IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220022
Staff Sergeant (E-6) **SAMUEL E. FYE,** United States Army, Appellant	Tried at Fort Bragg, North Carolina, on 16 September, 6-9 December and 19-20 January 2022, before a general court-martial convened by Commander, Headquarters, 1st Special Forces Command, COL G. Bret Batdorff and LTC Trevor I. Barna, Military Judge, presiding.

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

WILLIAM E. CASSARA, Esq.
[redacted]

TUMENTUGS D. ARMSTRONG
CPT, JA
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Defense Appellate Division

Assignments of Error

I.

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

II.

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

III.

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

IV.

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

V.

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

Argument

I.

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

A. Appellant Did Not Waive Consideration of His Motion for Mistrial.

Contrary to the Government's assertions, SSG Fye did not waive this Court's consideration of his motion for mistrial. Defense Counsel raised the issue before the Military Judge in three separate motions. (R. 752, 791, 978). After [redacted]'s direct testimony included several unresponsive and inadmissible statements, the defense asked for a mistrial. (R. 752). The Military Judge deferred ruling until the end of her testimony. (R. 759). Defense Counsel moved again for a mistrial before the conclusion of [redacted] testimony when she commented on SSG Fye's right not to testify. (R. 791). The Military Judge again deferred a ruling until [redacted]'s testimony was complete. (R. 795).

Despite his promise to allow Defense Counsel to further discuss their basis for mistrial at the conclusion of [redacted]'s testimony, the Military Judge instead pressed the Government to call its next witness. (R. 895).

The Government continued with its case, calling three additional witnesses before resting. (R. 895, 922, 939, 961). The next morning, before the defense began its case-in-chief, the Military Judge asked the defense whether they had more to add to their mistrial motion. (R. 968). Defense Counsel then

informed him that the defense had learned of the missing DFE report. (R. 969). After several recesses to determine the circumstances of the failure to turn the DFE report over to the defense, the Military Judge stated, "Also, pending before the Court is your R.C.M. 915 motion for a mistrial." (R. 978). The Military Judge noted that the basis for the motion was the M.R.E. 404(b) comments made by [redacted] throughout the trial and the failure of the government to disclose the new statement by [redacted] regarding the sound machine. (R. 978-79). He asked the defense whether they wished to maintain or to withdraw the mistrial motion. (R. 979).

After a recess to discuss the matter with appellant, Defense Counsel informed the Military Judge that the defense was renewing its request for a mistrial in light of the failure of the Government to disclose the DFE report, which contained exculpatory statements. (R. 983). The Military Judge then questioned both sides about the motion for mistrial and the Government and Defense provided extensive arguments on the issue. (R. 984-1008). Following argument, the Military Judge stated that he was recessing to consider the motion and would let the parties know of his ruling as quickly as possible. (R. 1008). Upon return, the Military Judge continued the court-martial for several weeks, a step the Government had argued was sufficient to cure the discovery failure, but still did not rule on the mistrial motion. (R. 1008). He set dates for written pleadings to be filed. (R. 1008). However, the Record is devoid of any further mention of the mistrial motion.

The defense moved for a mistrial three times during the trial proceedings, each for a separate basis. Had the Military Judge granted the motion, the charges and specifications would have been withdrawn from the court-martial. R.C.M. 915(c)(1). Instead, the court-martial continued on all charges and specifications. While the Military Judge stated that he was "deferring" his ruling, a lack of a mistrial declaration is the same as a denial. Each of the three occasions upon which the defense moved for a mistrial should be treated by this Court as a separate motion and each of the "deferrals" by the Military Judge should be treated as a denial.

B. If the Mistrial Motion Was Abandoned, the Military Judge Had a Sua Sponte Duty to Declare a Mistrial in Appellant's Case

The Defense made three separate motions for mistrial, each on increasingly more substantial bases, and the Military Judge's decision to proceed in the court-martial constituted a denial of those motions. Should this Court disagree and find that the defense's motion was abandoned, the Military Judge still possessed a *sua sponte* duty to declare a mistrial in this case due to the cumulative effect of [redacted]'s numerous prejudicial statements and the Government's discovery and disclosure failures. *See United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999) ("R.C.M. 915(a) sets forth that a mistrial my be declared in the discretion of the military judge '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.'").

No matter the state of the motion made by the defense, the Military Judge's failure to come to this conclusion despite the myriad ways that [redacted] inserted inadmissible and prejudicial misconduct into her testimony was an abuse of his discretion. The further failure of the Government to disclose exculpatory information concerning [redacted]'s testimony and to turn over the DFE report on SSG Fye's cell phone further exacerbated the circumstances casting substantial doubt upon the fairness of the proceedings.

C. The Military Judge Abused His Discretion When He Declined to Declare a Mistrial.

Contrary to the Government's argument for a plain error review, an appellate court reviews a military judge's decision on whether to grant a mistrial for an abuse of discretion. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). Whether on his own motion or the defense's, the Military Judge's decision not to grant a mistrial in SSG Fye's case was an abuse of discretion.

Turning first to the inadmissible M.R.E. 404(b) testimony given by [redacted], the Government claims that the Military Judge's instructions to disregard five of the ten inflammatory statements was sufficient to cure the error. While a curative instruction is the preferred remedy for correcting error when inadmissible evidence has come before the members, sometimes the nature of

the evidence is such "that it is not likely to be erased from the minds of the court members." *United States v. Pastor*, 8 M.J. 280, 284 (C.M. A. 1980).

The Military Judge's duty went beyond just instructing the members not to consider [redacted]'s statements. The Court of Appeals for the Armed Forces also encourages Military Judges to voir dire members to ensure they not only understand but also will adhere to the curative instructions. *United States v. Diaz*, 59 M.J. 79, 92 (C.A.A.F. 2003). Where an instruction does not cure the prejudice toward the accused, the judge must grant a mistrial. *Id*. The failure to do so is an abuse of discretion. *Id*. In this case, the Military Judge did not ensure that the members understood his instructions and would be able to follow them. The statements which the Military Judge instructed the members not to consider included an allegation that SSG Fye threw a liquor bottle at [redacted], that he drank and drove with his children in the car, that he intended to punch his pregnant ex-wife in the stomach, and that he was holding a knife while screaming at [redacted] (R. 514, 528-29, 730, 731). He did not question the members to determine whether they would adhere to his instructions to disregard these statements.

The Government points to the mixed findings in this case as proof that the members followed the Military Judge's instructions to disregard. However, the members still convicted SSG Fye of several serious violent offenses. The majority of the inadmissible statements made by [redacted] included threats of harm or uncharged physical assaults. This Court cannot be assured that these statements did not influence the members' determination of guilt on these offenses,

particularly when the Military Judge failed to instruct them to do so half of the time.

The Military Judge failed to instruct the members to disregard several objected to statements. These included references to "drug use," a threat to kill [redacted] and himself if she tried to leave the relationship, a court finding that SSG Fye was a danger to his children, and a separate threat to kill [redacted] that her son heard (R. 476, 519, 532, 648). The Government argues that these statements to which the Military Judge sustained objections but did not instruct the members to disregard "had little impact on the panel." (Govt. Ans. at 29). It is unclear how the Government, or this Court, can possibly know the impact these statements had upon the members in their determination of SSG Fye's guilt.

The Government also argues that the defense forfeited its objections to two of [redacted]'s inadmissible statements by not objecting at trial. While defense did not object to the final statement wherein [redacted] testified that SSG Fye threatened to cut her throat, the Military Judge clearly recognized the statement as problematic even before it was uttered. (R. 867). He attempted to stop [redacted] in the middle of her response, but she managed to complete it anyway. (R. 867). A defense objection was unnecessary where the Military Judge recognized the issue on his own. The Military Judge again instructed [redacted] to only answer the questions asked, but did not instruct the members to disregard the statement. (R. 867). The Military Judge's failure to instruct the members to disregard what he

clearly knew to be inadmissible was plain error, regardless of whether the defense lodged a formal objection.

Moving to [redacted]'s comment on SSG Fye's right not to testify, the Government again determines that this statement did not prejudice SSG Fye without providing evidence that this is true. (Govt. Ans. at 30). Although the Military Judge offered to craft an instruction to the members that SSG Fye was not required to testify, Defense Counsel feared this would serve only to raise the issue before the members again, solidifying [redacted]'s comments in their minds. (R. 794). As Defense Counsel stated, [redacted]'s inadmissible and inflammatory statement had put SSG Fye in a "difficult place" through no fault of his own. (R. 794). The prejudice to SSG Fye cannot be ignored because his counsel opted not to further emphasize the issue with the members.

The Government argues that Trial Counsel's use of leading questions on redirect did not prejudice SSG Fye because the defense did not object to the practice. This is another example of the Government and the Military Judge's inability to control [redacted]'s testimony putting SSG Fye in an impossible position. Were the defense to object to the use of leading questions, [redacted] would be left to inject further inadmissible and prejudicial material into her testimony. Instead, the defense allowed the leading questions and Trial Counsel was able to testify for [redacted] through his questions. Both choices were to SSG Fye's prejudice.

The Military Judge has a duty to exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to make

those procedures effective for determining the truth. Mil. R. Evid. 611(a). The Military Judge here failed to assert control over the questioning of [redacted]. He refused to even instruct her regarding her refusal to constrain her responses to the questions asked until she had made several inadmissible statements. (R. 526, 536, 735). When he finally began to instruct her to only answer the questions asked, she repeatedly ignored this instruction. (797, 799, 804, 806, 814, 825, 848, 864, 867, 879). The cumulative effect of the numerous inadmissible allegations warranted a mistrial declaration on their own, and the Military Judge's failure to grant the defense motion for a mistrial was an abuse of his discretion.

Addressing the Government's failure to disclose [redacted]'s testimony regarding the sound machine, the Government claims that SSG Fye's acquittal on the related specification eliminates any prejudice to SSG Fye. This argument overlooks the lost opportunity for the defense to further illuminate [redacted]'s lack of credibility. Her shifting stories and timelines and added facts were the primary methods by which the defense could attack her uncorroborated allegations. While the members did not find SSG Fye guilty of this offense, the harm to the defense ability to further attack [redacted]'s credibility stretched across the entire trial.

The Government's failure to provide the defense with the full forensic examination of SSG Fye's cell phone with [redacted] turned over to CID created an additional substantial basis for mistrial. The Government argues that this failure was cured by the continuance granted by the Military Judge. (Govt. Ans. at 32).

The continuance was not only insufficient relief to cure the Government's error, but itself created further prejudice to SSG Fye.

Trial Counsel acknowledged that the forensic examination contained exculpatory material. (R. 990). He also admitted that the Government counsel had made "numerous requests" for the full case file from CID but never received the forensic examination. (R. 992). When the defense learned of the forensic examination, after the Government had rested its case, they learned not only of the 120 voice messages that the CID agent had found to be relevant, but also that there had been at one time several thousand other audio messages that the agent who created the report did not find to be relevant. (R. 973). During the Article 39(a) hearing, Defense Counsel noted to the Military Judge that the Government had just turned over a disc with information from the phone but that the entirety of what was on the phone was not on that disc, but was instead on a "server back at CID." (R. 975).

While the Record does not make clear exactly what material the defense was able to obtain from the Government during the continuance, it is telling that the defense case only included discussions of the messages that the CID agent had initially found relevant. It is unclear whether the defense was able to obtain the "entirety" of the phone's contents or the thousands of other audio messages during that time. It is also unclear whether the defense was able to go through that large amount of material contemplated over the holiday break. The Military Judge's use of a continuance to cure the Government's discovery failure was

not sufficient relief. The entire Government case had already been presented. The defense had not had the benefit of the information on the phone during [redacted]'s testimony. The continuance did not cure this error.

The continuance not only did not assist the defense in recovering from the Government's failure to disclose the forensic examination, it created its own prejudice against SSG Fye. After over a month, the members were brought back to court. They had spent 41 days with only the Government's case in mind. Once they returned, the members now had to try to not only remember the testimony of the Government witnesses, but to remember which of [redacted]'s statements to consider and which not to consider. Ultimately, what they recalled of her testimony likely included the inadmissible threats and alleged assaults. They used all of this in their determination of SSG Fye's guilt.

The Government's tremendous oversight in its discovery obligations added to the numerous issues with [redacted]'s testimony and the Government's disclosure failure made the need for a new trial obvious. The Military Judge's decision not to grant a mistrial and give that new trial to SSG Fye was an abuse of his discretion.

II.

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

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

The Government argues that [redacted] "compellingly" testified about her allegation that SSG Fye inserted an enema into her anus without her consent. (Govt. Ans. at 37). While corroboration is not required and a single witness's testimony can support a guilty finding, in this case [redacted]'s lack of credibility should lead this Court to conclude that the Government cannot prove this offense beyond a reasonable doubt based upon her testimony alone.

[redacted] provided a great number of text messages between the pair, audio recordings wherein they discussed alleged physical altercations, and photos of damage SSG Fye allegedly did to the home. Yet, not one of those text messages or audio recordings or photos ever reference this "enema" incident at all. (Pros. Ex. 2, Def. Ex. A, Def. Ex. C). Several of the recordings were supposedly made at the end of, or after, the date range of the alleged sexual assault, even as that range shifted and changed from report to report. (Pros. Ex. 21, 22, 23, 24, 25, 26). In some of these recordings, SSG Fye and [redacted] spoke generally about their relationship and her allegations of physical abuse. (Pros. Ex. 22, Pros. Ex. 25). In none of the recordings did [redacted] ever allege, nor did SSG Fye ever discuss, an incident in which SSG Fye inserted an enema into [redacted]'s anus without her consent. The absence of this incident in discussions of alleged physical abuse is telling.

Similarly, no text messages between the pair discussed this "enema incident." The only relevant text message came on 6 December 2018, the day after she initially alleged this incident occurred, when [redacted] asked directly for "butt stuff" via text message. (R. 818). Although a large number of photos were taken to show bruising and damage to the home, none were taken to substantiate this allegation. (Pros. Ex. 6, 17, 18).

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

After weighing the lack of supporting evidence that this incident ever occurred, this Court cannot be convinced of SSG Fye's guilt beyond a reasonable doubt.

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

The Government again relies upon the audio recordings provided by [redacted] and the explanation given in her testimony as to what was occurring during them. (Govt. Ans. at 40-41). However, without the complete recordings or a forensic examination of her phone in order to determine their authenticity, this Court should not base its determination of SSG Fye's guilt on these exhibits. Further, [redacted]'s explanation of what was happening in those recordings must be considered in light of her damaged credibility. [redacted]'s allegations changed with each report to a new law enforcement agency. Her allegations only arose in the first place after SSG Fye sought equitable distribution of the marital home and the return of his property. (R. 851). Despite access to her mother and other close friends on a daily basis, [redacted] never disclosed this alleged abuse to them. She had means to support herself and her son and supportive family nearby. It was not until the motive to fabricate arose in the form of SSG Fye's lawsuit that she alleged physical abuse. These allegations, supported only by her testimony, should not convince this Court of SSG Fye's guilt beyond a reasonable doubt.

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

The Government points out that it is not required to show that the public was actually aware of SSG Fye's drunkenness. (Govt. Ans. at 42). Certainly this

is true, however there must be some indication that this conduct was of a nature to bring discredit upon the armed forces.

Here, excluding the evidence that related to other offenses for which SSG Fye was tried, the evidence relating specifically to SSG Fye's conduct after he drank alcohol included damage to his home and belongings, done within the walls of his home, and passing out, also in his home. (Pros. Ex. 6, Pros. Ex. 17). Under the "circumstances" testified to at trial, the public was unaware of his conduct within his own home. While drunkenness might have contributed to other offenses for which SSG Fye was tried and convicted, no evidence was introduced at trial that the drunkenness itself was of a nature to bring discredit to the armed forces. The Government's evidence on this specification did not meet its burden to prove guilt to "an evidentiary certainty" and is therefore factually insufficient.

III.

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

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

The Government argues that the sexual history between [redacted] and SSG Fye is relevant but "does not show that [redacted] consented on this particular occasion." (Govt. Ans. at 46). This argument misapprehends the defense of mistake of fact. Even if SSG Fye did insert an enema into [redacted]'s anus and even if [redacted] did not

actually consent to the use of an enema with SSG Fye on this particular occasion, despite the voluminous text messages in which they fantasized about exactly this scenario, he held an honest and reasonable belief that she did.

That belief was based upon not only the text messages in which [redacted] described her willingness to participate in anal penetration and enemas, but also the sexual history between the couple. (Pros. Ex. 2, Def. Ex. A, Def. Ex. C). [redacted] had given enemas to SSG Fye in the past and it was an established part of their sexual behavior. (R. 567-68, 780-81). The Government argues that the couple would discuss every detail before engaging in sexual fantasies so SSG Fye could not have believed that [redacted] consented. (Govt. Ans. at 46). This argument is contradicted by [redacted]'s own testimony that the couple had created a safety word after a scenario in which they had not discussed the fantasy beforehand and SSG Fye had believed that [redacted]'s protests were part of the fantasy. (R. 553-54). On this particular occasion, SM testified that while SSG Fye was administering the enema she told him to stop, but did not use the safety word. (R. 556). She did not use the safety word until she went to relieve herself in the bathroom and found the door locked. (R. 556).

The Government's evidence simply does not prove beyond a reasonable doubt that if this incident actually occurred, that SSG Fye did not possess an honest and reasonable mistaken belief that [redacted] consented to the enema, given the history of their sexual relationship.

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

The Government misstates SSG Fye's argument in regards to this offense. (Govt. Ans. at 48). An Article 134 offense does not need to be independently criminal, but the evidence presented must satisfy the terminal element in order to become criminal behavior. Without some nexus to the terminal element, there is no criminal aspect to the charged conduct.

The Government points to the audio recordings produced by [redacted] as evidence of SSG Fye's drunkenness. (Govt. Ans. at 48). However, only Prosecution Exhibits 19, 20, and 27 were purportedly recorded during the charged time frame for Specification 2 of Charge IV. While those recordings, according to the explanation given by [redacted] might establish that SSG was intoxicated, that is not enough to make his behavior criminal. The act of being drunk while in a troubled relationship is not enough to prove the terminal element.

No evidence of the terminal element was introduced and Trial Counsel never even argued that the evidence satisfied this element. The standard for criminality the Government sought to apply to this offense was overly broad and too vague to put servicemembers on notice of what behavior is criminal. Therefore, this guilty finding must fail as legally insufficient.

IV.

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

The Government's argument that SSG Fye was not prejudiced by his military defense counsel's failure to communicate with him during the post-trial processing of his court-martial is flawed. First, the Government claims that the SJA asked SSG Fye personally for an authorized recipient who would be able to receive transferred forfeitures. (Govt. Ans. at 54).

The SJA never stated that he or any member of his office spoke to SSG Fye. (Clemency Advice). Direct conversations between the SJA and SSG Fye while he was in confinement would certainly be unorthodox. A more sensible reading of the SJA's note is that Trial Defense Counsel was repeatedly asked for information for an authorized recipient of the forfeitures. Both SSG Fye and [redacted] were very clear that Trial Defense Counsel never informed either of them that [redacted] was not an authorized recipient. (Affidavit of [redacted] and Affidavit of SSG Fye). Nor did he ever ask for banking information for SSG Fye's sons.

The Government argues that SSG Fye has failed to provide information regarding his ongoing cancer treatment at the time of his sentencing. (Govt. Ans. at 54). However, SSG Fye explained what he was undergoing as part of his unsworn statement during presentencing. (R. 1332-35). The Government also

argues that SSG Fye has failed to adequately articulate what his submission to the Convening Authority would have included. Yet, in his affidavit and the accompanying brief, SSG Fye listed the documents he would have submitted. His brief contains the legal deficiencies he would have raised. Certainly, SSG Fye has specified what he would have submitted, but for Trial Defense Counsel's deficiencies. His inability to provide such a submission to the Convening Authority, his inability to request a deferral of confinement in order to complete cancer treatment and his inability to ensure his sons received his forfeited pay constitute clear prejudice resulting from the ineffective post-trial representation of Trial Defense Counsel.

V.

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

The Government argues that the 288 delay in SSG Fye's post-trial processing was not egregious based upon this Court's finding in another case that a delay of 296 days was not a denial of due process. However, in this case, 434 pages of this 1363-page Record had already been transcribed before the case concluded. (R. 1015). The Government then took from 20 January 2022 until 10 August 2022 to transcribe 929 pages. This delay is facially unreasonable.

The Government further argues that the post-trial delay in this case is not a due process violation because the command only had one court reporter to handle both transcription and in-court demands. (Govt. Ans. at 59). The staffing levels chosen by the Government cannot be a point in the Government's favor in this analysis. The month the Military Judge took to authenticate the Record remains without explanation and is also patently unreasonable. (Post-Trial Processing Timeline Memorandum).

SSG Fye has been prejudiced by this delay as he has had to wait to have his meritorious arguments reviewed by this Court. Even without articulated prejudice, the delay in this case is egregious enough to adversely affect the public's perception of the fairness and integrity of the military justice system. The Government cannot use its own understaffing in the court reporter position to excuse this delay in its post-trial processing. SSG Fye should not be made to bear the weight of such decisions.

Finally, this Court's determination of relief on this issue is not tied to a consideration of the appropriateness of the sentence as adjudged. "Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency." *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001).

Conclusion

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

[redacted]
FOR
WILLIAM E. CASSARA
Civilian Appellate Counsel

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 19 January 2024..

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