

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220531

Sergeant (E-5)

EDWARD T. McTEAR,

United States Army,

Appellant

Tried at Fort Stewart, Georgia, on 15 March 2022, 22 June 2022, 19-20 October 2022, before a general court-martial appointed by the Commander, Headquarters and Fort Stewart, Lieutenant Colonels Albert Courie and Trevor I. Barna, military judges, presiding.

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

Assignments of Error¹

**I. WHETHER APPELLANT’S CONVICTION FOR
SEXUAL ASSAULT WITHOUT CONSENT WAS
LEGALLY AND FACTUALLY SUFFICIENT.**

**II. THE GOVERNMENT VIOLATED APPELLANT’S RIGHTS
UNDER UNITED STATES V. STELLATO AND RULE FOR
COURTS-MARTIAL 701(e).**

**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 321
DAYS AFTER SENTENCING.**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Statement of the Case

On 20 October 2022, a military judge sitting as a general court-martial convicted appellant, SGT Edward T. McTear, contrary with his pleas, of one specification of sexual assault without consent, and two specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ).² (R. at 456-460; Statement of Trial Results). That same day, the military judge sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, twenty-four months confinement and a dishonorable discharge. (R. at 509; Statement of Trial Results). On 16 November 2022, the convening authority took no action on the findings but approved the sentence. (Convening Authority Action). On 1 February 2023, the convening authority superseded the previous action dated 16 November 2022, again took no action on the findings and disapproved the adjudged sentence pertaining to total forfeiture of all pay and allowances. (Convening Authority Action). On 2 February 2023, the military judge

² The military judge found appellant not guilty of The Specification of Charge II, Attempted Sexual Assault, in violation of Article 80, Uniform Code of Military Justice. The military judge also found Specifications 1, 2, and 3 of Charge I constituted an unreasonable multiplication of charges, and conditionally dismissed Specifications 2 and 3 pending appellate review and stated he wouldn't consider them for sentencing.

entered Judgment. (Judgment of the Court). This court docketed appellant's case on 19 September 2023. (Referral and Designation of Counsel).³

Statement of Facts

All charges stemmed from a single sexual encounter after a house-warming party at Appellant's house. Appellant became heavily intoxicated and after Ms. [REDACTED] had been drinking and smoking marijuana, she went to take a nap in the upstairs guestroom. Appellant then attempted to have sexual intercourse with Ms. [REDACTED] and touched portions of her body. The defense contested Appellant's state of mind and whether penetration occurred which is why the charge sheet included an attempt crime as well as the completed act.

During a second 39(a) session on 22 June 2022, the military judge discussed four motions. (R. at 14; App. Ex. II, App. Ex. III, App. Ex. IV, App. Ex. V). The government and defense stipulated to admit the complete sexual assault nurse examination file. (R. at 219). Both parties also stipulated to admit portions of appellant's CID interview. (R. at 373, Pros Ex. 3, Pros Ex. 8). The government used a forensic biologist at the United States Army Criminal Investigation Laboratory as an expert witness. (R. at 317). The expert testified that seminal fluid

³ The clerk of court sent the record to the military judge for authentication on 5 June 2023, and the military judge authenticated the record on 24 August 2023.

tested negative on Ms. [REDACTED] underwear. (R. at 322). The expert also testified that male DNA was not found on Ms. [REDACTED] vaginal swabs. (R. at 338).

Government's Theme of the Case

During the government's opening statement, the government's theme was that Ms. [REDACTED] was asleep during the charged offenses. (R. at 109). "The problem with [appellant's] actions is that [REDACTED] the victim in this case, was asleep. How do we know she was asleep? Because the accused tells Special Agent [REDACTED] [REDACTED]." (R. at 109). The government further stated in their opening that appellant waited for Ms. [REDACTED] to fall asleep to perform the charged offenses. (R. at 110).

The government also emphasized Ms. [REDACTED] was asleep in their closing argument. (R. at 419-420, 423, 426). "That's the intervening circumstance that he didn't plan for, was that he drank too much, couldn't get erect. The other one is [Ms. [REDACTED] was asleep while he was trying to do this." (R. at 419-420). The government argued that Ms. [REDACTED] did not consent because she was asleep. "And so, you know, for the lack of consent--right? --we know that a sleeping person cannot consent." (R. at 423). "But you know at the time that you're consummating this act that she is asleep." (R. at 426).

Sleep or the inverse, waking-up, was a focal point in the government's case. (*See, e.g.*, R. 108-109, 135-42, 190-91, 251, 292, 388).

Ms. ■ Trial Testimony

Ms. ■ testified that she could tell appellant was already drunk when she arrived at his house the night of the charged offense and explained, “Well, because he was, like, a little bit flush, you know, smiling a lot, really loud and happy, making toasts.” (R. at 130). She further testified, “I remember he sat on my lap, which is kind of weird, but he was drunk, so I let it pass . . . Another time, like, I remember, he took his pants off, just kind of random, but just like drunk antics, really.” (R. at 130-131).

On direct-examination, Ms. ■ described her night at appellant’s house, and ultimately ended up vomiting and falling asleep in his guest bedroom. (R. at 136-137).⁴ Ms. ■ stated her next memory after falling asleep was seeing appellant on the bed and falling back asleep. (R. at 137). The government asked Ms. ■ what she remembered next and she responded, “And then I remember I put my hand behind me, and I pushed, like, on the base of his penis, and I felt it leaving the lips. Basically, I couldn’t tell if I was pushing penis out of me, but it was definitely trying to be inserted into my vagina.” (R. at 140). The government then asked Ms. ■ what happened next and she stated, “Next is a blur. I don’t remember after I

⁴ The Government’s other witnesses (Mr. ■ and Ms. ■) and corroborate that Ms. ■ decided to go to sleep and that she walked up the stairs and went to bed.

pushed him away from me – you know, it was like a blink. And then I opened my eyes again, and he was gone.” (R. at 143).

On cross-examination, defense asked Ms. ■ if she wrapped her arms around appellant and laid her head on appellant’s back. (R. at 187). Ms. ■ answered, “Playing it off. He was drunk.” (R. at 187). Defense asked if she remembered the second time she woke up appellant was rubbing her back, and she responded “yes.” (R. at 190-191). The defense was able to impeach Ms. ■ as she admitted, that she had not previously told anyone about her telling/saying anything to Appellant during the act or whether the push took place. However, she was not impeached regarding whether she was asleep and appellant’s confession stated the same. (R. at 109; Pros Ex. 3, 8).

I. WHETHER APPELLANT’S CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT WAS LEGALLY AND FACTUALLY SUFFICIENT

Standard of Review

This court reviews questions of legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Whether the three distinct paragraphs within Article 120(b), UCMJ are separate and distinct theories of liability is a question of statutory interpretation reviewed de novo. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

Once an appellant makes a specific showing of a deficiency in proof, [this court] conduct[s] a de novo review of the controverted questions of fact.” *United States v. Scott*, __ M.J. __, 2023 CCA Lexis 456 (Army Ct. Crim. App. 14 Mar. 2024); *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). The test for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

After appellant makes a specific showing of a deficiency in proof, the test for factual sufficiency is whether, after weighing the evidence in the record of trial and giving appropriate deference for not having personally observed the witnesses, the members of [this] court are themselves clearly convinced that the finding of guilt was against the weight of the evidence. *Scott*, __ M.J. __, 2023 CCA Lexis 456 (quoting Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12); *Rosario*, 76 M.J. at 117. “[N]either a presumption of innocence nor a presumption of guilt” is applied, but the court “must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (emphasis added);

Scott, __ M.J. __, 2023 CCA Lexis 456 (rejecting a rebuttable presumption of guilt). In conducting its de novo review, the Court does not abandon logic and common sense. *See Washington*, 57 M.J. at 402–03 (Baker, J. concurring).

Law and Argument

This case presents the crossroads of Article 120(b)(2)(A) [without consent] and 120(b)(2)(B) [when the person knows or reasonable should know that the other person is asleep]. Generally, statutes are interpreted to avoid reading in surplusage. *See United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). In other words, this Court, in interpreting a statute, should not read a portion of a statute that would result in making another portion surplusage or meaningless. *See id.* In this case, the government’s theme and the only unimpeached evidence indicates that for each encounter (but definitely the first touching), Ms. ■ was asleep. However, the government, despite Ms. ■ testimony and specific language of being “asleep” versus “passed out” as well as appellant’s admissions to CID, charged and argued only “without consent.”

United States v. Riggins demonstrates this principle of law and statutory construction. *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016). *Riggins* determined Article 120(b)(1) without consent means affirmative non-consent because the subparagraphs of Article 120(b) are *distinct* legal theories. *Id.*

There, the Court held “the legal inability to consent [is] not equivalent of the Government bearing the affirmative responsibility to prove that [a victim] did not, in fact, consent [under a bodily harm theory.]” *Id.* at 84 (emphasis in original). In other words, *Riggins* illustrates that the words of the statute and the distinct theories matter in a charging decision. *See id.*

The fact that Congress struck “bodily harm” and inserted “without consent” or revised the statute in Article 120(b) shortly after *Riggins* only strengthens that case’s applicability. *See* National Defense Authorization Act for FY2017, Pub. L. No. 114-328, div. E, § 5540, 130 Stat. 2000, 2949-50 (2016). Put simply, because the court “assume[s] that Congress is aware of existing law when it passes legislation,” *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019), and because nothing suggests that Congress intended any substantive change by way of this specific amendment, the court must take *Riggins* into account as part of the “contemporary legal context.” *Id.*

Article 120(b)(2)(A) criminalizes a sexual act when committed “without the consent of the other person.” “Consent” is statutorily defined as “a freely given agreement to the conduct at issue by a *competent person*.” Article 120(g)(7)(A). Although the “consent’s” definition in (g)(7)(B) indicates that a sleeping person cannot consent, the definition and its application cannot subsume Article

120(b)(2)(B)’s theory of asleep. If that is the case, it makes the entirety of Article 120(b)(2)(B) surplusage and meaningless.

Without consent must require more than the person being asleep, if not Article 120(b)(2)(A) subsumes Article 120(b)(2)(B). First, because a separate subsection of Article 120(b)—(2)(B)—specifically criminalizes sexual acts committed when the other person cannot consent because they are asleep, interpreting “without consent” to *ipso facto* include a person who is asleep or unconscious in every instance reduces (b)(2)(B) to surplusage. *See, Sager*, 76 M.J. at 161 (“every provision is to be given effect and no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”); *see also Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (“the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”) (internal quotation marks omitted) (citation omitted). Indeed, such a broad interpretation of “without consent” would render every other subsection of Article 120(b) surplusage.⁵

⁵ A similar argument for “without consent” and the inability to consent was just argued at CAAF on 5 March 2024 based on a similar statutory interpretation issue. *United States v. Mendoza*, 2024 CAAF LEXIS 131 (C.A.A.F., Mar. 5, 2024). Senior Judge’s Walker’s dissent in *Mendoza* also illustrates this same point. *See United States v. Mendoza* ARMY 20210647, 2023 CCA LEXIS 198 (A. Ct. Crim. App. 8 May 2023) (Walker, S.J. dissenting).

A broad interpretation of “without consent” would be at odds with the federal analog statute. *See* 18 U.S.C. § 2242; *United States v. Freeman*, 70 F.4th 1265, 1273, n.4 (10th Cir. 2023) (suggesting that “without consent” in Sec. 2242(3) is a distinct crime from 2242(2) “incapable of appraising the nature of the sexual act”); *see also* *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (discussing comparison to federal statutes to determine legislative intent of the UCMJ). These are examples, although for a different subsection, that each portion of Article 120 should not overlap and should stand on its own without creating surplusage.

Where a general and a specific statute speak to the same concern, a prosecutor must charge the more specific statute even if the general provision was enacted later. *See Simpson v. United States*, 435 U.S. 6, 15 (1978)⁶ (finding it impermissible to charge both bank robbery with a firearm, and the use of firearm while committing a felony). State Supreme Courts have followed suit, both Washington State and Kansas both have established caselaw promoting the principle that “when two statutes are concurrent, the specific statute prevails over the general.” *State v. Danforth*, 643 P.2d 882, 883 (Wash. 1982); *State v. Williams* 829 P.2d 892 (Kan. 1992).

⁶ The statute at issue in *Simpson* was later amended by Congress.

When the evidence at trial deviates from what is alleged in the indictment, a variance may occur, but so too may a “constructive amendment.” *United States v. Hawkins*, 934 F.3d 1251, 1260 (11th Cir. 2019). A variance occurs where facts proved deviate from facts in the indictment; a constructive amendment occurs when elements are altered to broaden to the bases for conviction. *Id.* The latter may happen where the Government specifies a particular legal theory in the indictment but proves a different legal theory in the case. *Ingram v. United States*, 593 A.2d 992, 1006 (D.C. App. 1991). A constructive amendment is *per se* reversible error. *See United States v. Holt*, 777 F.3d 1234, 1261 (11th Cir. 2015); *Stirone v. United States*, 361 U.S. 212, 217 (1960) (holding that a variance which destroys an accused’s substantial right to be tried only on charges presented in the indictment “is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.”).

At trial, the government made it clear that their theory of the case was Ms. ■ was asleep when appellant sexually assaulted her. The government started this theory in their opening statement, “The problem with these actions is that [Ms. ■ the victim in this case, was asleep.” (R. at 109). “He will wait till she falls asleep... and then he will penetrate her vulva with his penis without her consent.” (R. at 110). This theory continued throughout the trial when Ms. ■ testified that she pushed appellant’s penis out of her when as she was waking up. (R. at 140).

The government argued that this case lacked consent because Ms. ■ was asleep. “And so you know, for the lack of consent-- right? -- we know that a sleep person cannot consent.” (R. at 423). There was no evidence that Ms. ■ was awake when appellant penetrated her. The only evidence that came out during trial where Ms. ■ was awake was when appellant touched her back and butt. (R. at 139). However, for Ms. ■ new memories of telling appellant that she did not want this or pushing appellant, each of those newer additions was impeached with Ms. ■ admitting and completing the impeachment. (*See, e.g.*, R. at 139-140). Even if they had not been, since a sleeping person cannot affirmatively give or deny consent, sleep is meant to be a separate and distinct theory. A previous statement expressing one’s reluctance to engage in intercourse assists clarifying if there was a mistake of fact as to consent.

The conduct the government sought to hold appellant accountable for was having sex with Ms. ■ when she could not consent because she was asleep. Between without consent, and being unable to consent while asleep, the latter is clearly more specific to the instant case. The principles of statutory construction require appellant be charged with Article 120(b)(2)(B). This makes a difference because of how one prepares and defends as well as the applicable defenses for a crime with a “knowledge” element.

Here, the government brought appellant's case to an Article 32, UCMJ preliminary hearing under a without consent theory, but proved the case at trial with a 'could not consent while asleep' theory. The government's variance between their charging theory and their proof has real consequences. By charging under a without consent theory and proving the case via a cannot consent while asleep theory the government removes a number of arrows from defense counsel's quill.

When a sexual assault is charged under a person being asleep, it adds an extra element that the accused knew or reasonably should have known that the victim was asleep while the sexual act was occurring. If knowledge was an element included in the offense, the ignorance or mistake only needed to exist in appellant's mind. This added element allows the defense to give appellant a voluntary intoxication defense, and an honest mistake of fact as a defense.

During the trial, evidence came out that appellant was very intoxicated the night of the charged offenses. (R. at 130-131, 187, 262, 436). Ms. [REDACTED] and Mr. [REDACTED] testified that appellant was so drunk he took his clothes off during the party. (R. at 130-131, 262-263). Appellant admitted in his CID interview that he drank at least twenty shots that night. (Pros. Ex. 3). Appellant also admitted that he honestly believed that Ms. [REDACTED] wanted to have sex with him based on her actions that night in his CID interview. (Pros. Ex. 3). If the government would have

charged the correct sexual assault offense that required specific intent, the defense could have used this testimony to go towards a voluntary intoxication and honest mistake of fact defense for appellant.

Even if this court looks to the impeached testimony of Ms. [REDACTED] about communications after the initial charged touching/penetration, this creates and additional issue with the factual sufficiency. By charging it in this way and then varying significantly from the government's theory in its opening (asleep) to its closing (asleep and he heard her say no/push when she woke up), it creates a constructive amendment and makes the factual sufficiency even more difficult since the only unimpeached testimony was regarding sleep. However, while those statements may affect appellant's mistake of fact defense, it is and was uncontested that during each touching and the penetration, Ms. [REDACTED] claimed to be asleep.

II. THE GOVERNMENT VIOLATED APPELLANT'S RIGHTS UNDER UNITED STATES V. STELLATO AND RULE FOR COURTS-MARTIAL 701(e).

Relevant Facts

[REDACTED] Trial Testimony

On direct-examination Mr. [REDACTED] testified that he saw appellant drinking the night of the charged offenses. (R. at 260). Mr. [REDACTED] further stated that he recorded appellant strip down to his underwear in the middle of the party. (R. at 262-263, 272). It is unclear because the video was not obtained, whether Ms.

■ was in the video, but from her testimony, she was close by and watching appellant. (R. at 130-31).

The government then asked Mr. ■ to explain what Ms. ■ told him while she was crying the next morning. (R. at 266). After recounting that appellant had sex with her, Mr. ■ testified that he planned to confront appellant. (R. at 266). “Me and a group of friends went to Sergeant McTear’s house, went into the house, pulled him up off the couch. I told him to step outside. I pulled out my phone to record and asked him—or told him that [Ms. ■ told me that he raped her.” (R. at 266). Mr. ■ stated that appellant told him *he didn’t do it* and his last statement was, “if this was to get out, he wouldn’t be able to be with his kids.” (R. at 269) . Mr. ■ admitted that his group of friends wanted to see harm done to appellant, and that he “fought a little bit” with appellant. (R. at 269). Mr. ■ testified that after the fight appellant FaceTime him and said he didn’t do it. (R. at 269).

On cross-examination, defense asked Mr. ■ if he also had the recording of the confrontation at appellant’s house. (R. at 272). Mr. ■ stated that he did not have the recording, and he did not believe that the government asked for the recording. (R. at 272). Mr. ■ admitted that he never got in trouble with law enforcement from the altercation with appellant, and his command “had no recollection of anything.” (R. at 273).

Mr. [REDACTED] also admitted that he showed the government the video of the interaction with appellant the day before testifying and did not turn it over to them. (R. at 274). On re-direct examination, Mr. [REDACTED] clarified that the video he showed the government the day before testifying was not the same video he recorded of appellant. (R. at 275-276). The government asked Mr. [REDACTED] to explain the contents of the recordings, and the defense objected to best evidence. (R. at 276).

During the 39(a) session, the government stated they viewed a video of the fight between appellant and Mr. [REDACTED]. (R. at 278). The video the government viewed was different from the video Mr. [REDACTED] recorded when he confronted appellant. (R. at 278). Mr. [REDACTED] told the government he received the video from a friend in California and declined to provide the video when the government asked. (R. at 279). The government did not subpoena the video that was in their office and shown to them, or the other two videos Mr. [REDACTED] indicated he made. (R. at 279-86). The defense told the military judge this was their first-time hearing about two videos and questioned if the government was aware. (R. at 283). The government stated they found out about the videos when they spoke to Mr. [REDACTED] the day prior and provided defense a memorandum from that meeting (the day before trial). (R. at 283-284). The military judge asked Mr. [REDACTED] about the video he recorded, and Mr. [REDACTED] stated he deleted the video after he left appellant's house. (R. at 285).

Mr. [REDACTED] did not indicate whether the video from his friend or the video of appellant dancing around Ms. [REDACTED] with his clothes off still existed.

Standard of Review

In evaluating discovery errors, where the defense has made a specific request, the court applies the heightened constitutional standard of harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004). Cases where the defense either did not make a discovery request or made only a general request for discovery, the court applies the harmless error standard. *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013). “Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.” *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013); *see United States v. Hart*, 29 M.J. 407, 409 (C.M.A. 1990).

Law

Under Article 46, UCMJ, the discovery rights available to an accused are broader than the constitutional due process rights afforded to his civilian counterpart. *Coleman*, 72 M.J. 184 at 187; *Hart*, 29 M.J. 410. Rule for Court Martial (R.C.M.) 701(e) provides “[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect

evidence...[n]o party may unreasonably impede the access of another party to a witness or evidence.” R.C.M. 701(e). “The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice.” *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Likewise, R.C.M. 701(a)(6) and *United States v. Brady*, 373 U.S. 83 at 87 (1963) require evidence that is exculpatory in nature.

“The failure of the trial counsel to disclose evidence that is favorable to the defense on the issue of guilt or sentencing violates an accused’s constitutional right to due process.” *Coleman*, 72 M.J. 184 at 186 (citing *Brady*, 373 U.S. at 87). “Our review of discovery/disclosure issues utilizes a two-step analysis: first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was a nondisclosure of such information, we test the effect of that nondisclosure on the appellant’s trial.” *Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

The Court of Appeals for the Armed Forces held that “trial counsel’s obligation under Article 46, UCMJ, includes removing “obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence.” *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (quotation marks omitted).

Importantly, a prosecutor cannot ignore or fail to obtain evidence that they know about, especially when it is exculpatory. *Stellato*, 74 M.J. 473. *Stellato* provides a good example of when a prosecutor knows of potential evidence and sees it, but then refuses to obtain it. *Id.* With respect to the remedy for a discovery violation, R.C.M. 701(g)(3) provides that if the military judge determines that a party has failed to comply with R.C.M. 701, he may order further discovery, grant a continuance, exclude evidence, or otherwise "[e]nter such other order as is just under the circumstances." *See United States v. Vargas*, 83 M.J. 150, 156-57 (C.A.A.F. 2023) (holding that under R.C.M. 701(g)(3) "the military judge may impose dismissal with prejudice if, after considering whether less severe alternative remedies are available, she concludes that dismissal with prejudice is just under the circumstances"). In *Vargas*, when the government learned of a few new lines of testimony the week before trial but failed to disclose it, the military judge disqualified the trial counsel and ultimately dismissed the case with prejudice given the potential bad-faith involved. *Id.*

Argument

Here, the government's witness Mr. [REDACTED] testified to three videos during appellant's trial. (R. at 262-263, 266, 274). All three videos were relevant to appellant's case. Mr. [REDACTED] first testified about a video he recorded of appellant stripping down to his underwear the night of his party. (R. at 262-263). This

testimony was brief, and both parties didn't have any follow up regarding the first video. There are many unanswered questions regarding this video that could have helped with appellant's defense. First, this video clearly indicates appellant's level of intoxication. If the government would have charged the correct sexual assault offense that required knowledge (as noted in the first assignment of error), this video could have been used to show appellant's voluntary intoxication. Second, it is unknown who was in the background of this video. It is likely Ms. [REDACTED] was in the video since she testified to her location and that appellant had sat on her lap just before. (R. at 130-131). That evidence could have been helpful to both defense and government depending on her reaction and who appellant was dancing for.

Mr. [REDACTED] testified to two other videos that caused the court to have a 39(a) session. (R. at 278). Mr. [REDACTED] recorded the first video of appellant when he confronted him about the charged offenses. (R. at 266). This video showed appellant denying the charged offenses and is therefore exculpatory. (R. at 269). The second video was a recording of the fight between appellant and Mr. [REDACTED], but it is unclear of its length, what was said before, during, and after, or who else may appear in the video since Mr. [REDACTED] brought back-up. (R. at 274). During a 39(a) session, the government stated they found out about the two videos when they spoke with Mr. [REDACTED] the day before. (R. at 278). The government viewed at

least one of the videos and did not subpoena the items that were shown to them in their own office. (R. at 278, 283-284).

The government failed their discovery obligations under *Stellato*, and R.C.M. 701(e). Similar to *Stellato*, the government was in “more” possession of relevant evidence and failed to obtain the video they viewed to defense. In other words, they were provided evidence and then did not take any steps to provide equal access, but allowed it to be removed and potentially deleted. Unlike *Stellato* where the box was at the victim’s home, this evidence was in the prosecution’s office when it was revealed. Once Mr. [REDACTED] showed the government the second video, the government had an obligation to turn the video over to defense and made efforts to identify other videos and obtain them with the simple act of a subpoena. The government should not have given up once Mr. [REDACTED] rejected their request or shied away because it may make Mr. [REDACTED], who feared he may be incriminated because of the fight, and unwilling to participate. The government should have exercised due diligence and tried to obtain all videos Mr. [REDACTED] testified to. It is also unclear when and if the government learned of the dancing video as they did not mention that video during the Article 39(a) session. Likewise, given Mr. [REDACTED] proclivity to film and the nature of the party, Mr. [REDACTED] phone and communications (which he also testified to regarding FaceTime

and text message) were relevant, contained exculpatory information, and was within the reach (literal and metaphorical through subpoena) of the government.

Moreover, by using Mr. [REDACTED] fight, and the injuries appellant sustained, as 404(b) evidence but then not obtaining the surrounding circumstances, this also prejudiced appellant's ability to explore that issue in the motion and at trial as well as raise other remedies like spoliation or cross-examination for obstruction of justice.

III. WHETHER THE DILATORY POST-TRIAL PROCESSING WARRANTS RELIEF WHERE THE CASE WAS NOT DOCKETED BY THE ARMY COURT OF CRIMINAL APPEALS UNTIL 321 DAYS AFTER SENTENCING.

Standard of Review

Unreasonable post-trial delay claims are reviewed de novo. *United States v. Grant*, 82 M.J. 814, 819 (Army Crim. Ct. App. 2022).

Law and Argument

This court is authorized to grant relief for post-trial delay under Article 66, UCMJ. Article 66(d)(1) provides "broad authority" to review and modify sentences. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). As such, this court may grant relief for post-trial delay without a showing of actual prejudice. *Id.* at 224 (citing *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). While this court must consider "all the facts and circumstances

reflected in the record,” *Tardif*, 57 M.J. at 224, “personnel and administrative issues” are not “legitimate reasons” to excuse the delay. *Arriaga*, 70 M.J. at 57. Allowing caseloads to become a factor would “trump the Article 66 and due process rights of appellants.” *Moreno*, 63 M.J. at 137 (internal quotation omitted).

This court granted sentencing relief ranging from fifteen to thirty days for eight cases that contained *less* post-trial delay than appellant’s case post *Winfield*. See e.g., *United States v. Garrigus*, ARMY 20220259, 2023 CCA Lexis 352 (Army Ct. Crim. App. 9 Aug. 2023) (summ. disp); *United States v. Jefferson*, ARMY 20220448, 2023 CCA Lexis 382 (Army Ct. Crim. App. 6 Sep. 2023) (summ. disp); *United States v. Pulley*, ARMY 20220494, 2023 CCA Lexis 289 (Army Ct. Crim. App. 6 Jul. 2023) (summ. disp); *United States v. Jobes*, ARMY 20210394, 2023 CCA Lexis 268 (Army Ct. Crim. App. 26 Jun. 2023) (summ. disp); *United States v. Bionaz*, ARMY 20220247, 2023 CCA Lexis 233 (Army Ct. Crim. App. 31 May 2023) (summ. disp); *United States v. Sandoval*, ARMY 20220198, 2023 CCA LEXIS 496 (Army Ct. Crim. App. 27 Nov. 2023) (summ. disp); *United States v. Rouson*, ARMY 20220319, 2023 CCA LEXIS 508 (Army Ct. Crim. App. 1 Dec. 2023) (summ. disp); *United States v. Sepulveda*, ARMY 20220241, 2023 CCA Lexis 223 (Army Ct. Crim. App. 5 May 2023) (summ. disp). Four of the eight cases contained an explanation from the office of the staff judge

advocate, and still received sentencing relief. The overwhelming majority of those cases cite no prejudice.

Following adjournment, the clerk of court sent the record to the military judge for authentication on 5 June 2023, and the military judge authenticated the record on 24 August 2023. (Authentication). Similar to *United States v. Morris*, the court found that a sixty-day delay between trial counsel’s precertification and the military judge’s authentication to be “excessive” under Article 66(d)(2). *United States v. Morris*, ARMY 20210624, 2023 CCA LEXIS 197 (Army Ct. Crim. App. 8 May 2023) (summ. disp). Here, the delay is twenty-five percent longer because it took over two and half months to authenticate the record.

In *United States v. Sepulveda*, 172 days elapsed between adjournment and appellate docketing. *Sepulveda*, ARMY 20220241, 2023 CCA Lexis 223 (Army Ct. Crim. App. 5 May 2023) (summ. disp). The office of the staff judge advocate signed a memorandum regarding post-trial processing and listed the following contributing factors, “The court reporter assigned to case attended an NCOES from 31 July – 9 September 2022. During this time frame, the two remaining court reporters were either on paternity leave or focused on handling other post-trial actions as well as sitting court.” *Id.* This court stated, “This explanation misses the mark, principally because, at the latest, the record should have been ready for the mail on 21 July 2022.” *Id.* This court also stated, “The span of over 100 days

between the military judge authenticating the record of trial and docketing with this court is unexplained and unacceptable.” *Id.* The appellant did not allege prejudice. *Id.* This court granted relief under Article 66(d)(1); Article 66(d)(2); and The Due Process Clause of the Fifth Amendment. *Id.* This court reduced appellant’s sentence 15 days. *Id.*

In *United States v. Rouson*, 275 days elapsed between announcement of sentence and appellate docketing. *United States v. Rouson*, ARMY 20220319, 2023 CCA LEXIS 508 (Army Ct. Crim. App. 1 Dec. 2023) (summ. disp). In *Rouson*, appellant plead guilty to two specifications of absence without leave, one specification of larceny, two specifications of wrongful appropriation, and eighteen specifications of fraudulent use of a credit and debit card in violation of Articles 86, 121, and 121a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 921, and 921a. *Id.* The chief of military justice explained the post-trial delay was due to, “high personnel turnover, the holiday block leave period, continuing case referral, and a three-month delay for the errata process.” *Id.* This court, citing *Arriaga* stated, “Legitimate justifications of post-trial delay do not include issues with personnel and administration. *Rouson*, ARMY 20220319, 2023 CCA LEXIS 508, *3 (quoting *United States v. Arriaga*, 70 M.J. 51, 57 (C.A.A.F. 2011)). The trial counsel took eighty-five days to complete the pre-certification of the record. *Id.* Based on the “[t]otality of the circumstances, including the length and reason

for the delay in conducting the pre-certification review, and appellant's alleged prejudice," this court reduced appellant's sentence fifteen days. *Id.*

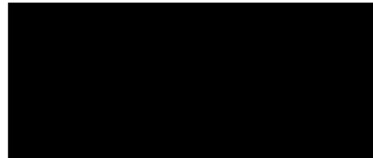
Here, the current explanation in this case is similar to *Rouson* and *Sepulveda*. In this case, the reason for the 321-day delay was because of court reporter shortages and docketing issues. In *Rouson*, the chief of military justice in appellant's case blamed personnel and administrative issues. *Sepulveda*, also dealt with personnel issues regarding the court reporters. Based on *United States v. Arriaga*, it is clear the justification memo provided in appellant's case does not justify the delay, especially where such a large gap was attributed to simply reviewing the record of trial which is not unique or lengthy.

Conclusion

For the foregoing reasons, appellant respectfully requests this court set aside the findings and sentence for Assignment of Errors I and/or II. For Assignment of Error III, appellant respectfully requests this court approve only such much of the sentence as provides for reduction to E1, confinement for 23 months, and a dishonorable discharge.



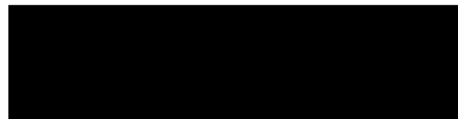
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
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