IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20210429
Private First Class (E-3)[1] **JONATHAN M. HERNANDEZ** United States Army Appellant	Tried at Fort Bragg,[2] North Carolina, on 28–29 June 2021, before a general court-martial convened by Commander, Headquarters, Fort Bragg, Lieutenant Colonel Amy S. Fitzgibbons, Military Judge, presiding.

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

Assignments of Error[3]

I. WHETHER APPELLANT'S CONVICTIONS FOR THE SPECIFICATIONS OF CHARGE I AND II ARE FACTUALLY SUFFICIENT.

II. WHETHER APPELLANT'S PLEA OF GUILTY TO COMMUNICATING A THREAT WAS PROVIDENT.

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[1] Consistent with the Referral Letter and record of trial, appellant was a Private First Class at the time of trial. (Charge Sheet; STR; *see also* R. at 4, 88, 238; App. Ex. VIII; R.C.M. 1106 Matters).

[2] At the time of trial, the installation was named Fort Bragg. Effective 2 June 2023, the installation was officially redesignated as Fort Liberty: https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38392-AGO_2023-13-000-WEB-1.pdf.

[3] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 2

III. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR EXCESSIVE POST-TRIAL DELAY.

Statement of the Case

On 29 June 2021, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of six specifications of assault, one specification of communicating a threat, two specifications of wrongful use of reproachful words, one specification of drunk and disorderly conduct, and one specification of wrongful possession of a controlled substance, in violation of Articles 128, 117, 134, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 912a, 917, 928, 934 [UCMJ]. (R. at 88–89, 146, 157, 303; Statement of Trial Results [STR]. The military judge also convicted appellant, contrary to his pleas, of one specification each of abusive sexual contact, indecent exposure, and assault consummated by a battery, in violation of Articles 120, 120c, and 128, UCMJ, 10 U.S.C. §§ 920, 920c, 928. (R. at 88, 303; STR). The military judge sentenced appellant to confinement for nine months and seventy-two days and a dishonorable discharge. (R. at 349–50; STR). The convening authority took no action on the findings or sentence. (Action). On 17 September 2021, the military judge entered judgment. (Judgment).

Statement of Facts

On 7 August 2020, appellant committed a series of crimes. (R. at 99, 133, 215). Appellant swung his fists and struck Specialist (SPC) PC, SPC JJ, and SPC JS. (R. at 99–100). Sergeant (SGT) CK, the charge of quarters (CQ) non-commissioned officer (NCO) on duty, instructed appellant to go to his barracks room, appellant then shoved and swung at him. (R. at 100, 107–08). While SGT CK was escorting appellant, appellant told him, "Fuck you. I'm in the Crip gang, and I'll whoop your ass," or words to that effect and called him a racial slur. (R. at 119, 125–27, 130). Private First Class [PFC] LJ, a military police officer who came to assist, appellant said, "Go fuck yourself," used the same racial slur, tapped his vest, and pushed him. (R. at 109–15, 125, 128, 130; *see also* R. at 237–38). Appellant wrongfully possessed cocaine the next day. (R. at 140–42).

Immediately preceding this series of events, appellant had gone to [redacted]'s[4] room a few times to take vodka shots with her and others in their unit. (R. at 99, 174–75, 196). On the last occasion, it was only her and appellant. (R. at 99, 176, 184–85). Witnesses observed the two remain in the room between thirty or forty minutes. (R. at 216, 220–21, 223–24, 234, 245, 247). Once in the room, [redacted] poured a shot for herself and handed appellant the bottle, and he drank.

[4] [redacted] and appellant were both specialists (E-4) at the time of this incident. (R. at 184).

(R. at 176, 187). As [redacted] told appellant, "Let's go back downstairs," put the bottle back in the fridge, and turned around, appellant grabbed her shoulders and forcibly kissed her lips. (R. at 176, 189). When she pushed him back and asked what he was doing, he slammed her against the wall. (R. at 177; Pros. Ex. 4).

Using his hands to hold her arms by her side, he pinned her to the wall and kissed her neck. (R. at 177, 183, 205; Pros. Ex. 5). [redacted] repeatedly protested and swung her head from right to left to hit his head off her neck. (R. at 177, 191). [redacted] testified her memory became hazy after this point. (R. at 195). She recalled he backed up and let go of her wrists but kept pinning her. (R. at 177, 196). He then lifted her shirt and placed his mouth on her left nipple. (R. at 177–78, 196, 205). After an uncertain amount of time, he pulled down his pants to his mid-thigh and exposed his half-erect genitalia to her. (R. at 178, 205).

A knock at the door caused appellant to let go of her and step back. (R. at 178–79, 190). She recalled being in the room only five minutes before hearing the knock. (R. at 191). [redacted] took the opportunity to run around him and out of the room. (R. at 178, 191–92). SGT MW was at the door and asked her, "Are you okay?" (R. at 179, 191). She recalled replying, "No" before running down to the quad area[5] (R. at 179; Pros. Ex. 2), but SGT MW testified she did not say a word.

[5] The quad area refers to the area outside [redacted]'s barracks building. (R. at 99, 170–71, 222; Pros. Ex. 2).

(R. at 217). [redacted] recalled appellant "doing something" when he stepped back. (R. at 179). SGT MW testified he saw appellant fidgeting with his waistline with his back towards him. (R. at 217). During his guilty plea colloquy, appellant recalled being "extremely upset" and in "an emotionally disturbed state" when he left the room and walked down to the quad area. (R. at 99). The next day, the [redacted] went to CID wherein they collected evidence. (R. at 182–83; Pros. Ex. 5-6). The resulting DNA report showed appellant's DNA on the interior cups of [redacted]'s bra, neck swabs, and interior chest area of her shirt. (Pros. Ex. 6). That report was admitted without objection. (R. at 208). Additional facts are incorporated below.

Assignment of Error I

WHETHER APPELLANT'S CONVICTIONS FOR THE SPECIFICATIONS OF CHARGE I AND II ARE FACTUALLY SUFFICIENT.

Additional Facts

After [redacted] returned to the quad, her change in demeanor was noticeable to SGT MW, PFC LJ, and SPC JS. (R. at 217–18, 232, 237, 244, 246). When she would not answer their questions, SGT MW and PFC LJ went to her room with her where she went into a fetal position and cried. (R. at 218). After repeatedly asking her what was wrong, she told them appellant's name and that he did not hit her. (R. at 219). Before he left the room, PFC LJ heard her say appellant tried to make

a move on her, but she talked him out of it, she tried to push him off her, and he pushed her. (R. at 237–238, 240). [redacted] then vomited in the bathroom while SGT MW stayed to comfort her. (R. at 218–19, 227). There she told him appellant grabbed her, threw her against the wall, and tried to kiss her neck. (R. at 219, 228). Sergeant LN recalled she was intoxicated but not drunk. (R. at 197; *see also* R. at 239).

Sergeant LN was married to Mr. FN at the time. (R. at 197–98). They were geographically separated and having a difficult time in their marriage. (R. at 198–99). The night of her assault, they were working on reconciling. (R. at 199). Sergeant LN worried people would think she and appellant were "hooking up" because everyone could see the two of them walking to her room alone. (R. at 186, 204). Sergeant LN and SGT MW separately indicated to co-workers—Staff Sergeant (SSG) AF and SGT IO—that they were dating. (R. at 268–71, 274–75, 277–79, 281–82). But at trial, [redacted] and SGT MW denied ever being in a relationship. (R. at 169, 203–04, 221, 229–20). SSG AF testified [redacted] had a reputation in the battery for embellishing and exaggerating the truth. (R. at 272). SGT IO testified that in his opinion, SGT MW was dishonest. (R. at 280).

Standard of Review

Questions of factual sufficiency are reviewed de novo. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington,* 57 M.J.

394, 399 (C.A.A.F. 2002). In reviewing factual sufficiency, this court is limited to the facts introduced at trial. *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007)(citing *United States v. Duffy*, 3 U.S.C.M.A. 20, 23, 11 C.M.R. 20, 23 (1953)).

Law

A. Factual sufficiency.

This court reviews factual sufficiency of court-martial convictions and may only affirm findings of guilty that are correct in fact. Art. 66(d)(1), UCMJ. In considering the record, this court may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. *Id.*

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this] court are themselves convinced of appellant's guilt beyond reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)(quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "[T]o sustain appellant's conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and

coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005).

This court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). It makes its "own independent determination as to whether the evidence constitutes proof of each element beyond a reasonable doubt." *Id.* Proof beyond a reasonable doubt does not require that the evidence be free from all conflict. *United States v. Trigueros*, 69 M.J. 604, 612 (Army Ct. Crim. App. 2010) (quoting *United States v. Rankin*, 63 M.J. 552, 557 (N. M. Ct. Crim. App. 2006)).

All the surrounding circumstances are to be considered in determining whether a person gave consent. Art. 120(g)(7)(C), UCMJ. The Court of Appeals for the Armed Forces [CAAF] "has long recognized that the government is free to meet its burden of proof with circumstantial evidence." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (discussing *United States v. Kearns*, 73 M.J. 177 (C.A.A.F. 2014) and *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007)).

The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015). Further, this court has stated: "we are required to make credibility determinations

on appeal, but those determinations . . . recognize the trial court's superior position in making those determinations. Our assessment of evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint." *United States v. Feliciano*, ARMY 20140766, 2016 CCA LEXIS 512, at *8 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.) (citing *Washington*, 57 M.J. at 399).

Factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial." *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014); *see also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-7-1 (29 February 2020) [Benchbook]. This applies in a military judge alone case. *Frey*, 73 M.J. at 251. The factfinder is also expected to use their "knowledge of human nature and the ways of the world." Benchbook, para. 2-5-12. "In light of all the circumstances in the case, [the fact finder] should consider the inherent probability or improbability of the evidence." *Id.* Additionally, "convictions for sexual offenses may be sustained on the basis of the victim's testimony alone . . . if it is not inherently improbable or incredible." *United States v. Deshotel*, 15 M.J. 787, 790 (A.C.M.R. 1983). *See also United States v. Urbina*, 14 M.J. 962 (A.C.M.R. 1982).

B. Article 120, UCMJ (Abusive Sexual Contact).

Any person subject to Chapter IV, MCM, UCMJ, who commits sexual contact upon another person without the consent of the other person is guilty of abusive sexual contact. Art. 120(d), UCMJ. The term "sexual contact" means touching, either directly or through the clothing, the breast of any person, with an intent to gratify the sexual desire of any person. Art. 120(g)(2), UCMJ. Touching may be accomplished by any part of the body. Art. 120(g)(2), UCMJ.

C. Article 120c, UCMJ (Indecent Exposure).

Any person subject to Chapter IV, MCM, UCMJ, who intentionally exposes, in an indecent manner, the genitalia, is guilty of indecent exposure. Art. 120c(c), UCMJ. The term "indecent manner" means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Art. 120c(d)(6), UCMJ.

Argument

Appellant contends the Specification of Charge I is factually insufficient as to the element of lack of consent and the Specification of Charge II as to the actus reus. (Appellant's Br. 9–12). He does not assert mistake of fact.[6] (*See also* R. at 291). But this court should find the government presented credible evidence that

[6] During closing argument, defense counsel stated "…I'm not raising a mistake of fact offense (sic) so the Court can consider one. I think what's pretty clear is that she is misrepresenting and fabricating." (R. at 291).

established his guilt of the specifications of Charge I and II beyond a reasonable doubt. *See Turner*, 25 M.J. at 325.

A. Lack of Consent.

The evidence relevant to consent were the testimonies of [redacted], SGT MW, PFC LJ and SPC JS, the photo of a bruise on the victim's neck (Pros. Ex. 5), and the DNA report (Pros. Ex. 6).

1. <u>Witness Credibility</u>.

With respect to the victim's credibility, the arguments appellant raises are the same as were argued at trial wherein the military judge believed her account. (*Compare* Appellant's Br. 9 *with* R. at 290–91). As the victim's testimony is central to this case, this court should afford a high degree of deference to the trial court for having seen and heard her. *See Davis*, 75 M.J. at 546.

There was also credible evidence supporting her testimony that the encounter was non-consensual. The victim's change in demeanor after she ran out of the room was noticeable to SGT MW, PFC LJ, and SPC JS. (R. at 215–17, 236–37, 239, 244–46).[7] Having begun the night joyful, they recalled her appearing distant and "shell-shocked" until in the privacy of her own room, where she cried and vomited. (R. at 215–21, 236, 244).

[7] *See also United States v. Marin*, 2023 CCA Lexis 464, at *17 (Army Ct. Crim. App. 30 Oct. 2023)(victim's actions, demeanor, and nearly contemporaneous reports provided evidence of the rape).

As at trial, appellant contends SGT MW's testimony is unreliable because he and the victim were "romantically linked" (*Compare* Appellant's Br. 9 *with* R. at 291). But their testimonies were nevertheless corroborated by disinterested witnesses. Both SGT MW and PFC LJ testified the victim said appellant pushed her and that she tried to push him off her. (R. at 237–38, 240). Both he and SPC JS testified she may have been in the room with appellant for thirty minutes. (R. at 216, 220–21, 223–24, 234, 245, 247). They all observed the same stark change in her demeanor. (R. at 236–37, 239, 244–46). Neither PFC LJ nor SPC JS had a motive to fabricate. Instead, SPC JS, who was sober that night, considered appellant a good friend. (R. at 243). Thus, the victim and each of these witnesses testified credibly.

2. <u>Impossibility</u>.

First, it is undisputed that there was an encounter between appellant and the victim. (Appellant's Br. 11). The photo of her neck and the DNA report support the same conclusion. (Pros Ex. 5–6). The latter corroborated her account that he kissed her neck and nipple, having detected appellant's DNA on the interior cups of her bra, neck swabs, and interior chest area of her shirt. (R. at 177, 205; Pros. Ex. 6).

Contrary to appellant's assertion, her account does not require appellant to have had "four arms." (Appellant's Br. 10). Appellant pinned her against the wall

using his hands on her wrist. (R. at 177, 183, 205). He released her wrists freeing one or both of his hands to lift her shirt, but continued to pin her, albeit in a manner not detailed in the record. (R. at 177–78, 196, 205). No bruise needed to have resulted from the victim headbutting appellant or throwing her head side-to-side to escape. (R. at 177, 191; Appellant's Br. 10). Moreover, while he stood between her and the door, she was able to escape when he took a step back in reaction to the knock at the door. (R. at 178–79, 190–92). Later, while still under the stress of the assault, she told SGT MW and PFC LJ what occurred: appellant grabbed her and put her against the wall, he pushed her, she pushed him, but he did not hit her. (R. at 219, 227–28, 237–38). The victim's account was believable. Thus, this court should find the government "has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *Gilchrist*, 61 M.J. at 793.

B. Exposure.

The evidence relevant to establish the actus reus was the testimony of the [redacted] and SGT MW. Sergeant LN credibly testified he pulled down his pants to his mid-thigh and exposed his half erect genitalia to her. (R. at 178, 205). She also confirmed she was able to see his penis. (R. at 178). While [redacted]'s memory was hazy after she headbutted him, she remembered him pulling down his pants. (R. at 179, 205). Moreover, SGT MW saw appellant "fidgeting" with his

waistline when the victim ran out of the room. (R. at 217). The credible testimony of an eyewitness during the incident and another immediately after constitutes proof of this element beyond a reasonable doubt. *Washington*, 57 M.J. at 399.

Assignment of Error II

WHETHER APPELLANT'S PLEA OF GUILTY TO COMMUNICATING A THREAT WAS PROVIDENT.

Additional Facts

When appellant said, "I'll whoop your ass," to SGT CK, he wanted him to know he was going to punch or push him. (R. at 119, 121). This was not a joke. (R. at 119). Appellant was agitated SGT CK was telling him what to do. (R. at 119). He told SGT CK he was in the Crip gang, even though he was not, to seem threatening and tough. (R. at 119, 121). This was appellant expressing a present determination to injure him. (R. at 122–23). SGT CK was in uniform at the time he heard appellant's threat and appellant's communication was wrongful. (R. at 123, 131). SGT CK's role was to ensure the health and welfare of the soldiers that night. (R. at 135). The military judge reviewed with appellant the elements of communicating a threat, including the definition of wrongful. (R. at 117–18). During his guilty plea, appellant voluntarily admitted to the elements of Charge IV and its specification. (R. at 118–23). Although he did not have an independent memory of events, he relied upon the statements of SGT CK and PFC LJ. (R. at

120). *See, e.g.*, *United States v. Axelson*, 65 M.J. 501, 521 (Army Ct. Crim. App. 2007).

Standard of Review

An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019)) (quotations omitted). On direct review, courts apply the clear law at the time of the appeal, not the time of trial. *Tovarchavez*, 78 M.J. at 462. Appellant must establish (1) there is error (2) that is clear or obvious and (3) results in material prejudice to his substantial rights. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F 2011); *United States v. Upham*, 66 M.J. 83 (C.A.A.F 2008).

"[Appellate courts] review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Kim*, 83 M.J. 235, 238 (C.A.A.F. 2022) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)); *see United States v. Roach*, 66 M.J. 410, 412 (C.A.A.F. 2008).

Law and Argument

A. Providence.

"During a guilty plea inquiry[,] the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea

before accepting it." *Kim*, 83 M.J. at 238 (quoting *Inabinette*, 66 M.J. at 321–22). A military judge abuses their discretion by failing to obtain from appellant an adequate factual basis to support the plea or if his or her ruling is based on an erroneous view of the law. *Id.* (quotations omitted).

Military trial judges are afforded broad discretion in whether to accept a plea. *Id.* Military courts apply a substantial basis test: "Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea[?]" *Id.*

"For this Court to find a plea of guilty to be knowing and voluntary, the record of trial 'must reflect' that the elements of 'each offense charged have been explained to [appellant]' by the military judge." *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003) (quoting *United States v. Care*, 18 C.M.A. 535, 541, 40 C.M.R. 247 (1969)). "Rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." *United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013) (quoting *Redlinski*, 58 M.J. at 119).

B. *Counterman v. Colorado* is inapplicable.

Counterman v. Colorado does not apply to this case. 143 S. Ct. 2106 (2023). To the extent this Court finds it does apply, Article 115, UCMJ, and its case law are consistent with *Counterman's* holding. In application, the

presumption that the military judge knew and followed the law is not overcome. Even if this Court finds the military judge committed clear or obvious error, it did not result in material prejudice to appellant's substantial rights under the facts of this case. *See* Art. 45(c), UCMJ; *United States v. Moratalla*, 82 M.J. 1 (C.A.A.F. 2001).

1. *Counterman v. Colorado* requires a subjective intent in true threat cases which is no more demanding than recklessness.

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Nevertheless, "[t]he First Amendment permits restrictions upon the content of speech in a few limited areas. Among these historic and traditional categories of unprotected expressions is true threats. True threats are serious expressions conveying that a speaker means to commit an act of unlawful violence." *Counterman*, 143 S. Ct. 2106, at *2110 (quoting *Virginia v. Black*, 538 U.S. 343, 359) (citations omitted). The "true" in that term distinguishes what is at issue from jests, "hyperbole," or other statements that when taken in context do not convey a real possibility that violence will follow. *Id.* at 5–6 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

Counterman held that the State must prove the defendant had some subjective understanding of his statements' threatening character. *Id.* at *4–5. The majority acknowledged the ability to prosecute some objectively dangerous

communications would be outweighed in favor of preventing a chilling effect on speech. *Id*. at *2, 10.

Turning to the question of what level of subjective intent was required, the Court held that the First Amendment required no more demanding a showing than recklessness. *Id*., at *4–5. While the Court found that the First Amendment shielded a speaker who was merely negligent (i.e., a speaker was not, but should have been, aware of a substantial risk that others will understand his words as threats), the prosecution is not required to prove purpose (i.e., a person acts purposefully when he wants his words to be received as threats) or knowledge (i.e., a person acts knowingly when he knows to a practical certainty that others will take his words as threats). *Id*., at *10–11 n.5.

The Court reasoned that "[a] reckless defendant has done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm." *Id*., at *12. Thus, to prosecute a true threat, the State must prove the speaker was aware that others could regard his statements as threatening violence and delivers them anyway. *Id.*

2. The rationale in *Counterman* does not apply to this case.[8]

[8] Moreover, *Counterman* did not arise from, and therefore did not address the military context, whose differing character of its community members and mission may justify a more restrictive application of First Amendment protections. *See Parker v. Levy*, 417 U.S. 733, 759 (1974) ("The armed forces depend on a command structure that at times must commit men to combat, not only hazarding

The legislation considered in *Counterman* was a Colorado stalking statute that the Court ultimately found was unconstitutional because the State had no requirement to prove a subjective intent.[9] *Counterman*, 143 S. Ct. 2106, at *2112 (citing P*eople v. Cross*, 127 P. 3d 71, 76 (Colo. 2006)); *see generally* Colo. Rev. Stat. §18–3–602(1)(c) (2016). The text of the statute provided in part:

> (1) A person commits stalking if directly, or indirectly through another person, the person knowingly:
> [. . .]
> (c) Repeatedly . . . makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.

Colo. Rev. Stat. §18–3–602(1)(c) (2016).

In contrast, Congress required "both an objective expression of intent and a subjective intent" to prove Article 115, UCMJ. *See* Benchbook, Note 1. The text of the statute provides: "Any person subject to this chapter who wrongfully

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their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civilian population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."); s*ee generally* Articles 88-90, 92, 133, UCMJ.

[9] Notably, Colorado criminalizes threats under two statutes: stalking and menacing. *Compare* Colo. Rev. Stat. §18–3–206 (2016) ("A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury.") *and* Colo. Rev. Stat. §18–3–602(1)(c) (2016) *with* Article 115, UCMJ, 10 U.S.C. § 915 (2018) *and* Article 130, UCMJ, 10 U.S.C. § 930 (2018).

communicates a threat to injure the person . . . shall be punished as a court-martial may direct." The elements of this offense include:

> (a) That the accused communicated certain language expressing a present determination or intent to injure the person . . . presently or in the future
> (b) That the communication was made known to that person or to a third person; and
> (c) That the communication was wrongful.

Benchbook. The first element requires an objective inquiry, analyzing the existence of a threat from the viewpoint of a reasonable person in the recipient's place. *United States v. Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577, at *9 (C.A.A.F. 2023) (quoting *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995)) (internal quotation marks and alterations omitted). The third element of wrongfulness relates to appellant's subjective intent. Article 115, UCMJ, explanation; *Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577, at *7 (citing *United States v. Rapert*, 75 M.J. 164, 169 (C.A.A.F. 2016)). Because of this two-prong approach, the concerns in *Counterman* are not present. *See United States v. Greene-Watson*, ACM 40293, CCA LEXIS 542, at *11 n.10 (Air Force Ct. Crim. App. 27 Dec 2023) ("[Article 115, UCMJ] already imposes the objective-subjective analysis . . . effectively endorsed by the Supreme Court's approach in *Counterman*.").

3. Congress already requires a subjective intent greater than recklessness under Article 115, UCMJ.

The Court of Appeals for the Armed Forces [CAAF] has explained the subjective element of wrongfulness required a mens rea higher than negligence. 75 M.J. 164, 168–69 (C.A.A.F. 2016). The Court in *Harrington* further explained, "the key question is not whether the speaker intended to carry out the object of the threat, but rather 'whether the speaker intended his or her words to be understood as sincere.'" __ M.J. ___, 2023 CAAF LEXIS 577, at *7 (quoting *Rapert*, 75 M.J. at 169 n.10). Of note, *Harrington* makes no reference to *Counterman* and instead supports the proposition in *Rapert*, making the holdings in both CAAF cases clear precedent in this case. *Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577; *Rapert*, 75 M.J. 164, 169.

This element is satisfied if the appellant "transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat." Article 115, UCMJ, explanation. His plea colloquy must establish his statement was "not made in jest, as idle banter, or for an innocent or legitimate purpose" that contradicts the expressed intent to commit the act when viewed under the circumstances. 75 M.J. at 169; *see* Article 115, UCMJ, explanation. Thus, if the Court finds appellant's plea colloquy needed to prove his subjective belief, then that protection identified in *Counterman* already applies to servicemembers.

4. There was no plain error because the military judge inquired into the element of wrongfulness during appellant's plea colloquy.

In this case, the military judge reviewed all the elements of Article 115, UCMJ with appellant, namely:

> The communication is wrongful if you transmitted it for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat. The communication is not wrongful if it is made under circumstances that reveal it to be [in jest] or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act.

(R. at 118). Moreover, unlike in *United States v. Prather*, there was no burden shifting, expressly or impliedly. 69 M.J. 338 (C.A.A.F. 2011). Instead, this colloquy is consistent with *Rapert* and *Harrington* and in harmony with *Counterman*. *Compare Harrington*, __ M.J. ___, 2023 CAAF LEXIS 577 *and Rapert*, 75 M.J. 164 *with Counterman*, 143 S. Ct. 2106.

Absent clear evidence to the contrary, the military judge is presumed to know and follow the law. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). This presumption is not overcome in this case. Therefore, because the military judge convicted appellant of the charge of "communicating a threat," she necessarily found that appellant made the statement for the purpose of issuing a threat or with the knowledge it would be viewed as a threat and not in jest or for an innocent or legitimate purpose.

5. There was no prejudice to the appellant as his threat constitutes what *Counterman* deems unprotected speech.

Appellant was not materially prejudiced in this case. *Sweeney*, 70 M.J. at 304; *Upham*, 66 M.J. 83. First, the subjective intent element of Article 115, UCMJ was not contested. (R. at 118). Second, this element was established by appellant's own admission that he was aware others could regard his statements as threatening violence and delivered them anyway. *Counterman*, 143 S. Ct. 2106, at *2117; *Upham*, 66 M.J. at 87. (R. at 123).

Here, the content of the statement was an unconditional threat of a violent action demonstrating present intent towards SGT CK: "I'll whoop your ass." (R. at 122–23). Appellant was aware of the character of this communication because the statement was unambiguous in word choice and connotation. *Cf. Counterman*, 143 S. Ct. 2106, at *2114 (referring to "I am going to kill you for showing up late" as a statement that when taken in context does not convey a real possibility violence will follow).

Moreover, the plea colloquy established his statement was a true threat because it was not made in jest, as idle banter, or for an innocent or legitimate purpose. When appellant said, "I'll whoop your ass," to SGT CK, he wanted him to know he was going to punch or push him. (R. at 119, 121). *Cf. Counterman*, 143 S. Ct. 2106, at *2113 n.2 (discussing hypothetical situations where a speaker may be unaware of the character of their communication). When appellant in the

same breath told SGT CK he was in the Crips gang, he wanted to appear threatening and tough. (R. at 119, 121). Viewed in totality, his threat was aggression and provocation towards SGT CK that surpassed the level of recklessness. Clearly, appellant's statement fell outside the ambit of protected speech such that prosecuting the dangerous communication outweighed concerns of a chilling effect on his speech.[10] *See Counterman*, 143 S. Ct. at *2117. Thus, assuming arguendo there was error, such error did not result in material prejudice to appellant's substantial rights. Art. 45(c), UCMJ.

Assignment of Error III

WHETHER APPELLANT IS ENTITLED TO RELIEF FOR EXCESSIVE POST-TRIAL DELAY.

Additional Facts

Appellant's court-martial adjourned on 29 June 2021. (R. at 351). On 13 August 2021, the convening authority took no action. (Action). On 17 September 2021, the military judge entered judgment. (Judgment).

The transcription was completed and sent for errata to trial counsel on 3 June 2022. (Chronology). The trial counsel completed the pre-certification on 9 November 2022. (Precertification). The transcript was corrected and forwarded to

[10] As in *Levy*, the interests unique to the military context are implicated by appellant's communication; his statement, "I'll whoop your ass," to a non-commissioned officer who was in the performance of his official duties undermines the effectiveness of response to command. 417 U.S. at 759.

the military judge for errata and authentication on 16 November 2022. (Chronology). The military judge authenticated the record on 5 January 2023. (Authentication). The court reporter certified the 351-page transcript on 22 February 2023. (R. at 351; Certification). On the same day, the Office of the Staff Judge Advocate (OSJA) provided a timeline explaining the post-trial processing delay. (Chronology). Thereafter, this court docketed the case on 6 March 2023. (Referral and Designation of Counsel).

Standard of Review

This court conducts a de novo review of claims of unreasonable post-trial delay. *United States v. Winfield*, 83 M.J. 662, 666 (Army Ct. Crim. App. 2023).

Law

To evaluate claims of post-trial delay, this court evaluates (1) whether appellant suffered a due process violation under the Constitution, and (2) sentence appropriateness under Article 66(d), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

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). To analyze post-trial delays and due process, appellate courts analyze four factors (*Barker*

factors): "(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); *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). 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).[11] The *Barker* analysis, however, 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).

Where an 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." *Toohey*, 63 M.J. at 362. If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a

[11] Additionally, Court of Criminal Appeals [CCAs] 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. None of these factors are implicated in this case.

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. *Id*. 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.

Absent a due process violation, this Court next considers whether relief for excessive post-trial delay is warranted based on the CCA's sentence appropriateness authority under Article 66(d)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 224 (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." Because 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." *Winfield*, 83 M.J. at 666. 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 totality of the circumstances in this case merits no more than fifteen days' confinement credit.

A. The first and second Barker factors weigh in favor of appellant.

From the date appellant's court-martial adjourned to the date of docketing with this court, 615 days elapsed. (R. at 351; Referral and Designation of Counsel). The record of trial consists of a mere 351 pages. (R. at 351). The OSJA's timeline cited the "major contributors to the delay were high personnel turnover within the court reporter section and the abrupt vacancy of the post-trial paralegal position." (Chronology). Additional causes included schools, post-trial backlog, other trials, medical separation, and permanent changes of station. (Chronology). The errata process accounted for a six-month delay to which the same personnel issues contributed. (Chronology). As personnel issues are not "legitimate reasons justifying otherwise unreasonable post-trial delay," the first and second *Barker* factors weigh in favor of appellant. *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011).

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

Next, appellant concedes he did not request speedy processing. (Appellant's Br. 20). While this does not waive appellant's speedy post-trial rights, the "failure to assert the right will make it difficult for [an appellant] to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532. He also asserts the delay prejudiced him without specifying the prejudice. (Appellant's Br. 20). Thus, the third and fourth *Barker* factors favor appellee.

C. Fairness or integrity of the military justice system not impugned.

Appellant failed to show 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. As such, appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145.

D. Appropriate relief under an Article 66(d)(2), UCMJ analysis.

Appellant asks this court to grant "appropriate relief" based on a "pervasive pattern of delay at Fort Bragg"[12] and due to the delay in this case being excessive. (Appellant's Br. 21–23).

Under the specific facts of this case, the delay was excessive. However, this

[12] The government opposes appellant's request to take judicial notice of the post-trial processing times in other cases. (Appellant's Br. 22). The number of days without particularized facts as to the reason(s) for delay or record of trial presents an incomplete picture and is unnecessary to determine this case.

court should not provide appellant a windfall. *See, e.g.*, *United States v. Nicholas*, 53 M.J. 656, 658 n.4 (Army Ct. Crim. App. 2000); *United States v. Collins*, 44 M.J. 830, 833 (Army Ct. Crim. App. 1996), pet. denied, 47 M.J. 76 (C.A.A.F. 1997)("Providing relief that is totally disproportionate to the harm suffered, or that grants the appellant a major windfall, is neither required nor appropriate."). This court should grant no more than fifteen days' confinement credit.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and grant relief in the form of fifteen days' confinement credit.

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CERTIFICATE OF SERVICE, U.S. v. HERNANDEZ (20210429)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 29th day of January, 2024.

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