for excessive post-trial delay without a showing of ‘actual prejudice’ within the meaning Article 59(a).” *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). The court looks to “all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay,” in deciding what findings and sentence should be approved. *Tardif*, 57 M.J. at 224.

This court previously applied a 150-day limit on the time lapse between final adjournment of the court-martial and appellate docketing, with delays beyond this 150-day limit deemed presumptively unreasonable pursuant to *United States v. Brown*, 81 M.J. 507 (Army Ct. Crim. App. 2021). This court overruled *Brown* in *United States v. Winfield*, 83 M.J. 662 (Army Ct. Crim. App. 2023). With the 150-day limit no longer in place, appellate courts must “scrutinize even more closely the unit-level explanations for post-trial processing delays between final adjournment and appellate docketing.” *Id.* at 665. “Staff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units' cases on appeal.” *Id.* at 665-66. Even cases taking less

than 150 days between sentencing and appellate docketing are no longer presumptively reasonable. *Id.*

In deciding reasonableness, this court considers “a case’s transcript length, competing requirements (e.g., *actual* operational exigencies, in-court coverage), military judge availability, court reporter availability and utilization for transcription, and resource shortfalls . . . .” *Id.* at 666. Generally, “personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post trial delay.” *Arriaga*, 70 M.J. at 57.

In *Winfield*, this court acknowledged “some cases justifiably take longer than 150 days to process for appellate review” and “[o]thers should take significantly less time.” 83 M.J. at 665. This case falls within the latter. Appellant’s trial lasted just over two days and the transcript is only 481 pages long. Considering the relevant factors in *Winfield* and other post-trial processing cases, appellants case falls on the shorter end of processing times and should not have required over a year to complete.

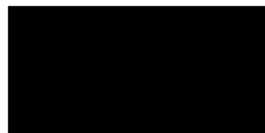
The record shows there were multiple unexplained delays. There is no explanation for why precertification was completed 307 days after sentencing. There is also no explanation for why, after the ten-month delay for precertification, it took an additional 73 days for the record of trial to reach the military judge.

While this delay was ongoing, appellant remained confined and without appellate counsel.

Following adjournment, the government took 374 days to docket appellant's case without any explanation. This court should grant appellant relief and refuse to condone the government's failure to timely process appellant's record as required by Article 66(d) of the UCMJ and the Due Process Clause of the Fifth Amendment.

### **Conclusion**

Wherefore, appellant respectfully asks this Honorable Court to set aside the findings and sentence.



JAKE D. NARE  
Major, Judge Advocate  
Appellate Defense Counsel  
Defense Appellate Division



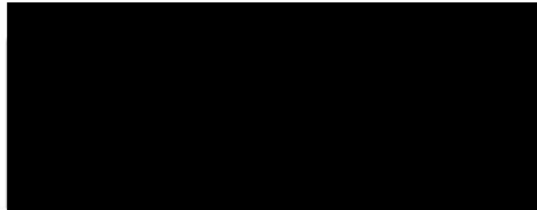
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically submitted to Army  
Court and Government Appellate Division on December 6, 2023.



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