

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

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF  
APPELLEE**

v.

Docket No. ARMY 20220152

Sergeant (E-5)

**JORGE L. ESPINAL,**

United States Army,

Appellant

Tried at Vilseck, Germany, on 22 February and 30 March 2022, before a general court-martial convened by the Commander, 7th Army Training Command, Lieutenant Colonel Thomas P. Hynes, Military Judge, presiding.

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

**Assignments of Error**

**I. WHETHER THE EVIDENCE IS LEGALLY AND  
FACTUALLY SUFFICIENT TO SUPPORT  
APPELLANT'S CONVICTION FOR FORGERY OF  
LEAVE AND EARNINGS STATEMENTS (LESS).**

**II. 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 385  
DAYS AFTER SENTENCING.**

**Statement of the Case**

On 30 March 2022, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of forgery, false official statement, and larceny, in violation of Articles 105, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 905, 907, and 921 [UCMJ]. (R. at 205; Statement of Trial

Results [STR]). The military judge sentenced appellant to 120 days for the forgery, 30 days for the false official statement, and 60 days for the larceny, all to be served concurrently, and a bad-conduct discharge. (R. at 277; STR).

On 5 April 2022, the convening authority took no action on the findings and sentence, and on 12 June 2022, the military judge entered judgment. (Action; Judgment). On 19 April 2023, this court docketed appellant's case. (Referral).

### **Statement of Facts**

Appellant divorced Ms. SB in 2012, and together they shared one son born in 2009, ■■■. (R. at 64; Pros. Ex. 2). In 2017, appellant received a permanent change of station from Fort Campbell, Kentucky to Vilseck, Germany. (Pros. Ex. 4, pp. 3, 5). On 3 October 2018, appellant signed a Department of the Army Form (DA Form) 5960 claiming ■■■ was in the custody of appellant's mother in the Bronx, New York, and submitted a parenting plan purported to be from Montgomery County, Tennessee indicating appellant was the primary caregiver for ■■■. (Pros Ex. 4, pp. 2, 6-15). At appellant's trial, Ms. SB testified that their son has always lived with her and has never lived with appellant's mother in the Bronx, New York. (R. at 63–64). Although appellant and Ms. SB fought over custody of their son starting around 2011, Ms. SB testified that she is the custodial parent. (R. at 64, 71). A court order from New York County, New York dated 13 February 2018 reflected appellant as the non-custodial parent for ■■■. (Pros. Ex. 1).

While stationed in Germany, appellant began dating Ms. SH in 2019, they dated for a year, and during that timeframe they were engaged. (R. at 74). Appellant and Ms. SH shared one son together, [REDACTED]. (R. at 75). In October 2020, Ms. SH sued appellant for child support for [REDACTED] and appellant was ordered to pay child support for their son by the Weiden District Court. (R. at 76, 78). Ms. SH testified that appellant provided his Leave and Earnings Statements (LESs) to the Weiden District Court, but she knew something was incorrect because some lines of the LES were missing, the numbers were not matching up with each other, and the January 2020 LES reflected having 30 days instead of 31. (R. at 77–79). She also testified that she compared the LESs that appellant submitted to the German court to his previous LESs that she still had in her possession from their time living together. (R. at 79). Noting discrepancies, she then reported and submitted the LESs to the Inspector General and Criminal Investigation Division at Grafenwoehr’s base. (R. at 80).

Ms. SH hired Mr. MH as her attorney in the German family law case after reporting the discrepancies in appellant’s LES to her previous attorney and his failure to act. (R. at 80). According to Mr. MH, financial documents like LESs assist the court in determining the amount of child support a person is required to pay. (R. at 102). He also testified that basic allowance for housing (BAH) is considered income for child support purposes, and that the judge only looks at the

income and debt of the individual to determine the appropriate amount of child support, but they may also look at other factors in determining spousal support. (R. at 107).

Ms. BT, the team chief for the 266th Finance Office in Grafenwoehr, testified that she has served in that position since 2016. (R. at 115). Ms. BT testified that BAH is an entitlement that a soldier stationed in Germany would earn to support dependents located in the United States, so long as they qualify for the entitlement. (R. at 119). A soldier is entitled to BAH if they have a court order making them the custodial parent. (R. at 120). The finance office requires court orders, or some proof of dependency, and the soldier's DA Form 5960 that reflects which dependent(s) the soldier is claiming for that time period. (R. at 119). Due to appellant's falsification of the DA Form 5960 and false parenting plan, Ms. BT calculated the loss to the U.S. Government to be over \$111,000. (R. at 121, 123).

Ms. BT also pulled and reviewed appellant's LESs from October 2019 through June 2020 directly from the finance system. (R. at 116–17). She testified that those LESs showed that appellant received BAH entitlements from October 2019 through June 2020. (R. at 117). She also reviewed the LESs that appellant submitted to the Weiden District Court for the same timeframe, testified that the LESs did not show that appellant was receiving BAH, that there was a line missing

between the deduction and the allotments column, and that she had never seen LESs missing that information. (R. at 118).

Additional Facts are incorporated below.

### **Assignment of Error I**

#### **WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT APPELLANT’S CONVICTION FOR FORGERY OF LEAVE AND EARNINGS STATEMENTS (LESs).**

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

Appellant was charged with, among other things, falsely altering his Defense Finance and Accounting Service (DFAS) LESs “by removing the entitlement for basic allowance for housing and reducing the total income . . . which was used to the legal harm of Ms. SH, in that it caused the Weiden District Court to award Ms. SH lower child support payment . . . than she would otherwise have been entitled to.” (Charge Sheet).

Ms. SH testified that with the LESs appellant provided, she received “100%” of the statutory minimum amount of support she was entitled to; however, had she had the unaltered LESs, she would have received 130–160% of that amount. (R. at 80–81). During his testimony, Mr. MH clarified that, per a schedule called the “‘Düsseldorfer Tabelle’ . . . 100% of the minimum child support is the lowest amount of child support” in Germany, and “the highest [amount] is, I think, 180%.” (R. at 101–02). The support agreement Ms. SH and appellant settled on in

Weiden District Court, based on the altered LESs he submitted, required him to pay the statutory minimum amount; however, once Ms. SH received the unaltered LESs, the amount of support she received increased. (R. at 81, 85, 106, 111).

### **Standard of Review**

This court reviews questions of legal and factual sufficiency *de novo*.

*United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). “The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.” *Id.* “When applying this test for legal sufficiency, [appellate courts are] ‘bound to draw every reasonable inference from the evidence . . . in favor of the prosecution.’” *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citation and internal quotation marks omitted).

Where, as here, any finding of guilty is for an offense that occurred before 1 January 2021, this court applies the prior version of Article 66, UCMJ in evaluating factual sufficiency. *See* Pub. L. No. 116-283, §542, 134 Stat. 3612-13 (2021). Pursuant to that standard, the test for factual sufficiency is “whether, after weighing the evidence of record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of [appellant’s] guilt beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citation omitted). This term does not mean “that the evidence must be free

from any conflict,” and the government is always “free to meet its burden of proof with circumstantial evidence.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). In making its determination regarding factual sufficiency, this court applies “neither a presumption of innocence nor a presumption of guilt” and “must assess the evidence in the entire record without regard to the findings reached by the trial court.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

### **Law**

To find the appellant guilty of forgery, pursuant to Article 105, UCMJ, the government was required to prove:

- (a) That appellant falsely altered a certain writings, to wit: DFAS LESSs, by removing the BAH and reducing the total income;
- (b) That the writing was of a nature which would, if genuine, apparently change Ms. SH’s legal rights to her prejudice; and
- (c) That the false altering was with the intent to defraud.

*Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. IV, ¶ 37.b.(1).

“The crux of forgery is the false making of the writing.” *United States v. Weeks*, 71 M.J. 44, 47 (C.A.A.F. 2012). The writing or altering in question must have legal efficacy, meaning it “must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability to the prejudice of another.” *United States v. Hopwood*, 30 M.J. 146, 147 (C.M.A.

1990). The document in question and extrinsic facts are admissible to show whether the writing or altering possesses this legal efficacy requirement. *Id.* Additional documents in a case where a servicemember is charged with forgery may constitute extrinsic facts relevant to the question of legal efficacy when considered in conjunction with a false document. *United States v. Jones-Marshall*, 71 M.J. 534, 536 (Army Ct. Crim. App. 2012). However, those additional documents must confer legal efficacy upon the document itself, define the document as possessing legal efficacy itself, or establish that, under the circumstances, legal efficacy inheres in the document alleged. *Id.* at 536.

### **Argument**

Appellant's conviction is both legally and factually sufficient and supports the basis for a forgery conviction.

#### **A. Appellant's conviction is factually sufficient.**

The circumstantial evidence factually supports appellant altered his LESs. *See King*, 78 M.J. at 221. The documents submitted to the Weiden District Court to determine appellant's child support obligation included his own LESs that only he and few others, like Ms. BT, had access to. Although the altered LESs were submitted by appellant through his attorney, only appellant stood to benefit from the reduced child support obligation. Based on common knowledge and the ways of the world, it defies logic that appellant's attorney—an officer of the court—

would alter the documents herself or knowingly submit altered documents; the same could likewise be said of anyone other than appellant. *See United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014) (factfinders “are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial.”); Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 2-5-12 (29 Feb. 2020) (factfinders “are expected to use [their] own common sense and [their] knowledge of human nature and the ways of the world” in weighing and evaluating evidence). Based on the evidence, this court can be satisfied that its “own independent determination [establishes] the evidence constitutes proof of each required element beyond a reasonable doubt.”

*Washington*, 57 M.J. at 399.

**B. Appellant’s conviction is legally sufficient.**

“To properly convict a soldier of forgery, the evidence must establish that the false document alleged must itself impose such legal harm. The document in question and extrinsic facts are admissible to show whether the document in and of itself possesses this legal efficacy required to sustain a proper prosecution.” *Jones-Marshall*, 71 M.J. at 536.

As [REDACTED]’s custodial parent, Ms. SH was required to provide for him. Relying on the altered LESSs, appellant’s child support obligation was the minimum amount of child support statutorily required, therefore obligating Ms. SH to pay the

remainder of any expenses. Had it not been for the altered LESs, Ms. SH would have received an increased amount of child support from appellant, offsetting the costs she had to pay out of pocket for the expenses incurred by their son, [REDACTED] This is demonstrated by the fact that once the correct LESs were provided to the Weiden District Court, appellant's child support obligation increased. The altered LESs in this case thus had legal efficacy because they operated to the prejudice or detriment of Ms. SH. Unlike the false receipts in *Jones-Marshall*, the altered LESs were not a "preliminary step toward imposition of legal harm or perfection of a legal right." 71 M.J. at 535. Rather, the altered LESs were the pivotal step. Thus, drawing every reasonable inference from the evidence in favor of the prosecution viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.

### **Assignment of Error II**

**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 385 DAYS AFTER SENTENCING.**

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

Appellant's court-martial adjourned on 30 March 2022. (R. at 277). On 6 April 2022, the convening authority took no action, and on 12 June 2022, the

military judge entered judgment. (Action; Judgment). The case was docketed with this court on 19 April 2023. (Referral). The total number of days from adjournment to docketing was 385 days.

The government included a six-page memorandum in the record of trial explaining the delay, attributing it to a combination of “backlogged court[s]-martial[], Eclipse equipment failures, missing documentation, and active courts-martial support taking precedence over transcribing duties, and record of trial assembly.” (Post-Trial MFR).

### **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); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011); *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022).

### **Law**

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 situations where the appellant is unable to show they have suffered prejudice from any delay, the court will find a due process violation only when, “in balancing the other three factors, [the post-trial] delay is so egregious that tolerating it would

adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Toohey*, 63 M.J. at 362. If the court finds a due process violation, the burden shifts to the government to prove the constitutional error was harmless beyond a reasonable doubt, analyzing the case for prejudice. *United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). 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.*

Absent a Fifth Amendment due process violation, this court considers whether relief for excessive post-trial delay is warranted based on the Court of Criminal Appeals’ [CCA] sentence appropriateness authority under Article 66(d)(1), UCMJ. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Additionally, pursuant to Article 66(d)(2), UCMJ, a CCA “may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record.” 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, 666 (Army Ct. Crim. App. 2023). Should this court find 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**

Rather than allege a due process violation or prejudice under *Barker v. Wingo*, 407 U.S. 514 (1972), appellant solely argues that that the government’s attribution of the delay to a combination of backlogged court-martials, Eclipse equipment failures, missing documentation, and active courts-martial taking precedence over transcribing duties is a facially unreasonable explanation. (Appellant’s Br. 14). From this assertion, appellant concludes that “five catastrophic technical failures points to error, not happenstance.” (Appellant’s Br. 14).

However, the government made substantial efforts in processing the electronic record of trial, including submitting “the raw data transcript and audio . . . to the regional [court reporter] manager . . . for transcription in order to help minimize the backlog of pending transcripts” while the 7th Army Training Command court reporters continued to transcribe and assist with active courts-martial. (Post-Trial MFR).

Balancing these facts with the post-trial processing delay and the unit's explanation, further relief would be inappropriate under the circumstances of appellant's case. *See Winfield*, 83 M.J. at 666; *See also United States v. Collins*, 44 M.J. 830, 833 (Army Ct. Crim. App. 1996), pet. denied, 47 M.J. 76 (C.A.A.F. 1997) ("Providing relief that is totally disproportionate to the harm suffered, or that grants the appellant a major windfall, is neither required nor appropriate."); *United States v. Cannon*, ARMY 20220366, \_\_\_ M.J. \_\_\_, at \*2 (Army Ct. Crim. App. 22 Jan. 2024) ([summ. disp.](#)) ("After reviewing the entire record and considering the totality of the circumstances, we find while there is some delay, the explanation provided by the OSJA, albeit minimal, sufficiently memorialized the competing requirements. As such, we find the sentence appropriate and decline to grant any relief for post-trial processing delay.").

Appellant submitted documents falsely claiming custody of his son ■■■, resulting in unearned BAH in excess of \$111,000, according to Ms. BT. He later altered his LESs and submitted them to the Weiden District Court to lessen his child support obligation for ■■■. In other words, appellant had no moral quarrels with defrauding the government or the mother of his child, and submitted false or altered documentation in his pursuit of maximizing his personal gain. Considering the seriousness of the offenses for which appellant was convicted, and that appellant did not suffer any prejudice from the post-trial processing delay, this

court should affirm appellant's sentence and find that relief is inappropriate in this case. *See Winfield*, 2023 CCA LEXIS 189 at \*9; *see also United States v. Hemmingsen*, ARMY 20180611, 2021 CCA LEXIS 180, at \*9 (Army Ct. Crim. App. 15 Apr. 2021) (mem. op.) (finding that, "despite the government's failure to meet its obligation to provide timely post-trial processing of the record, relief is not warranted" under this court's Article 66(d), UCMJ, authority because the appellant's sentence was appropriate.).

However, even if this court sees fit to set aside the forgery conviction, appellant's prayer for relief from post-trial delay—that he be spared a bad-conduct discharge—is incongruent with the dishonesty, selfishness, and greed evident from the facts supporting the remaining convictions of larceny of military property and false official statement.

## Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and the sentence.



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**CERTIFICATE OF FILING AND SERVICE,**

I certify that a copy of the foregoing was sent via electronic submission to the  
Defense Appellate Division at [REDACTED]  
[REDACTED] on this 12th day of April 2024.

[REDACTED]  
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