

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

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20220169

Specialist (E-4)

**KRISTIAN B. PADGETT,**

United States Army,

Appellant

Tried at Fort Liberty,<sup>1</sup> North Carolina on 23 November 2021, 29 January 2022, and 5 April 2022, before a general court-martial convened by the Commander, Headquarters, Fort Liberty, Colonel G. Bret Batdorff and Colonel Travis L. Rogers, Military Judges, presiding.

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

**Assignments of Error I<sup>2</sup>**

**I. WHETHER THE PLEA-AGREEMENT’S  
SPECIFIC SENTENCE RUNS AFOUL RCM 705,  
THUS RENDERING THE PRESENTENCING  
PROCEEDING AN “EMPTY RITUAL.”**

**II. WHETHER THE OSJA’S POST-TRIAL DELAY  
WARRANTS RELIEF UNDER BOTH THE DUE  
PROCESS CLAUSE AND ARTICLE 66, UCMJ.**

---

<sup>1</sup> At the time of trial, the installation was named Fort Bragg. Effective 2 June 2023, the installation was officially redesignated as Fort Liberty.

<sup>2</sup> 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 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.

**III. WHETHER SPECIFICATIONS 2 AND 3 OF CHARGE I ARE MULTIPLICIOUS OR OTHERWISE CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.**

**Statement of Case**

On 5 April 2022 a military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of two specifications of domestic violence, one alleging strangulation and the other alleging a violent offense, both in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b [UCMJ].<sup>3</sup> (R. at 87; Statement of Trial Results [STR]). The military judge sentenced appellant to six months confinement and a bad-conduct discharge [BCD].<sup>4</sup> (R. at 124; STR). On 12 May 2022, the convening authority approved the findings and adjudged sentence and granted appellant's request for waiver of automatic forfeitures for the benefit of his spouse. (Action). On 23 May 2022, the military judge entered judgment. (Judgment). This court docketed appellant's case on 28 August 2023. (Referral and Designation of Counsel Letter).

---

<sup>3</sup> Pursuant to the plea agreement, one specification of domestic violence and a charge with one specification of aggravated assault with a dangerous weapon, both committed against Mrs. ■■■, were dismissed without prejudice, ripening into prejudice upon announcement of appellant's sentence. (App. Ex. V; R. at 87).

<sup>4</sup> As part of the plea agreement, appellant would be confined for six months for Specification 2 of Charge I (strangulation) and three months for Specification 3 of Charge I (violent offense), to run concurrently. (App. Ex. V; R. at 124).

## Statement of Facts

Appellant and Mrs. ■ were married in August 2019. (R. at 56). On 23 May 2021 at Fort Liberty, North Carolina, appellant heard his wife talking about him on the phone and “whatever she said” made him “very angry.” (R. at 56). Appellant proceeded to grab Mrs. ■’s “throat with [his] left hand [and] squeezed her throat with enough force to impede her breathing” for about ten seconds. (R. at 56; Pros. Ex. 1). “Right after” appellant “stopped squeezing [Mrs. ■’s] throat” he hit Mrs. ■’s “left side of her face” in the jaw with his fist. (R. at 65–67; Pros. Ex. 1). After he struck his wife, “she slumped down and slid down the wall.” (R. at 67).

Charges were preferred against appellant on 12 October 2021 and referred to a general court-martial on 18 November 2021. (Charge Sheet). On 10 March 2022 appellant submitted an offer to plead guilty to the convening authority. (App. Ex. V). That agreement included a plea of guilty to Specification 2 of Charge I and a plea of guilty by exceptions to Specification 3 of Charge I. (App. Ex. V). The agreement prescribed a sentence of 6 months confinement and a BCD. (App. Ex. V para 7(a)). As part of his offer, appellant waived “all waivable motions” and “waive[d] and expressly and affirmatively waive[d his] right to file any motion at trial under Rules for Courts-Martial [R.C.M.] 905(b), 906(b), 907(b)(2)(B)-(D), and 907(b)(3).” (App. Ex. V. para 6(d)). The convening authority approved the agreement on 17 March 2022. (App. Ex. V).

During pre-sentencing the government presented no substantive evidence. (R. at 91). Mrs. ■ gave a victim impact statement describing the effect of appellant's crimes on her and her family. (R. at 92–94). In his pre-sentencing case appellant entered a “Good Soldier Book” into evidence, called four witnesses on his behalf, and gave an unsworn statement. (Def. Ex. A; R. at 95–114). During argument appellant's counsel acknowledged the agreed upon sentence but asked the military judge to “utilize [his] powers under Article 60(a) . . . specifically paragraph (c), to recommend in the STR that the convening authority consider suspending the confinement sentence.” (R. at 117). He further noted the sentence of six months and a BCD was “fair and just considering the circumstances.” (R. at 118). After noting several times appellant had agreed to the term of confinement, defense counsel concluded his argument by asking the court to have “mercy” on appellant and utilize his “power of recommendation in the STR.” (R. at 118–22). The military judge did not recommend the term of confinement be suspended. (STR).

The court-martial adjourned on 5 April 2022. (R. at 125). The record of trial was certified on 31 July 2023 and the transcript was certified on 2 August 2023. (Chronology). The Office of the Staff Judge Advocate (OSJA) included a post-trial processing timeline memorandum dated 16 August 2023 which explained the delay in processing in appellant's case. (Post-Trial Processing Timeline).

## **Assignment of Error I**

### **WHETHER THE PLEA-AGREEMENT’S SPECIFIC SENTENCE RUNS AFOUL RCM 705, THUS RENDERING THE PRESENTENCING PROCEEDING AN “EMPTY RITUAL.”**

#### **Standard of Review**

“The interpretation of provisions of the R.C.M., and whether a term in a [plea agreement] violates the R.C.M., are questions of law that [this court] review[s] de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citing *United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007)).

#### **Law**

The Military Justice Act of 2016 (MJA 16), enacted through the National Defense Authorization Act for Fiscal Year 2017, brought several changes to include the addition of Article 53a, UCMJ, 10 U.S.C. § 853a. The President implemented Article 53a, UCMJ, in R.C.M. 705. Plea agreements may include promises by convening authorities to limit the sentence which may be adjudged. R.C.M. 705(b)(2)(E). These limitations may include a minimum and maximum punishment which may be imposed, which the military judge is bound by. R.C.M. 705(d)(1). Either party may propose any term or condition not prohibited by law or public policy. R.C.M. 705(e)(1), (3)(A). “If a plea agreement contains limitations on the punishment that may be imposed, the court-martial . . . shall sentence the accused in

accordance with the agreement.” R.C.M. 910(f)(5). A military judge must reject any plea agreement, or strike any provision, which “is prohibited by law,” “is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements,” or “violates public policy.” Articles 53a(b)(4) and 53a(b)(5), UCMJ, 10 U.S.C. §§ 853a(b)(4), (5); *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003) (citations omitted).

Pretrial agreements which have the effect of transforming sentencing proceedings into “an empty ritual” are impermissible. *See, e.g., United States v. Davis*, 50 M.J. 426, 429 (C.A.A.F. 1999). “A term or condition in a plea agreement shall not be enforced if it deprives the accused of . . . the right to complete presentencing proceedings” and “the complete and effective exercise of post-trial and appellate rights.” R.C.M. 705(c)(1)(B).

### **Argument**

Appellant’s plea agreement did not deprive him of a right to a complete presentencing proceeding. The agreement lawfully limited the sentence, but did not prevent appellant from presentencing evidence or argument on his behalf or limit his post-trial clemency rights. Further, appellant’s post-trial and appellate rights were not limited by the agreement. Finally, even if the agreement violated provisions of R.C.M. 705, appellant was not prejudiced.

**A. Appellant's plea agreement did not deprive him of a meaningful pre-sentencing proceeding.**

As a preliminary matter, appellant's plea agreement is lawful. The MJA 16 expressly allowed provisions to limit the sentence which may be adjudged, to include a minimum and maximum punishment which may be imposed. R.C.M. 705(d)(1). Here, appellant and the convening authority agreed that the minimum and maximum term of confinement be the same and a BCD be adjudged. (App. Ex. V). This did not render his pre-sentencing proceedings an empty ritual.

Appellant confuses the pre-sentencing proceedings with the sentence adjudged. As other courts of criminal appeals (CCAs) have discussed, the sentence adjudged is not the only part of the pre-sentencing process. *United States v. Rivero*, 82 M.J. 629, 634 (N.M. Ct. Crim. App. 2022) ("Appellant mistakenly construes the military judge's selection of sentence as being the only meaningful part of the sentencing process."). Clearly the record reflects that appellant was able to put on evidence, including witness testimony, in matters of extenuation and mitigation. (R. at 95–114; Def. Ex. A). *Cf. Davis*, 50 M.J. 426 (Finding a violation of due process where the plea agreement's terms precluded the appellant from presenting evidence in extenuation and mitigation, but denying relief absent a showing of prejudice). Thus, appellant's reliance on *Allen* and its progeny, such as *Davis*, is

misplaced even if that law is still applicable to post-MJA 16 proceedings. *See generally United States v. Allen*, 25 C.M.R. 8 (1957).<sup>5</sup>

As the *Allen* Court dealt with a very different judicial landscape, this court should look to its sister courts' handling of post-MJA 16 plea agreement proceedings. When dealing with a sentence requirement of a BCD, the Air Force Court (AFCCA) noted, "the Rules for Courts-Martial's references to 'complete sentencing proceedings' must not be read in isolation or inseparably tied to now-obsolete practices, but in conjunction with the evolution of those sentencing proceedings."<sup>6</sup> *United States v. Geier*, 2022 CCA LEXIS 468, \*11 (A.F. Ct. Crim. App. 2 Aug. 2022) (unpub.). It further noted there was "no notion of due process that would prohibit a military accused from negotiating for a specific sentence under the UCMJ provisions applicable to his court-martial." *Id.* at \*10. The AFCCA went on to reject the claim that "complete sentencing proceedings" prohibits minimum and maximum sentences: "given the fact Congress elsewhere in the UCMJ addresses minimum and maximum sentences, the absence of such

---

<sup>5</sup> *See also United States v. Reedy*, 2024 CCA LEXIS 40 (A.F. Ct. Crim. App. 2 Feb 24) at \*13 (noting a factor to consider when determining if the limitations render pre-sentencing an "empty ritual" under the new system is whether "the sentencing proceeding provided appellant an opportunity to put forward evidence in mitigation and extenuation, call witnesses, and provide argument, including whether any sentence component was appropriate.").

<sup>6</sup> As the appellant in *Geier* did, appellant here relies heavily on obsolete case law discussing the plea agreement process prior to the change in R.C.M. 705. (Appellant's Br. 5–7).



qualifications with respect to the ‘limitations’ in Article 53a, UCMJ, is strong evidence such limitations may apply to both the upper and lower ends of the punishment spectrum.” *Id.* at \*13.

The Navy-Marine Corps Court (NMCCA) similarly applied this logic and held, “even if the terms of the plea agreement had removed all discretion in sentencing (e.g., had required a sentence of confinement and forfeitures where the minimum and maximum terms were identical), this would not have rendered the presentencing proceedings meaningless.” *Rivero*, 82 M.J. at 634. That court explained there were still several important ways that presentencing proceedings still have meaning in such instances, such as maintaining conformity with R.C.M. 705; the ability of the military judge to recommend that the convening authority suspend any part of that punishment; informing the “the convening authority’s decision regarding the military judge’s suspension or clemency recommendation, if any”; aiding in post-trial requests for clemency; and informing a CCA’s sentence appropriateness review. *Id.* That hypothetical case is identical to present case, and the NMCCA’s analysis is correct and should be applied here.

This court should apply the same logic as its sister service courts and reject appellant’s claim that the provision deprived him of his right to a complete presentencing proceeding. (Appellant’s Br. 5). Appellant presented evidence, witnesses, and argument during pre-sentencing. (*See R.* at 95–114, 117–122; Def.

Ex. A). While he acknowledged the appropriateness of the mutually agreed-upon sentence, he still presented a meaningful pre-sentencing case and argument, as the *Rivero* court noted, when his counsel asked the military judge to recommend that the convening authority suspend the term of confinement. (R. at 117, 121–22). Likewise, trial counsel’s argument that the prescribed punishment was “fair and just” and a “proportional retributive sentence . . . for the violent crimes” he committed speaks to the meaningfulness of post-trial review by the convening authority and this court that the *Rivero* court identified. (R. at 116–117). The actions of both sides show that the parties believed, as the *Rivero* court did, that there was more meaning in the proceedings than just the sentence. This court should find the same here.

**B. Appellant’s post-trial and appellate rights remained intact.**

Appellant predicates his argument on the faulty premise that the “the complete and effective exercise of post-trial and appellate rights” means the ability to receive appellate relief on any particular ground. (Appellant’s Br. 7–9).

Appellant engages in a hypothetical in which his defense counsel were deficient in performance.<sup>7</sup> (Appellant’s Br. 7–9). He claims that because in his hypothetical there would be no prejudice under *Strickland v. Washington*, and therefore relief

---

<sup>7</sup> He does not actually claim his counsel were ineffective in their representation.

would not be warranted, that his *actual* his plea agreement violated R.C.M. 705.<sup>8</sup>

466 U.S. 668, 698 (1984). This is an inappropriate application of R.C.M. 705. That rule prohibits plea agreements that deprives the accused of the appellate process because:

to give up these matters would leave no substantial means to ensure judicially that the accused's plea was provident, that the accused entered the pretrial agreement voluntarily, and that the sentencing proceedings met acceptable standards.

R.C.M. 705 analysis at A21-40; *see also United States v. Chin*, 75 M.J. 220, 225 (C.A.A.F. 2016) (Stucky, J. dissenting). The Rule clearly prohibits the total waiver of an Article 66, UCMJ appellate review, not the waiver of a specific claim upon review. *See Chin*, 75 M.J. at 223 (noting that a complete appellate review is one done under Article 66(c), UCMJ); *United States v. Tate*, 64 M.J. 269, 272 (C.A.A.F.

---

<sup>8</sup> In support of this claim, appellant points this court to dicta from *United States v. Kerr*, 2023 CCA LEXIS 434 (N.M. Ct. Crim. App. 2023) and *United States v. Raines*, 82 M.J. 608 (N.M. Ct. Crim. App. 2022) neither of which is applicable to this case. In *Kerr* the Navy-Marine Corps court set aside a BCD as inappropriately severe given the appellant's matters in mitigation – including acts of heroism in Afghanistan, his Traumatic Brain Injury and Post Traumatic Stress Disorder. 2023 CCA LEXIS at \*8. Similarly, *Raines* is a petition for extraordinary relief where the military judge struck a provision of a plea agreement requiring that a BCD be adjudged and still bound the parties to the remainder of the agreement against their wishes. 82 M.J. 608. Significantly, appellant's trial defense counsel *did* present “three character witnesses who spoke highly of his reliability as a soldier and his rehabilitative potential,” which appellant leveraged in his post-trial submission to the convening authority and highlights again in his request for relief from this court. (Appellant's Br. 3–4 (citing R. at 95–108); Post-Trial Matters).

2007) (holding that a plea agreement that deprived the appellant of parole and clemency consideration was unenforceable under R.C.M. 705(c)(1)(B)); *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (holding that a plea agreement waiving appellate claims of multiplicity and unreasonable multiplication of charges was not prohibited under R.C.M. 705(c)(1)(B)). It is clear from this very appeal that appellant's plea agreement did not deprive him of the right to an appeal.

**C. Appellant suffered no prejudice.**

Even if this court breaks with our sister service courts to find the plea agreement violates R.C.M. 705, appellant has failed to show how he is prejudiced. Appellant's plea agreement permitted him to engage in a complete and effective post-trial and appellate process, as evidenced by his two other alleged errors before this court and request for significant relief. (Appellant's Br. 9–17). *See United States v. Goldstein*, 2023 CCA LEXIS 8 (A.F. Ct. Crim. App 11 January 2023) at \*14–15 (noting the appellant was not deprived of his appellate rights when he raised six issues on appeal: “in other words, even if the plea agreement provision was legally unenforceable, and in light of our conclusions in this case, [a]ppellant has failed to demonstrate any prejudice.”) Nothing in the plea agreement has prevented appellant from presenting evidence at sentencing, requesting a suspension of his confinement from the trial court, or exercising his post-trial and appellate rights; therefore, he cannot show prejudice.

## Assignment of Error II

### WHETHER THE OSJA'S POST-TRIAL DELAY WARRANTS RELIEF UNDER BOTH THE DUE PROCESS CLAUSE AND ARTICLE 66, UCMJ.

#### Standard of Review

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

#### Law

##### A. Fifth Amendment Procedural Due Process.

Servicemembers convicted at courts-martial have a due process right, under the Fifth Amendment, to post-trial processing without unreasonable delay. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003). In order to analyze post-trial delays and due process, courts analyze four factors that examine: “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice.” *Barker*, 407 U.S. at 530; *Moreno*, 63 M.J. at 135. The four *Barker* factors must be balanced, and “no single factor [is] required to find that post-trial delay constitutes a due process violation.” *United States v. Toohey*, 63 M.J. 353, 361 (*Toohey II*) (C.A.A.F. 2006) (quoting *Moreno*, 63 M.J. at 136) (citing *Barker*, 407 U.S. at 533). However, the *Barker* analysis is not required if this court determines that any due

process violation is harmless beyond a reasonable doubt. *United States v. Finch*, 64 M.J. 118, 125 (C.A.A.F. 2006).

In situations where the appellant is unable to show they have suffered prejudice, the court will find a due process violation only when “in balancing the other three factors, the [post-trial] delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Anderson*, 82 M.J. at 88. If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether a due process error was harmless beyond a reasonable doubt, the court analyzes the case for prejudice. *Ashby*, 68 M.J. at 125. This analysis is “separate and distinct from the consideration of prejudice as one of the four *Barker* factors.” *Id.* Under this review, the court considers “the totality of the circumstances” based on the “entire record.” *Id.* The court “will not presume prejudice from the length of the delay alone,” but instead requires “evidence of prejudice in the record.” *Id.*

#### **B. Sentence Appropriateness and Appropriate Relief.**

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, 225 (C.A.A.F. 2002).

Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA “may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record.” Since Article 66(d)(2), UCMJ, does not define “excessive delay,” “in considering whether a delay is excessive, this court will broadly focus on the totality of the circumstances surrounding the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit’s memorialized justifications for any delay.” *United States v. Winfield*, 83 M.J. 662, 665 (Army Ct. Crim. App. 2023). Even if there is excessive delay, “Article 66(d)(2) dictates [that this court] ‘may provide appropriate relief’ and leaves the determination as to whether relief is provided, and what type of relief is appropriate, to [this court’s] discretion.” *Id.*

### **Argument**

The government did not violate appellant’s due process rights because there was no prejudice. Further, considering the totality of the circumstances, he deserves no relief under a sentence appropriateness analysis; appellant suffered no prejudice and thus, there is no harm to correct. Therefore, this court should affirm the findings and sentence as adjudged.

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

From the date the military judge adjourned appellant's court-martial to the date of docketing with this court, 511 days elapsed. (R. at 125; Referral and Designation of Counsel). Thus, under the particular facts of this case, the first factor weighs in favor of appellant.

The third *Barker* factor also favors appellant, as he requested speedy post-trial processing on 23 February 2023. (Request for Speedy Post Trial Process).

**B. The second and fourth *Barker* factor weighs in favor of the government.**

The Chief of Justice provided a detailed memorandum explaining the timeline and delay in appellant's case. (Post-Trial Processing Timeline). The government generally attributed the delay in transcribing the record to operational and deployment demands for XVIII Airborne Corps, shortages in personnel and experience, the need to contract for transcription service, and review of that product. (Post-Trial Processing Timeline). The government further specifically explained appellant's case was delayed due to lack of manning, a heavy docket, a significant backlog between April 2022 and August 2023, the loss of the civilian post-trial paralegal, the parental leave of both the senior court reporter and regional manager, an unexpected deployment, and the need to review the contracted transcript. (Post-Trial Processing Timeline). This detailed explanation adequately



explains the delay and the efforts made to mitigate it, and thus the second *Barker* weighs in favor of the government.

Turning to the fourth *Barker* factor, appellant fails to establish prejudice. Appellant claims his appeal of the other assignments of error has been constrained. (Appellant's Br. 15). However, as discussed *infra* and *supra*, these claims fail and as such, appellant has not been prejudiced as he claims. There is no evidence in the record — nor does appellant allege — that he has suffered any particularized anxiety and concern “distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.” *Moreno*, 63 M.J. at 140. He has failed to articulate any actual or particularized impact to his appeal or himself which resulted from this delay, beyond his lack of possession of the ROT — which he requested not be served on him. (App. Ex. VII). *Ashby*, 68 M.J. at 125; *Toohey*, 63 M.J. at 361 (determining that the appellant being represented by several appellate counsel over the course of his appeal was insufficient to show particularized anxiety or concern “distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision”); *United States v. Cooper*, ARMY 20200614, 2022 CCA LEXIS 399 (Army Ct. Crim. App. 7 July 2022) at \*3 (in which this court determined that without a showing of any particularized anxiety or concerns or a specific identification of how the delay would prejudice appellant at a rehearing, a

delay of 242 days in itself was not prejudicial). Like the appellants in *Ashby*, *Anderson*, *Toohey*, and *Cooper*, appellant's claim of prejudice fails.

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

Appellant has failed to show, beyond the mere claim, that the delay was so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system” and thus overcome the absence of prejudice. *Toohey*, 63 M.J. at 362. Appellant makes only a claim, without support, that there are “‘persistent post-trial processing delays’ within that OSJA” and that would adversely impact the public’s perception of the military justice system.

(Appellant’s Br. 15). Since appellant does not explain how the delay was “egregious” under *Toohey*, the facts of this case show that appellant did not suffer a due process violation. *Moreno*, 63 M.J. at 145. Further, there is no evidence that “‘persistent post-trial processing delays’ within that OSJA” that warrant concerns of public perception. Thus, considering the mitigating factors provided by the OSJA, the delay does not impugn the fairness or integrity of the military justice system.

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

Relief is not warranted because appellant’s sentence was appropriate—as he conceded during argument—and setting aside any portion of it would be an undeserved windfall to appellant. *See Winfield*, 83 M.J. at 666 (“Despite excessive post-trial delay in the processing of appellant’s court-martial, a bad-conduct

discharge is a significant punishment and is an appropriate characterization of appellant's service given his misconduct." Mrs. ■ described the impact appellant's crimes had on her. (R. at 92–94). She described both the physical effects of the assault and the emotional damage they caused. (R. at 92–94). She recounted being "terrified I wouldn't make it through" as appellant strangled her. (R. at 93). Mrs. ■ also described the impact on the family, explaining she is "left to pick up [their children's] emotions and all of their sadness and put them back together again" because "they're hurt by this more than [appellant] will ever know." (R. at 93)

Further, appellant's sentence was appropriate in light of his crime and the maximum allowable punishment for his conviction.<sup>9</sup> *See United States v. Morris*, ARMY 20210624, 2023 CCA LEXIS 197, at \*3 (Army Ct. Crim. App. 8 May 2023) ([summ. disp.](#)) ("[W]e find this delay excessive under Art. 66(d)(2). Even in the absence of prejudice, we also find this delay violates the Due Process Clause. . . . However, we can identify no appropriate relief available under either the Constitution or the UCMJ, [because] the adjudged sentence was identical to appellant's request."). Thus, this court should affirm appellant's sentence and find that relief is inappropriate in this case.

---

<sup>9</sup> Prior to the plea agreement appellant faced a maximum confinement of 11 years and a dishonorable discharge. *MCM*, App'x. 12.

### **Assignment of Error III**

#### **WHETHER SPECIFICATIONS 2 AND 3 OF CHARGE I ARE MULTIPLICIOUS OR OTHERWISE CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.**

#### **Standard of Review**

Whether an appellant has waived an issue is a legal question this Court reviews de novo. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019)). When an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal. *Gladue*, 67 M.J. at 313.

#### **Law**

##### **A. Waiver.**

Waiver is the intentional relinquishment or abandonment of a known right. *Davis*, 79 M.J. 331 (quoting *Gladue*, 67 M.J. at 313 (cleaned up)). A valid waiver leaves no error for this court to correct on appeal. *Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)). “A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.” *Gladue*, 67 M.J. at 314 (citing *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995)). “That includes double jeopardy, the basis of the multiplicity objection.” *Id.* (citing *Ricketts v. Adamson*, 483 U.S. 1, 10, 1987). “Although the President has prohibited the waiver

of certain fundamental rights in a [pre-trial agreement], neither multiplicity nor the unreasonable multiplication of charges is among them.” *Gladue*, 67 M.J. at 314.

## **B. Multiplicity.**

Multiplicity implicates the Fifth Amendment’s Double Jeopardy Clause. R.C.M. 907(b)(3)(B) discussion. The Double Jeopardy Clause precludes a court, contrary to the intent of Congress, from imposing multiple convictions and punishments under different statutes for the same act or course of conduct. *Coleman*, 79 M.J. at 102 (citing *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). If an offense is multiplicitous for sentencing it is necessarily multiplicitous for findings. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). The inverse is also true. *Id.* In *Cooper*, this court distinguished that multiplicity requires an elemental analysis, whereas unreasonable multiplication of charges examines the gravamen of the offenses. *United States v. Cooper*, No. ARMY 20150425, 2016 CCA LEXIS 661, at \*5–6 (Army Ct. Crim. App. Nov. 7, 2016) ([sum. disp.](#)).

At trial, a specification may be dismissed upon timely motion when (1) it is multiplicitous with another specification, (2) is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and (3) should be dismissed in the interest of justice. R.C.M. 907(b)(3)(B). A charge is multiplicitous if the proof of such charge also proves every element of

another charge. R.C.M. 907(b)(3)(B). To determine whether one offense is multiplicitous of another, military courts apply the elements test articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). *Id.* This test is focused on a strict facial comparison of the elements of the charged offenses, not to the pleadings or proof of these offenses. *Id.* (quoting *Teters*, 37 M.J. at 377).

In *Coleman*, the CAAF articulated a three-step inquiry to determine whether two charges are multiplicitous: (1) determine whether the charges are based on separate acts; (2) if not, determine whether Congress made an overt expression of legislative intent regarding whether the charges should be viewed as multiplicitous; and (3) if no such expression, seek to infer Congress's intent based on the elements of the violated statutes and their relationship to each other. *Coleman*, 79 M.J. at 103. Charges based on separate acts are not multiplicitous because separate acts may be charged and punished separately. *Id.* Also, if each statute requires proof of an element not contained in the other, it may be inferred that Congress intended for an accused to be charged and punished separately under each statute. *Id.*

### **C. Unreasonable Multiplication of Charges**

“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” R.C.M. 307(c)(4). “In *Quiroz*, [CAAF] endorsed several factors iterated by the lower court in that case as a guide for military judges and appellate courts to consider in determining whether

there has been an unreasonable multiplication of charges.” *Campbell*, 71 M.J. at 23 (citing *United States v. Quiroz*, 55 M.J. 334, 338–39 (C.A.A.F. 2001)). The *Quiroz* factors include:

- (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
- (2) Is each charge and specification aimed at distinctly separate criminal acts?;
- (3) Does the number of charges and specifications misrepresent or exaggerate the appellant’s criminality?;
- (4) Does the number of charges and specifications unfairly increase the appellant’s punitive exposure?; and
- (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

*Quiroz*, 55 M.J. at 338 (citation omitted); *see also Campbell*, 71 M.J. at 24 & n.10.

“One or more factors may be sufficiently compelling, without more, to warrant relief.” *Campbell*, 71 M.J. at 23.

## **Argument**

### **A. Appellant waived claims of multiplicity and UMC.**

Appellant waived claims of multiplicity and UMC at trial. First, appellant knowingly and voluntarily entered into a plea agreement with specific language that he “expressly and affirmatively waive[d his] right to file *all* waivable motions.” (App. Ex. V, para. 6(d)(emphasis added)). The agreement then specifically noted

he “expressly and affirmatively waive[d his] right to file any motion at trial under [R.C.M.]...906(b)...and 907(b)(3).” R.C.M 906(b)(12) includes motions for appropriate relief for unreasonable multiplication of charges. R.C.M. 907(b)(3)(B) discusses motions to dismiss based on multiplicity.

Appellant confirmed his waiver of the right to file all waivable motions with the military judge. (R. at 75–77). In doing so the military judge expressly confirmed that appellant understood he was giving up “any appellate court from having the opportunity to determine if you are entitled to any relief based upon these motions” and that appellant’s “defense counsel explain[ed] this term of [the] agreement and the consequences” to him. (R. at 76–77). The military judge then discussed how the offer to plead guilty explicitly included motions under R.C.M. 906(b) and 907(b)(3). (R. at 75–77). In discussing both the general waiver of “all waivable motions” and the specific waiver of motions under R.C.M 906(b) and 907(b)(3) the military judge ensured appellant understood that he was waiving the claims he now raises.

Contrary to appellant’s claim now, this waiver was clearly knowing and voluntary and thus has extinguished appellant’s right to raise these issues here. (Appellant’s Br. 22). Even if the “waive all waivable motions” clause was the only indication of the knowing and voluntary waiver, that would still be sufficient. *See Gladue* 67 M.J. at 314 (finding appellant’s claims waived when, although



“multiplicity and unreasonable multiplication of charges were not among those subsequently discussed by the military judge and the civilian defense counsel . . . the text of the [agreement] unambiguously agrees to ‘waive any waiveable [sic] motions’ . . . [a]ppellant explicitly indicated his understanding that he was giving up the right ‘to make any motion which by law is given up when you plead guilty.’”) However, here appellant expressly waived motions under the applicable rules for UMC and multiplicity. (App. Ex. V, para. 6(d); R. at 75–77). This removes any doubt to the intentionality and voluntariness of the waiver. *Davis*, 79 M.J. 331.<sup>10</sup>

**B. The charges are not multiplicitious.**

If this court finds appellant forfeited his multiplicity claim rather than waived it, he is still not entitled to relief. There was no plain error as the charged offenses are separate acts.

The charges appellant suggests charges for domestic violence under Article 128b(5) (Strangulation) and domestic violence under Article 128b(1) (Violent Offense) are not multiplicitious. Despite being listed under the same article, the two offenses are separate and distinct as they require different *actus reus*. A simple

---

<sup>10</sup> See also *United States v. Malone*, ARMY 20230151, 2024 CCA LEXIS 217, at \*9 (Army Ct. Crim. App. 23 May 2024) ([mem. op.](#)) (“It does not serve the ends of justice to allow appellant to deliberately decline to make a multiplicity challenge, even when directly asked by the military judge if he had any such motions, at a time when the convening authority could still withdraw from the [plea] agreement; and instead wait to raise such a challenge for the first time on appeal after he has reaped all of the benefits and the convening authority can no longer withdraw.”)

comparison of the elements of the specifications show they contain unique elements:

Elements by Offense	
Article 128b (Strangulation)	Article 128b (Violent Offense)
<u>Element 1</u> : That (time and place alleged), the accused assaulted Mrs. ■■■, the spouse of the accused;	<u>Element 1</u> : That, (state the time and place alleged), the accused committed a violent offense, to wit: striking Mrs. ■■■ in the face with his closed hand; and
<u>Element 2</u> : That the accused did so by strangling Mrs. ■■■ with his hand; [and]	<u>Element 2</u> : That the violent offense was committed against Mrs. ■■■ who was, at the time of the violent offense, the spouse of the accused.
<u>Element 3</u> : That the strangulation was done with unlawful force or violence.	

While it is true that strangulation would qualify as a “violent offense,” a punch as charged in Specification 3 of Charge I would not qualify as strangulation and therefore the two are sufficiently distinguishable. *Brown v. Ohio*, 432 U.S. 161, 166 (1977) (citing *Iannelli v. United States*, 420 U.S. 770, 785 n. 17 (1975)) (“If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .”). As such, “the *Blockburger* rule is clearly satisfied . . . and separate offenses warranting separate convictions and punishment can be presumed to be Congress’ intent.” *Teters*, 37 M.J. at 377–78. Therefore, the charged offenses are not multiplicitious.<sup>11</sup>

---

<sup>11</sup> See also *Malone*, 2024 CCA LEXIS 217 at \*14 (“Congress clearly expressed its intent to view the offense of domestic violence as separate and apart from assault

### **C. The charges are not unreasonably multiplied.**

To the extent this court finds appellant merely forfeited his UMC claim, or elects to pierce his waiver, a review of the *Quiroz* Factors shows that the offenses were not unreasonably multiplied. 55 M.J. at 338–39. Further, even if they were, appellant suffered no prejudice and therefore is not entitled to relief.

#### **1. There was no UMC under *Quiroz*.**

The *Quiroz* factors show that the charges were not unreasonably multiplied. *Quiroz*, 55 M.J. at 338–39. The first *Quiroz* factor weighs heavily in favor of the government. As discussed *supra*, appellant not only did not object to the specification being unreasonably multiplied at any point prior to the instant appeal, he expressly waived that objection.

The second *Quiroz* factor slightly favors the government because each specification targets a specific *actus reus*, specifically strangulation and a punch. (Charge Sheet). Further, although close in time, appellant admitted there was a break in time between the strangulation and the punch, noting, “Right after I

---

consummated by battery. . . . [D]omestic violence is more akin to the ‘specialized assaults charged under Article 120 or 134’ in which each touching or penetration within a continuous course of conduct may be charged as a separate offense, as opposed to a ‘simple’ assault not involving domestic partners.”) This court should agree and determine, even if the charged acts were in the same transaction, multiple units of prosecution is still appropriate.

stopped squeezing my wife’s throat, I raised my right hand and made a fist. I hit [Mrs. ■■■] in the left side of her face with my fist.”<sup>12</sup> These were not simultaneous acts, but rather acts with a break, albeit short, where appellant could have stopped himself. *See United States v. Phillips*, ARMY 20220233, 2024 CCA LEXIS 51 (Army Ct. Crim. App. 30 January 2024) ([mem op.](#)) at \*11 (finding consecutive sentencing for a third instance of domestic violence following two assaults immediately prior, for which Phillips received concurrent sentences, “not unreasonable” because the breaks between the assaults afforded the “opportunity to reevaluate his *mens rea*.”). The mere fact that there is overlap in some of the underlying facts which support each of appellant’s convictions does not render them unreasonably multiplied. Similarly, the third *Quiroz* factor weighs in the government’s favor because the specifications do not “misrepresent or exaggerate the appellant’s criminality.” *Quiroz*, 55 M.J. at 338 (citation omitted). Appellant stands convicted of two specifications because he committed two separate crimes that were clearly intended to punish two separate offenses: (A) strangulation, and (B) punching his wife.<sup>13</sup>

---

<sup>12</sup> In his brief appellant notes Mrs. ■■■ testified “he put his throat – or his hand around [her] throat and punched [her] in the face.” (Appellant’s Br. 20). That testimony is from an Article 39(a) session concerning pre-trial motions, and not during the merits of the case. (R. at 22).

<sup>13</sup> Appellant incorrectly claims that *United States v. Bearden* found “[the] second and third *Quiroz* factors control where same facts supported multiple convictions.” ARMY 20110754, 2013 CCA LEXIS 935, at \*6 (Army Ct. Crim. App. 31 Oct.

The fourth *Quiroz* factor heavily favors the government. Pursuant to the plea agreement, the confinement for both Specifications 2 and 3 of Charge I were to run concurrently with each other. (App. Ex. V). As such, even if this court were to dismiss or merge Specification 3 of Charge I and reassess appellant's sentence, there would be no impact to the aggregate sentence and his punitive exposure would have ultimately remained the same.

The fifth and final *Quiroz* factor also weighs heavily in favor of the government, as there is no evidence of prosecutorial overreaching. Appellant knowingly and voluntarily offered and agreed to a plea agreement that included he plead guilty to these two specifications, and dismiss two others including a more serious offense. (App. Ex. V). Appellant cannot now accuse the prosecution, for the first time, of overreaching when appellant specifically agreed to plead guilty in exchange for the dismissal of other charged specifications and a cap on his potential sentence. *See Malone*, 2024 CCA LEXIS 217, at \*8–9.

## **2. Appellant was not prejudiced.**

Even if the *Quiroz* factors favor appellant, he was not prejudiced. As previously demonstrated, the concurrent nature of the sentences for Specifications 2 and 3 of Charge I render any claims regarding sentencing error under this


---

2013) ([summ. disp.](#)) (Appellant's Br. 21). The *Bearden* court held “*under the facts of this case*, the *Quiroz* factors balance in favor of appellant” as the second and third factors outweigh the remaining *Quiroz* factors. *Id.* at \*5–6 (emphasis added).

assignment of error entirely harmless. As such, appellant has already received the benefit he would be entitled to if this court found the presence of unreasonable multiplication of charges for sentencing.


### **Conclusion**

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.



PATRICK S. BARR  
CPT, JA  
Appellate Attorney, Government  
Appellate Division

KALIN P. SCHLUETER  
LTC, JA  
Branch Chief, Government  
Appellate Division



JACQUELINE J. DEGAINE  
COL, JA  
Deputy Chief, Government  
Appellate Division

CHRISTOPHER B. BURGESS  
COL, JA  
Chief, Government  
Appellate Division