

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

UNITED STATES

Appellee

v.

Specialist (E-4)
NICHOLAS R. ST. JEAN
United States Army

Appellant

**BRIEF ON BEHALF OF
APPELLANT**

Docket No. ARMY 20190663

Tried at Fort Sill, Oklahoma, on 24-26
September 2019 by a general court-
martial convened by Commander, Fires
Center of Excellence and Fort Sill,
Colonel Douglas Watkins and LTC
Joseph Marcee, and Colonel Robert
Shuck, military judges, presiding.

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

Assignments of Error

**I. WHETHER THE MILITARY JUDGE ERRED BY
ALLOWING THE GOVERNMENT TO PRESENT
HUMAN LIE DETECTOR EVIDENCE.**

**II. WHETHER THE MILITARY JUDGE ERRED
BY ALLOWING THE GOVERNMENT TO MAKE
IMPROPER HUMAN LIE DETECTOR
ARGUMENT.**

**III. WHETHER THE MILITARY JUDGE ERRED
BY FAILING TO PROVIDE ANY CURATIVE
INSTRUCTIONS TO THE MEMBERS AFTER THE
GOVERNMENT PRESENTED HUMAN LIE
DETECTOR EVIDENCE AND MADE IMPROPER
HUMAN LIE DETECTOR ARGUMENT.**

IV. WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412.

V. WHETHER THE MILITARY JUDGE ERRED BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL OFFENSE.

VI. WHETHER THE MILITARY JUDGE ERRED BY IMPOSING A TIME LIMIT ON DEFENSE COUNSEL'S CLOSING ARGUMENT.

VII. WHETHER THE SPECIFICATION OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT.

VIII. WHETHER THE SPECIFICATION OF CHARGE II IS LEGALLY AND FACTUALLY INSUFFICIENT.

Table of Contents

Assignments of Error.....	i
Table of Authorities	v
Statement of the Case	1
Statement of Facts.....	2
Argument	15
I. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO PRESENT HUMAN LIE DETECTOR EVIDENCE.....	15
Standard of Review	15
Law.....	16
Argument	Error! Bookmark not defined.
II. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO MAKE IMPROPER HUMAN LIE DETECTOR ARGUMENT.....	25
Standard of Review	25
Law.....	25
Argument	25
III. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO PROVIDE ANY CURATIVE INSTRUCTIONS TO THE MEMBERS AFTER THE GOVERNMENT PRESENTED HUMAN LIE DETECTOR EVIDENCE AND MADE IMPROPER HUMAN LIE DETECTOR ARGUMENT.....	29
Standard of Review	29
Law.....	29
Argument	30
IV. WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EVIDENCE UNDER MIL. R. EVID. 412	32
Standard of Review	32
Law.....	33
Argument	35

V. WHETHER THE MILITARY JUDGE ERRED BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL OFFENSE	56
Standard of Review	56
Law	57
Argument	58
VI. WHETHER THE MILITARY JUDGE ERRED BY IMPOSING A TIME LIMIT ON DEFENSE COUNSEL’S CLOSING ARGUMENT.....	65
Standard of Review	65
Law	66
Argument	67
VII. WHETHER THE SPECIFICATION OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT.	73
Standard of Review	73
Law	73
Argument	75
VIII. WHETHER THE SPECIFICATION OF CHARGE II IS LEGALLY AND FACTUALLY INSUFFICIENT.	81
Standard of Review	81
Law	81
Argument	82
Conclusion.....	88
Groستefon Matters	Appendix

Table of Authorities

UNITED STATES SUPREME COURT

<i>Herring v. New York</i> , 522 U.S. 853 (1975)	66
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	74

COURT OF APPEALS FOR THE ARMED FORCES

<i>United States v. Bess</i> , 75 M.J. 70 (C.A.A.F. 2016)	57, 66
<i>United States v. Bethea</i> , 46 C.M.R. 223 (C.M.A. 1973)	74, 83
<i>United States v. Brooks</i> , 64 M.J. 325 (C.A.A.F. 2007)	16, 17
<i>United States v. Cameron</i> , 21 M.J. 59 (C.M.A. 1985)	18
<i>United States v. Carter</i> , 47 M.J. 395 (C.A.A.F. 1998)	33
<i>United States v. Clark</i> , 48 C.M.R. 83 (C.M.A. 1973)	75
<i>United States v. Commisso</i> , 76 M.J. 315 (C.A.A.F. 2017)	89
<i>United States v. Davis</i> , 79 M.J. 329 (C.A.A.F. 2020)	29
<i>United States v. Dimberio</i> , 56 M.J. 20 (C.A.A.F. 2001)	57
<i>United States v. Dykes</i> , 38 M.J. 270 (C.M.A. 1993)	74
<i>United States v. Ediger</i> , 68 M.J. 243 (C.A.A.F. 2010).....	34
<i>United States v. Ellerbrock</i> , 70 M.J. 314 (C.A.A.F. 2011).....	32, 34, 57
<i>United States v. English</i> , 79 M.J. 116 (C.A.A.F. 2019)	81, 86
<i>United States v. Erikson</i> , 76 M.J. 231 (C.A.A.F. 2017)	32
<i>United States v. Fletcher</i> , 62 M.J. 175 (C.A.A.F. 2005)	25
<i>United States v. Gravitt</i> , 17 C.M.R. 249 (C.M.A. 1954)	65
<i>United States v. Grier</i> , 53 M.J. 30 (C.A.A.F. 2000).....	29
<i>United States v. Grostefon</i> , 12 M.J. 431 (C.M.A. 1982)	88
<i>United States v. Harrison</i> , 31 M.J. 330 (C.M.A. 1990).....	18
<i>United States v. Hill-Dunning</i> , 26 M.J. 260 (C.M.A. 1988).....	17, 20
<i>United States v. Kasper</i> , 58 M.J. 314 (C.A.A.F. 2003)	17, 18, 29, 30, 31
<i>United States v. Knapp</i> , 73 M.J. 33 (C.A.A.F. 2014)	16
<i>United States v. Kohlbek</i> , 78 M.J. 326 (C.A.A.F. 2019)	15, 16, 32, 56
<i>United States v. Lopez</i> , 76 M.J. 151 (C.A.A.F. 2017)	17, 20
<i>United States v. Lubasky</i> , 68 M.J. 260 (C.A.A.F. 2010)	81, 86
<i>United States v. Manns</i> , 54 M.J. 164 (C.A.A.F. 2000).....	34, 52
<i>United States v. Martin</i> , 75 M.J. 321 (C.A.A.F. 2016).....	17
<i>United States v. McDonald</i> , 57 M.J. 18 (C.A.A.F. 2002).....	29
<i>United States v. Pabon</i> , 42 M.J. 404 (C.A.A.F. 1995)	74

<i>United States v. Ruppel</i> , 49 M.J. 247 (C.A.A.F. 1998)	34
<i>United States v. Turner</i> , 25 M.J. 3245 (C.M.A. 1987)	73, 74
<i>United States v. Walters</i> , 58 M.J. 391 (C.A.A.F. 2003)	74
<i>United States v. Washington</i> , 57 M.J. 394 (C.A.A.F. 2002)	73, 81
<i>United States v. Whitney</i> , 55 M.J. 413 (C.A.A.F. 2001).....	29, 30, 31

SERVICE COURTS OF CRIMINAL APPEALS

<i>United States v. Andreozzi</i> , 60 M.J. 727 (Army Ct. Crim. App. 2004)	34, 35, 36, 41, 43, 44, 45, 46, 47, 48
<i>United States v. Bonilla</i> , ARMY 20131084, 2016 CCA LEXIS 590 (Army Ct. Crim. App. 2016) (mem. op.)	66
<i>United States v. Bostick</i> , 33 M.J. 849 (A.C.M.R. 1991)	26, 27
<i>United States v. Dock</i> , 20 M.J. 556 (A.C.M.R. 1985)	67, 69, 70, 71, 73
<i>United States v. Gaddy</i> , ARMY 20150227, 2017 CCA LEXIS 179 (Army Ct. Crim. App. 2017) (summ. disp.)	57
<i>United States v. Gilchrist</i> , 61 M.J. 785 (Army Ct. Crim. App. 2005)	73, 74, 81
<i>United States v. Gordon</i> , NMCCA 200600942, 2007 CCA LEXIS 415 (N.M. Ct. Crim. App. 2007)	43
<i>United States v. Harrington</i> , No. AMC 39223, 2018 CCA LEXIS 456 (A.F. Ct. Crim. App. 2018)	42
<i>States v. Lopez</i> , ARMY 20100457, 2013 CCA LEXIS 603 (Army Ct. Crim. App. 2013) (mem. op.)	42
<i>United States v. Norwood</i> , 79 M.J. 644 (N.M. Ct. Crim. App. 2019)	17
<i>United States v. Parker</i> , 54 M.J. 700 (Army Ct. Crim. App. 2001)	80
<i>United States v. Payne</i> , NMCCA 200501454, 2009 CCA LEXIS 107 (N.M. Ct. Crim. App. 2007)	65, 67, 70
<i>United States v. Rankin</i> , No. AMC 39486, 2019 CCA LEXIS 486 (A.F. Ct. Crim. App. 2019)	42
<i>United States v. Roukis</i> , 60 M.J. 925 (Army Ct. Crim. App. 2005)	74
<i>United States v. Taylor</i> , ARMY 20160744, 2018 CCA LEXIS 499 (Army Ct. Crim. App. 2018) (mem. op.)	57
<i>United States v. Tomlinson</i> , 20 M.J. 897 (A.C.M.R. 1985)	21, 22, 24
<i>United States v. Thomas</i> , No. AMC 39315, 2019 CCA LEXIS 78 (A.F. Ct. Crim. App. 2019)	35, 40, 47, 48 49
<i>United States v. Willis</i> , 50 M.J. 841 (Army Ct. Crim. App. 1999)	85
<i>United States v. Zak</i> , 65 M.J. 786 (Army Ct. Crim. App. 2007)	42

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
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Statement of the Case

On 10 May 2019, 15 July 2019, and 24-26 September 2019, appellant was
tried by officer and enlisted members at a general court-martial at Fort Sill,
Oklahoma. Appellant was convicted, contrary to his pleas, of one specification of
sexual assault in violation of Article 120, UCMJ, 10 U.S.C.A. § 920 (2016), and
one specification of false official statement in violation of Art. 107, UCMJ, 10
U.S.C.A. § 907 (2016).

The court-martial sentenced appellant to be reduced to the grade of E-1,
forfeit all pay and allowances, be confined for five years, and be dishonorably

discharged. (R. at 564). The convening authority deferred reduction in grade, adjudged forfeitures, and automatic forfeitures until entry of judgement. (Convening Authority Action). Beyond this, the convening authority did not take action on the findings or the sentence. (Convening Authority Action).

Statement of Facts

Private (PV2) ■■■, the named victim in this case, joined the Army in July 2017. (R. at 131). After initial entry training, PV2 ■■■ was sent to Airborne School with a follow-on assignment at Fort Bragg, North Carolina. (R. at 131-32). PV2 ■■■ sustained a leg injury at Airborne School and was dropped from the school after failing the run portion of the Army Physical Fitness Test (APFT). (R. at 131-32, 172). After being disenrolled from Airborne School, PV2 ■■■'s follow-on assignment was changed to Fort Sill, Oklahoma. (R. at 131-32). Upon arrival at Fort Sill, PV2 ■■■ was in a relationship. (R. at 173).

Immediately upon her arrival to Fort Sill, PV2 ■■■ learned she was scheduled to deploy soon. (R. at 251). PV2 ■■■ initially testified that she “was excited to deploy,” but that she later had mixed feelings about the deployment when she learned appellant would also be deploying. (R. at 251). On cross examination, she denied saying that she wanted to get out of the deployment prior to the alleged 5 May 2018 assault. (R. at 251). However, when confronted with

text messages she had sent to her father on 3 May 2018 (her first day of in-processing at Fort Sill), she acknowledged stating that she did not want to deploy, that she thought she could get out of deploying, and that she thought she would do so. (R. at 252).

On Thursday, 3 May 2018, the same day she texted her father about getting out of the deployment, PV2 [REDACTED] met appellant. (R. at 133). Appellant was a Specialist (SPC) (E-4) at the time and was PV2 [REDACTED]'s sponsor. (R. at 133). Appellant invited PV2 [REDACTED] to a concert taking place on Saturday, 5 May 2018 in Kansas. (R. at 134). PV2 [REDACTED] invited appellant to her room on the evening of 3 May 2018 so that he could use his laptop to purchase their concert tickets. (R. at 136, 179). The defense attempted to introduce evidence that a consensual romantic encounter took place between appellant and PV2 [REDACTED] in her barracks room on 3 May 2018. (App. Ex. XV) (sealed). However, the military judge excluded this evidence under Military Rule of Evidence [Mil. R. Evid.] 412. (App. Ex. XXXV) (sealed).

Appellant returned to PV2 [REDACTED]'s barracks room on Friday, 4 May 2018 and took a nap there. (R. at 136). At this time, PV2 [REDACTED] also paid him back for the concert tickets he purchased for her the previous day. (R. at 136).

Later on 4 May 2018, PV2 [REDACTED] testified she was hanging out at the “smoke pit” talking to other soldiers and trying to make some new friends. (R. at 140).

PV2 [REDACTED] testified that, after hanging out at the smoke pit, she, appellant, SPC [REDACTED] and SPC [REDACTED] all drove to a shoppette to buy alcohol to celebrate SPC [REDACTED]’s birthday. (R. at 140). PV2 [REDACTED]’s testimony diverged from other witnesses on this point, as both SPC [REDACTED] and SPC [REDACTED] testified that PV2 [REDACTED] did not accompany the group to the shoppette. (R. at 424, 440).

After the disputed trip to the shoppette, PV2 [REDACTED] testified that she consumed two or three alcoholic drinks with the group that evening (the evening of 4 May 2018), which she described as “not many.” (R. at 140).

On cross examination, PV2 [REDACTED] acknowledged that she had falsely reported to CID that she had gone straight back to her room after hanging out at the smoke pit on 4 May 2018. (R. at 212).

Later, PV2 [REDACTED] testified she left the group and went to her room for the night, giving the key card to her barracks room to appellant before she left so that he could check on her. (R. at 141). PV2 [REDACTED] testified that she woke up in the early morning hours of 5 May 2018 to appellant having sexual intercourse with her. (R. at 141-42). PV2 [REDACTED] testified that she remembered appellant putting his hand over her mouth after she woke up. (R. at 142). Thereafter, she testified that appellant

“stayed in the room all night.” (R. at 143). On cross examination, PV2 [REDACTED] acknowledged telling CID that appellant had left her barracks room immediately after he finished having sex with her. (R. at 211). The defense counsel asked her: “Didn’t you testify on direct that he spent the night?” (R. at 211). PV2 [REDACTED] responded: “Yes, sir. That past statement was false.” (R. at 211). The defense counsel followed up: “So, you admit you lied in your past statement?” (R. at 211). PV2 [REDACTED] responded: “Yes, sir.” (R. at 211). A few moments later, PV2 [REDACTED] also acknowledged that she had also inaccurately reported to CID that she had gone straight back to her room after hanging out at the smoke pit on 4 May 2018. (R. at 212).

In contradiction to her testimony on direct that she had been asleep when the assault began, PV2 [REDACTED] acknowledged on cross that she had told a Staff Sergeant (SSG) [REDACTED] that appellant had followed her back to her room, pushed her down, and raped her. (R. at 217-18). PV2 [REDACTED] testified that she “maybe” also told this story to another soldier. (R. at 217-18). A witness at trial, SPC [REDACTED], testified that PV2 [REDACTED] had told him that someone had pushed her onto her bed, held her down, and raped her while at one point she said, “please don’t do this, I have a boyfriend.” (R. at 354). PV2 [REDACTED] admitted that she had told these stories about being pushed or held down, and also admitted that they were false. (R. at

217-18). She stated she had “made up that part of the story” because she did not think people would believe her if she acknowledged giving appellant a key card to her barracks room on the night in question. (R. at 217-18); (R. at 221) (“The first time I told the story to the first few people, I guess I did lie so they would believe me.”).

Despite the allegation that she was asleep when the charged sexual assault began, PV2 [REDACTED] acknowledged on cross that, when asked by CID what she had been doing immediately before the charged sexual encounter she “possibly” stated “this is where it gets really fuzzy.” (R. at 202). The defense counsel asked her to clarify: “So, it got really fuzzy before the actual sexual assault allegedly occurred?” (R. at 202). Despite her testimony on direct that she was asleep up until the assault began, PV2 [REDACTED] responded: “Yes sir.” (R. at 202).

PV2 [REDACTED] also acknowledged telling the government for the first time in July of 2019, approximately fourteen months after the charged assault, that appellant had sex with her in the bathroom as well as on the bed. (R. at 218-19). When asked why she had omitted this from all of her prior statements during the fourteen months between the alleged assault and July of 2019, PV2 [REDACTED] stated she had forgotten about it until then. (R. 218-19).

Despite purportedly being sexually assaulted by appellant in the early hours of 5 May 2018, PV2 [REDACTED] still decided to accompany appellant and a group of other soldiers to the concert in Kansas on 5 May 2018. (R. at 144-45). PV2 [REDACTED] rode in the passenger seat of appellant's car to the concert, approximately a six-to-eight-hour car ride. (R. at 232). In the car, PV2 [REDACTED] wrote a poem about both the alleged assault and her boyfriend. (R. at 362) (Pros. Ex. 13). PV2 [REDACTED] also texted her mom on the morning of 5 May that she had been raped. (R. at 284-85).

The group stopped at a motel before the concert. (R. at 146). The group rented two rooms at the motel: one for the males and one for the females. (R. at 146). Several pictures and videos were taken at the concert, to include a smiling selfie which PV2 [REDACTED] posted to social media with the caption "Don't worry be happy!" and a video showing PV2 [REDACTED] dancing next to appellant (Def. Ex. N) (selfie); (Pros. Ex. 1) (dancing video).

Upon returning to the motel after the concert, PV2 [REDACTED] decided to sleep in the room occupied by appellant and SPC [REDACTED] (the male soldiers in the group), rather than the adjacent hotel room where the other females were sleeping. (R. at 149). PV2 [REDACTED] testified that she had initially planned to sleep on the pullout bed in the male room. (R. at 149). However, when appellant lay down her she ended up sleeping "on the bathroom kitchen floor." (R. at 149). PV2 [REDACTED] explicitly denied

getting back into the pullout bed with appellant. (R. at 240) (DC: “So, after you went to bed in the kitchen, you never joined Specialist St. Jean in that pull out bed?” PV2 [REDACTED]: “No sir.”). To the contrary, another of the female soldiers in the group, SPC [REDACTED], testified that upon entering the male room the next morning she witnessed PV2 [REDACTED] and appellant sleeping on the pullout bed together. (R. at 410).

The group drove back to Fort Sill on 6 May 2018. (R. at 151). PV2 [REDACTED] again rode in the passenger seat of appellant’s car. (R. at 430). PV2 [REDACTED] testified that during a stop on the car ride home, SPC [REDACTED] noticed her crying and asked what was wrong. (R. at 151). She testified that she told SPC [REDACTED] she had been sexually assaulted by appellant. (R. at 151) (defense objection sustained on hearsay grounds). To the contrary, SPC [REDACTED] testified that he *did not* notice PV2 [REDACTED] crying. (R. at 442-43). Furthermore, SPC [REDACTED] testified that, on the ride home, PV2 [REDACTED] told him that there had been a sexual encounter between herself and appellant, that she regretted it, and that she was concerned about her reputation. (R. at 445). SPC [REDACTED] testified that PV2 [REDACTED] made it explicitly clear that the sexual encounter had been consensual. (R. at 445). In addition to testimony from SPC [REDACTED] that PV2 [REDACTED] had directly told him the sex had been consensual, PV2 [REDACTED] acknowledged that it was possible she had told the

government that she did “not believe” she had given consent, rather than conclusively stating she had not given consent. (R. at 201).

PV2 ■■■ testified that, after the assault, she was scarred of appellant and, specifically, terrified of appellant’s “bright red” car. (R. at 245-46). However, on cross examination she acknowledged that, in addition to riding to and from the concert in Kansas in appellant’s car, she continued to receive rides to work from appellant, in the same red car, in the aftermath of the purported sexual assault. (R. at 245-46). She also acknowledged continuing to have additional casual social interactions with appellant, to include purchasing a TV stand from him on 15 May 2018. (169-70, 245-46, 270).

PV2 ■■■ testified that she was wearing a tampon on the day of the charged assault. (R. at 141). She further testified that the tampon was pushed inside of her during sexual intercourse and she did not realize it was still inside of her until it fell out while she was using the bathroom the next day, after returning to Fort Sill after the concert. (R. at 144, 152, 228). PV2 ■■■ acknowledged that she had not sought medical attention for the allegedly compacted tampon. (R. at 229). She did not keep it or photograph it. (R. at 229-30). The only evidence regarding the tampon came from her testimony.

After PV2 [REDACTED]'s tampon purportedly fell out the day after the concert, she decided she wanted to go to the Sexual Harassment/Assault Response and Prevention (SHARP) office in order to get a therapist. (R. at 153). PV2 [REDACTED] got a ride to the SHARP office from appellant, despite the fact that he was the very individual who she claimed had assaulted her. (R. at 153).

PV2 [REDACTED] also claimed to have text messages from appellant in which he admitted to assaulting her. (R. at 258). However, she claimed she had deleted these messages. (R. at 258). No such messages were recovered during a forensic examination of her phone. (R. at 315). The only evidence of these supposed messages came from her testimony.

PV2 [REDACTED] further testified that she had bruising on her lower body after 5 May 2018, as a result of the assault. (R. at 162). PV2 [REDACTED] posted pictures of bruising on her legs to a private Instagram account on 9 May 2018 and 19 May 2018. (R. at 157-59). The military judge excluded the photos from 19 May 2018 but allowed the photos from 9 May 2018. (R. at 157-59, 162). Screenshots of these Instagram posts were admitted into evidence. (Pros. Ex. 16, 17). One witness, SPC [REDACTED], testified to noticing bruises on PV2 [REDACTED]'s legs in early May 2018. (R. at 351). No other witnesses confirmed seeing bruising, even when spending significant time with her wearing short shorts directly after the alleged

assault. *See, e.g.*, (R. at 388) (Private First Class (PFC) ■■■■■ testifies she viewed PV2 ■■■■■'s legs at the 6 May 2018 concert and noticed no bruising). On cross examination, PV2 ■■■■■ admitted to deleting the original photos of the bruising from her phone. (R. at 225). As such, she acknowledged that there was no way to determine the date the photos were originally taken. (R. at 162).

PV2 ■■■■■ also admitted that, after the alleged assault, she had told her mother that she was “not sure” if she had any marks on her body. (R. at 228). PV2 ■■■■■ acknowledged that the first time she mentioned a leg injury in connection with the assault was on 2 November 2018, in her second CID interview. (R. at 231).

Additionally, PV2 ■■■■■ acknowledged that she had sustained injuries to her legs at Airborne School, shortly before her arrival at Fort Sill (R. at 223). These injuries were severe enough that they caused her to drop out of Airborne School. (R. at 223).

On cross examination defense played a video showing PV2 ■■■■■ dancing at the concert on 6 May 2018, the day after the alleged injuries. (R. at 226); (Pros. Ex. 1). PV2 ■■■■■ denied she was “dancing” but acknowledged she was “being active.” (R. at 226). She stated that, by the end of the night, she was limping back to the car. (R. at 226). None of the other concert attendees corroborated that she was limping at the concert. Criminal Investigations Division (CID) Special Agent

(SA) CD testified that PV2 [REDACTED] reported these injuries in a 2 November 2018 interview, but made no mention of them during her prior 21 September 2018 interview. (R. at 331). A sexual assault forensic exam was never conducted. (R. at 306). No expert testimony was presented by either side as to the likelihood that the bruising was caused by consensual sex, nonconsensual sex, or some other factor, such as PV2 [REDACTED]'s recent leg injuries at Airborne School.

PV2 [REDACTED] made no mention of being drugged during her direct examination. However, the defense put on evidence that, at some point in 2018, PV2 [REDACTED] told another soldier, SPC Phelps, that appellant had assaulted her after "someone put something in her water." (R. at 378-79). On cross examination, PV2 [REDACTED] testified that she always had the feeling appellant had drugged her but "never wanted to speak out about it because I didn't have evidence about it". (R. at 230).

On 11 May 2018, CID requested PV2 [REDACTED] participate in the investigation. (R. at 193). PV2 [REDACTED]C refused to take part in CID investigation. (R. at 169, 193). PV2 signed a declination to participate statement at CID on 11 May 2018. (R. at 477).

On 2 July 2018, PV2 [REDACTED] was arrested. (R. at 194-95). The arrest was for underage drinking and disorderly conduct. (R. at 369). Two days later, on 4 July 2018, PV2 [REDACTED] contacted CID SA [REDACTED] about changing her mind, and participating

in the investigation into appellant. (R. at 195). PV2 ■■■ did not disclose to SA ■■■ that she was arrested less two days prior. (R. at 309). PV2 ■■■ eventually received an Article 15 for underage drinking. (R. 371). PV2 ■■■ testified that she had attempted suicide three times and that her arrest for underage drinking occurred during the first of these suicide attempts. (R. at 261, 265). Of note, while it seems unlikely that the unit would have issued an Article 15 for a drinking alcohol as part of a bonafide suicide attempt, this dynamic does not seem to be addressed one way or another on the record.

The first time PV2 ■■■ substantively spoke to CID was 21 September 2018. (R. at 197). The interview lasted approximately 13 minutes, during which PV2 ■■■ read an entry from her journal then immediately left for a tattoo appointment. (R. at 198). PV2 ■■■ did not report the concert, motel, or any previous sexual interactions with appellant to CID. (R. at 244). On 2 November 2018, CID requested PV2 ■■■'s phone for examination, but she did not turn it in until 27 November 2018. (R. at 259). When the phone was examined, approximately 75 deleted text messages and pictures were discovered but not recovered. (R. at 315). At trial, PV2 ■■■ testified that appellant had told her not to speak with CID. (R. at 188). PV2 ■■■ acknowledged that she did not report appellant allegedly

pressuring her not to speak to CID in any of her interviews or statements until one or two days before trial. (R. at 188-89).

PV2 [REDACTED] underwent a medical evaluation board (MEDBOARD) and was discharged with a 70 percent disability rating, for which she receives a paycheck every month. (R. at 255-56). PV2 [REDACTED] was allowed to undergo the MEDBOARD discharge despite having an Article 15 for underage drinking and failing a second APFT while at Fort Sill. (R. at 366, 371). PV2 [REDACTED] denied being excited about being discharged via a MEDBOARD. (R. at 255). However, when confronted, she acknowledged sending a text message to a friend saying “They are med boarding me, it’s lit”). (R. at 256).

PV2 [REDACTED] acknowledged significant memory problems on the stand. (R. at 199-201, 203). On 13 and 15 July, PV2 [REDACTED] met with government counsel and stated that her memory was not clear on the night of the incident. (R. at 201-02). She acknowledged telling the government that she did not remember much of the night of the incident. (R. at 201-02). She also acknowledged spontaneously telling CID that she had “bad memory.” (R. at 199-200).

Appellant was interviewed by CID SA [REDACTED] while he was deployed in Qatar on 8 June 2018. (R. at 287). During this interview, appellant denied having sex with PV2 [REDACTED] or having spent time with her during the time period in question (R.

at 293); (Pros. Ex. 26). The government entered a seventy-nine second audio clip of this interview into evidence. (Pros. Ex. 26). Despite appellant's denial of having sex with PV2 ■■■, the defense theory at trial was that sexual intercourse had occurred on 5 May 2018 but was consensual. *See, e.g.*, (R. at 200, 445) (Defense questioning witnesses about consent); (R. at 484-85, 491-92) (Defense closing arguments that sex was consensual).

For the sake of judicial economy, additional facts of specific relevance to the various assignments of error are contained within the argument section.

Argument

I. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO PRESENT HUMAN LIE DETECTOR EVIDENCE.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Kohlbek*, 78 M.J. 326, 333 (C.A.A.F. 2019) (internal quotation marks and citations omitted). A military judge abuses their discretion if their findings of fact are clearly erroneous or their conclusions of law are incorrect. *Id.* at 333-34 (internal quotation marks and citations omitted).

Appellate courts "[review] the prejudicial effect of an erroneous evidentiary ruling de novo." *Id.* at 334 (internal quotation marks and citations omitted).

Article 59(a), UCMJ, provides that the “findings or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” 10 U.S.C.A § 859(a) (2012). For nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings. *Kohlbeek*, 78 M.J. at 334 (internal quotation marks and citations omitted). In analyzing prejudice, appellate courts weigh: (1) the strength of the Government’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *Id.* (internal quotation marks and citations omitted).

Law

“It is the ‘exclusive province of the court members to determine the credibility of witnesses.’” *United States v. Knapp*, 73 M.J. 33, 34 (C.A.A.F. 2014) (quoting *United States v. Brooks*, 64 M.J. 325, 328, n.3 (C.A.A.F. 2007)).

Human lie detector testimony is “an opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case.” *Id.* at 36 (quoting *Brooks*, 64 M.J. at 328) (additional internal citations omitted). “This class of testimony is inadmissible because it exceeds the limits of permissible character evidence governed by Mil. R. Evid. 608 (evidence of character, conduct, and bias of witness), exceeds the scope of the witness’ knowledge, in violation of

Mil. R. Evid. 701 (opinion testimony by lay witnesses), and usurps the fact-finder's exclusive function to weigh evidence and determine credibility.” *United States v. Norwood*, 79 M.J. 644, 658 (N.M. Ct. Crim. App. 2019) (citing *United States v. Kasper*, 58 M.J. 314, 314 (C.A.A.F. 2003).

Even without an express statement as to truthfulness, testimony may still be the functional equivalent of human lie detector testimony where "the substance of the testimony leads the members to infer that the witness believes the victim is truthful or deceitful with respect to an issue at trial." *United States v. Lopez*, 76 M.J. 151, 155 (C.A.A.F. 2017) (citing *United States v. Martin*, 75 M.J. 321, 324 (C.A.A.F. 2016) (additional internal citations omitted)). Witnesses “should not be permitted to give testimony that is the functional equivalent of saying that the victim in a given case is truthful or should be believed.” *Brooks*, 64 M.J. at 329.

Under appropriate circumstances, evidence of a psychological diagnosis is permissible, to include evidence “that the diagnosis is based on the *assumption* that what the client has said is the truth.” *United States v. Hill-Dunning*, 26 M.J. 260, 262 (C.M.A. 1988) (citing Mil. R. Evid 705) (emphasis in original). However, an expert in psychology “may not testify that it is his opinion that the client is truthful absent appropriate foundation.” *Id.* This “is a distinction which can and must be drawn and recognized.” *Id.* For example, an expert about child abuse is not

permitted to testify that the alleged child victim is or is not telling the truth as to whether the abuse occurred. *Kasper*, 58 M.J. at 315 (citing *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990)). Nor can a diagnosis stemming from the reported abuse be used inferentially as a proxy for the truth of the underlying report. *United States v. Cameron*, 21 M.J. 59, 64-65 (C.M.A. 1985) ("to allow an 'expert' to offer his opinion on the resolution of a credibility dispute goes too far, and it makes no difference whether the opinion is express or follows inferentially from the expert's diagnosis of a psychological condition suffered by the witness whose credibility is at issue.").

Argument

The first three assignments of error are closely related, and all involve the improper use of human lie detector evidence at appellant's trial. Specifically, the government used the fact that PV2 [REDACTED] had been assigned a disability rating, and discharged via a MEDBOARD, on the basis of a diagnosis stemming directly from the charged assault as evidence of the truth of her underlying report.

The error began when the military judge overruled defense counsel's objection to the government eliciting testimony from PV2 [REDACTED] about the basis of her disability rating. The subject of PV2 [REDACTED]'s disability rating was first raised, for a proper purpose (impeachment), during cross examination, when defense counsel

questioned PV2 [REDACTED] about being discharged via a MEDBOARD. (R. at 255-56). Defense counsel asked PV2 [REDACTED] whether she was excited about being discharged via a MEDBOARD. (R. at 255). PV2 [REDACTED] stated that she was not excited, but the MEDBOARD was the best option for her to get out. (R. at 255). Defense counsel then confronted PV2 [REDACTED] with a text message to a friend saying, “They are med boarding me, it’s lit”. (R. at 256). PV2 [REDACTED] acknowledged that she had “probably” said that and acknowledged that “lit” was a term of excitement. (R. at 256). Defense counsel then asked her if she received a 70 percent disability paycheck every month. (R. at 256). Assistant trial counsel objected on hearsay grounds but the military judge overruled the objection stating that “it’s being used for impeachment so it’s not hearsay.” (R. at 256).

On redirect, assistant trial counsel asked PV2 [REDACTED]: “Just in general what is your disability rating based on?” (R. at 268). Defense counsel now objected on hearsay grounds. (R. at 268) (“It’s going to be hearsay. She doesn’t make a determination of what it’s based on. It’s being offered for the truth of the matter asserted.”). The military judge overruled the objection, and assistant trial counsel continued the line of questioning:

ATC: What is the basis of your disability rating?

PV2 [REDACTED]: Major depressive PTSD and leg injuries.

ATC: What are – the major depression and PTSD, what are those based on?

PV2 ■■■: The assault.

(R. at 268).

Assistant trial counsel also attempted to introduce a narrative summary from PV2 ■■■'s MEDBOARD, but the military judge sustained a defense objection to its admission on multiple grounds, including “Medical testimony without an expert.” (R. at 268-70); (Pros. Ex. 20 for ID).

Under appropriate circumstances, an expert in psychology may have been able to testify as to PV2 ■■■'s psychological diagnosis. This may have been relevant, for example, to explain counterintuitive behavior or memory lapses. Under no circumstances, however, would it have been permissible for such testimony to be used as evidence of the truthfulness of PV2 ■■■'s underlying accusations. *See Hill-Dunning*, 26 M.J. at 262. Nevertheless, as can be seen from the use the government made of this evidence in closing arguments (addressed in the following assignment of error), that is exactly what the government did here. The government used the fact that medical experts had diagnosed PV2 ■■■ with a psychological condition as a result of the charged assault as evidence that the underlying assault must have in fact occurred. This is the functional equivalent of human lie detector testimony. *See Lopez*, 76 M.J. at 155.

As an additional problem, the issue was compounded because the military judge allowed this testimony to come from PV2 [REDACTED] herself rather than through the testimony of another witness (such the doctor(s) who made the diagnosis) who could have been cross examined by the defense. This added hearsay and confrontation problems to the human lie detector problem.

The military judge sustained a defense objection based, inter alia, on “medical testimony without an expert”, when the government attempted to introduce a narrative summary from PV2 [REDACTED]’s MEDBOARD. (R. at 268-70); (Pros. Ex. 20 for ID). Nevertheless, the military judge allowed the government to admit substantively the same evidence through the testimony of PV2 [REDACTED] and, as discussed in the following assignments of error, allowed trial counsel to argue the significance of the non-testifying experts’ determination that PV2 [REDACTED] has been assaulted, and failed to give any curative instructions to the panel regarding the proper use of such evidence.

This Court’s predecessor’s treatment of this issue in *United States v. Tomlinson* is instructive to the present case. 20 M.J. 897 (A.C.M.R. 1985). In *Tomlinson*, the government called a social worker who had treated the alleged victim of sexual assault. *Id.* at 899. The social worker testified that the alleged victim exhibited the symptoms of rape trauma syndrome. *Id.* at 901. Going

further, the social worker testified that it was unlikely that the alleged victim was faking her symptoms. *Id.* at 900-01. The court set aside the conviction, holding “The court members in this case were fully competent to determine whether [the alleged victim] was credible; consequently, the probative value of [the social worker’s] testimony was not great. The danger of unfair prejudice caused by such testimony is obvious since the admission of [the social worker’s] testimony gave ‘a stamp of scientific legitimacy’ to the truth of [the alleged victim’s] factual testimony.” *Id.* at 901 (internal quotation marks and citations omitted).

In the present case, just as in *Tomlinson*, the government improperly used evidence of medical diagnoses to give a stamp of scientific legitimacy to PV2 ■■■’s allegations and provide unwarranted reinforcement of the alleged victim’s testimony.

The military judge properly allowed the defense to question PV2 ■■■ about her MEDBOARD for the non-hearsay purpose of impeachment. (R. at 256). This in no way justified the government using evidence about the MEDBOARD for the hearsay purpose of bolstering the truth of PV2 ■■■’s underlying allegations. As can clearly be seen by the arguments the government made about this evidence in closing and rebuttal (discussed in the following assignment of error), the

government's purpose in eliciting this evidence was to impermissibly provide a stamp of scientific legitimacy to PV2 [REDACTED]'s allegations.

Turning to prejudice, all four of the factors for analyzing whether the improperly admitted evidence had a substantial influence on the findings favor appellant.

First, as discussed at length in A.E. VIII, the government's case had substantial weaknesses. Regardless of whether the court finds the evidence legally and factually insufficient, these same factors are certainly sufficient to establish that the government's case was not particularly strong.

Second, the defense case was correspondingly strong. Here, as is often the case, the strength of the defense case was largely tied to the weakness in the government case. The defense's main strategy was to attack the government evidence, which it did quite successfully. That said, the defense also presented significant affirmative evidence to support appellant's defense. For example, the defense called a witness who testified to witness PV2 [REDACTED] sleeping in the same bed as appellant the very night after the charged assault, directly contradicted PV2 [REDACTED]'s testimony that she did not sleep in the same bed on that night. (R. at 410). Additionally, and perhaps most notably, the defense called a witness who testified that, the day after the charged sexual encounter, PV2 [REDACTED] told him that there had

been a sexual encounter between herself and appellant, that she regretted it, and that she was concerned about her reputation. (R. at 445). This witness testified that PV2 ■■■ made it explicitly clear that the sexual encounter had been consensual. (R. at 445).

Third, the improperly admitted evidence was material. The truth of PV2 ■■■'s allegations was the ultimate issue to be decided by the finder of fact. Introduction of evidence that, as assistant trial counsel argued in closing and rebuttal, this issue had already been determined by a team of experts was material.

Fourth, and finally, the quality of the evidence in question was strong. Indeed, the strength of the stamp of scientific legitimacy human lie detector testimony stemming from a medical or psychological diagnosis is precisely why such evidence is prohibited. *See e.g., Tomlinson*, 20 M.J. at 901. In a way, it is difficult to imagine stronger (albeit improper) evidence to provide a panel of senior Army leaders than to tell them that a team of their fellow Army professionals had already decided the very issue they were there to consider.

Appellant requests this Court set aside the finding of guilty as to the Specification of Charge I.

II. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO MAKE IMPROPER HUMAN LIE DETECTOR ARGUMENT.

Standard of Review

Improper Argument is a question of law that appellate courts review de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011).

If an objection is made at trial, appellate courts review for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing Article 59(a), UCMJ, 10 U.S.C.A § 859(a) (2000)). To determine prejudice from improper arguments, appellate courts consider: (1) the severity of the misconduct; (2) any curative measures taken; and (3) the strength of the government's case. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005).

Law

Adopted from A.E. I above.

Argument

Building on the evidence discussed above, trial counsel argued in closing:

Professional medical providers were involved in this case from the beginning, and it was finally determined by those professionals that she qualified for an MEB. It wasn't Private [REDACTED] who made that decision. It wasn't her making all these suicide attempts just to get an MEB. She's a brand new soldier to the unit. She just wanted to go home. And this MEB – you heard it on cross – is linked to major depression that

she was going through when she tried to kill herself three times – and that depression was because Specialist Nicholas St. Jean sexually assaulted her on 4 May 2018.

(R. at 479).

Later, during rebuttal argument, trial counsel argued:

Defense is claiming that she fabricated this story. She's playing the system to get this MEB. Let's unpack what they are saying. They are essentially arguing that all the healthcare providers that saw her, in addition to the VA, was duped by her. That essentially, the Army doctors, and the behavioral health providers, are wrong.

(R. at 505).

These closing arguments greatly compounded the erroneous admission of human lie detector evidence discussed in the preceding assignment of error. By arguing that “professional medical providers” had already “determined” that PV2 ■■■ qualified for a MEDBOARD based on diagnosed psychological conditions stemming directly from the charged assault, trial counsel was telling the panel, in no uncertain terms, that Army authorities had already decided the ultimate issue of the case. (R. at 479). Trial counsel doubled down on this improper argument even more clearly during her rebuttal argument. (R. at 505).

An instructive case from this Court's predecessor is *United States v. Bostick*, 33 M.J. 849 (A.C.M.R. 1991). In *Bostick*, the government called a psychologist who had treated the alleged victim of sexual assault. *Id.* at 851. The psychologist

testified that he had diagnosed the alleged victim with PTSD and rape trauma syndrome. *Id.* Furthermore, the psychologist testified that he did not believe the alleged victim was faking her symptoms. *Id.* The court in *Bostick* emphasized that, as in the present case, during argument, “the trial counsel stressed that ‘[the psychologist], in his opinion, says she was not faking.’” *Id.* at 853.

As in *Bostick*, the trial counsel in the present case argued that PV2 [REDACTED]’s psychological diagnosis, and ultimate MEDBOARD, bolstered the truth of her underlying claims and showed she was not faking. In short, trial counsel invoked the conclusions of medical experts to argue that the truth of PV2 [REDACTED]’s report had already been evaluated and substantiated. Trial counsel told the panel that, in order to side with the defense, they would have to contradict conclusions already made by these learned Army professionals.

As discussed in the preceding assignment of error, defense counsel objected when the government asked PV2 [REDACTED] what her medical disability rating was based on, a question clearly calculated to elicit the response that it was based on trauma from the charged assault. (R. at 268). The objection was overruled. (R. at 268). Defense counsel did not renew the objection when trial counsel returned to the subject of PV2 [REDACTED]’s diagnosis stemming from the charged assault during closing

argument, but it had been preserved when they objected earlier at trial. (R. at 479, 505).

Turning to prejudice, all three of the factors for analyzing whether the improper argument had a substantial influence on the findings favor appellant.

First, the severity of the improper argument was high. Indeed, it is difficult to imagine a more severe violation of the sanctity of the fact finding function of a criminal trial than to tell the panel that the very issue they are there to decide has already been decided.

Second, as discussed in the following related assignment of error, no curative measures were taken.

Third, the government's case was not strong. As discussed at length in A.E. VIII, the government's case had substantial weaknesses.

Appellant requests this Court set aside the finding of guilty as to the Specification of Charge I.

**III. WHETHER THE MILITARY JUDGE ERRED
BY FAILING TO PROVIDE ANY CURATIVE
INSTRUCTIONS TO THE MEMBERS AFTER THE
GOVERNMENT PRESENTED HUMAN LIE
DETECTOR EVIDENCE AND MADE IMPROPER
HUMAN LIE DETECTOR ARGUMENT.**

Standard of Review

Whether the members were instructed properly is a question of law that appellate courts review de novo. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003) (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). In the absence of a defense objection to the omission of an instruction, appellate courts review for plain error. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (internal citations omitted); *see also* Rule for Courts-Martial [R.C.M.] 920(f). To be plain error: (1) there must be error; (2) the error must be plain (clear and obvious); and (3) the error must affect the substantial rights of the appellant. *United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000) (internal citations omitted).

Law

Adopted from A.E. I above with the following additions:

The prejudice from the introduction of human lie detector evidence may be negated through appropriate instructions by the military judge. *United States v. Whitney*, 55 M.J. 413, 415-16 (C.A.A.F. 2001) (military judge's remedial action, in

the form of a curative instruction, was sufficient to negate prejudice from improper human lie detector testimony). Regardless of defense objection, the military judge is responsible for making sure human lie detector evidence is not admitted and that members are provided with appropriate cautionary instructions. *Kasper*, 58 M.J. at 319 (citing *Whitney*, 55 M.J. at 415-416).

Argument

After the above-discussed human lie detector evidence was admitted and improper human lie detector argument was made by trial counsel, it was plain error for the military judge to fail to provide an appropriate cautionary instruction to the members. This is both a factor in the prejudice analysis discussed in the preceding assignment of error (the lack of curative measures), and a separate error in and of itself.

“If a witness offers human lie detector testimony, the military judge *must* issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony.” *Kasper*, 58 M.J. at 315 (emphasis added) (internal citations omitted). In the present case, the military judge provided no such instructions.

Even had there been some legitimate use for the evidence in question, it was the responsibility of the military judge to instruct the members that it could not be

used to invade the province of their fact finding function. In *Whitney*, after human lie detector testimony had been erroneously admitted, the military judge instructed the panel “. . . determination of truth is in your realm, and nobody can come in here and tell you whether or not someone is being truthful. That’s purely up to you to decide.” 55 M.J. at 416. The C.A.A.F. found even this instruction to be less forceful than it should have been. *Id.* (“The curative measure taken by the military judge in this case could have been clearer and more forceful.”). Nevertheless, it was sufficient to tip the prejudice analysis in favor of the government. *Id.*

The C.A.A.F. directly addressed the issue of a military judge’s failure to give a limiting instruction about human lie detector evidence in *Kasper*, and found plain error. 58 M.J. at 319-20 (“Although as a general matter instructions on limited use are provided upon request under M.R.E. 105, the rule does not preclude a military judge from offering such instructions on his or her own motion, and failure to do so in an appropriate case will constitute plain error.”) (internal citations omitted). In the present case, as in *Kasper*, the military judge gave no such instruction, even after trial counsel’s forceful invocation of human lie detector argument in both her closing argument and rebuttal argument. This failure was plain error here, just as it was in *Kasper*.

Appellant requests this Court set aside the finding of guilty as to the Specification of Charge I.

**IV. WHETHER THE MILITARY JUDGE ERRED
BY EXCLUDING EVIDENCE UNDER MIL. R.
EVID. 412.**

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (internal quotation marks and citations omitted). A military judge abuses their discretion if their findings of fact are clearly erroneous or their conclusions of law are incorrect. *Id.* (internal quotation marks and citations omitted).

Where proffered evidence is constitutionally required and admissible Mil. R. Evid. 412(b)(1)(C), appellate courts test for prejudice by determining whether the error was harmless beyond a reasonable doubt. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (internal citations omitted). For nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings. *Kohlbeck*, 78 M.J. at 334 (internal quotation marks and citations omitted). In analyzing prejudice, appellate courts weigh: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality

of the evidence in question, and (4) the quality of the evidence in question. *Id.* (internal quotation marks and citations omitted).

Law

Mil. R. Evid. 412 provides that, in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions, the second and third of which are pertinent to the present case. Mil. R. Evid. 412. The burden is on the proponent to overcome the general rule of exclusion by demonstrating an exception applies. *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1998) (internal quotation marks and citations omitted).

The second exception under Mil. R. Evid. 412 includes “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent . . .” Mil. R. Evid. 412(b)(1)(B). Evidence that fits under this exception may nevertheless be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice to the alleged victim’s privacy. Mil. R. Evid. 412(c)(3). In addition, like other evidence, evidence otherwise admissible under Mil. R. Evid. 412(B)(1)(B) may be excluded “if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading

the members, undue delay, wasting time, or needlessly presenting cumulative evidence.” Mil. R. Evid. 403. Where a military judge conducts a proper balancing test under Mil. R. Evid. 403, an appellate court will not overturn the ruling absent a clear abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (quoting *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998)). However, appellate courts “give military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing.” *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (internal citations omitted).

The third exception under Mil. R. Evid. 412 provides that the evidence is admissible if its exclusion “would violate the constitutional rights of the accused.” Mil. R. Evid. 412(b)(1)(C). Generally, evidence of other sexual behavior of an alleged victim is constitutionally required and “must be admitted within the ambit of [Mil. R. Evid.] 412(b)(1)(C) when [it] is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice.” *Ellerbrock*, 70 M.J. at 318 (internal quotation marks and citations omitted).

“Relevance of prior sexual activity between an accused and an alleged victim is increased by the degree of its similarity to the charged conduct, and whether the sexual activity is distinctive and unusual.” *United States v. Andreozzi*,

60 M.J. 727, 739 (Army Ct. Crim. App. 2004). However, “similarity and distinctiveness are not indispensable qualities of relevant Mil. R. Evid 412(b)(1)(B) evidence but simply enhance the relevance.” *United States v. Thomas*, No. AMC 39315, 2019 CCA LEXIS 78, *20 (A.F. Ct. Crim. App. 2019) (setting aside airman’s convictions due to military judge’s overreliance on *Andreozzi* to exclude evidence of prior consensual sexual activity between appellant and named victim, notwithstanding the fact that the prior activity involved sexual text messages and appellant was charged with nonconsensual sexual intercourse).¹

Argument

The defense filed a motion to introduce evidence under Mil. R. Evid. 412, to include evidence that PV2 [REDACTED] and appellant had a consensual romantic encounter on 3 May 2018, and that this encounter left marks on appellant’s body indicating it was consensual activity. (App. Ex. XV) (sealed). The defense later supplemented this motion with factual additional disclosures from the government. (Appellate Exhibit XXXIV) (sealed).

¹ Available at: <https://advance.lexis.com/api/permalink/8a35940b-265c-411a-82ac-fcf419ce4364/?context=1000516>.

The defense motion argued that this evidence should be admitted under both Mil. R. Evid. 412(b)(1)(B) and 412(b)(2)(C). (App. Ex. XV) (sealed). After a closed evidentiary hearing, the military judge denied the defense motion to introduce evidence of the prior romantic encounter under either Mil. R. Evid. 412(b)(1)(B) and 412(b)(2)(C). (App. Ex. XXXV) (sealed). The military judge acknowledged that the evidence of prior consensual sexual behavior between appellant and the named victim had some relevance as to consent. (App. Ex. XXXV) (sealed). However, the military judge minimized the relevance of this evidence throughout his ruling. (App. Ex. XXXV) (sealed). In analyzing the relevance of the proffered evidence, the military judge focused heavily on the dissimilarity between the charged act (sexual intercourse) and the prior sexual conduct (a sexual encounter short of sexual intercourse). (App. Ex. XXXV) (sealed). The military judge cited *Andreozzi* for the proposition that similarity between prior sexual behavior and the charged conduct is important to determining its probative value. (App. Ex. XXXV) (sealed).

At trial, the defense theory was that sexual intercourse had occurred on 5 May 2018 but was consensual. *See, e.g.*, (R. at 200, 445, 484-85, 491-92). However, due to the military judge's ruling, the defense was not able to present

any evidence of the prior consensual romantic interactions between appellant and PV2 ■■■ from less than 48 hours prior to the charged assault.

The military judge's exclusion of evidence that appellant and PV2 ■■■ had a consensual romantic encounter in the same location (PV2 ■■■'s barracks room) less than 48 hours prior to the charged sexual intercourse, an encounter PV2 ■■■ failed to disclose in any of her voluminous pretrial statements, was erroneous and prejudicial. The exclusion of this evidence hamstrung the defense argument that the sexual intercourse in question had been consensual, deprived the fact finder of vital context, deprived the appellant of his right to effectively confront his accuser, and limited appellant's ability to testify effectively in his own defense. This evidence should have been admitted under both Mil. R. Evid. 412(b)(1)(B) and 412(b)(1)(C), each of which will be examined in turn below. Thereafter, the military judge's Mil. R. Evid 403 analysis will be discussed.

Mil. R. Evid. 412(b)(1)(B)

Generally speaking, consensual sexual encounters do not spontaneously erupt out of nowhere. Rather, it is common sense that human sexual relations generally progress over time, with an initial encounter, often involving a "lower" level of sexual conduct, developing into a higher level of sexual conduct, such as sexual intercourse. Given this dynamic, Mil. R. Evid. 412(b)(1)(B) recognizes

that evidence of a consensual sexual history between two individuals is relevant to the question of consent to subsequent sexual activity. Absent the protections of this rule, the defense in any sexual assault case would be left to argue consent in a vacuum without context, deprived of any ability to explain the progression of the sexual relationship leading up to the charged event. Mil. R. Evid. 412(b)(1)(B) is the only buffer between an accused and this untenable and illogical position. In the present case, however, the military judge's erroneous exclusion of the consensual sexual history between PV2 [REDACTED] and appellant gutted the very heart of Mil. R. Evid. 412(b)(1)(B) and left the defense in just such an untenable position.

Appellant met the named victim on 3 May 2018. (R. at 133). That very day, the two had a consensual romantic encounter in PV2 [REDACTED]'s barracks room. (App. Ex. XV) (sealed). The next evening, 4 May 2018, almost immediately preceding the charged sexual encounter, PV2 [REDACTED] gave appellant key card to her barracks room (the same room in which they had the consensual romantic encounter the day before). (R. at 141). PV2 [REDACTED] admitted to lying directly about this fact because she did not think people would believe her if she acknowledged giving appellant a key card to her barracks room on the night in question. (R. at 217-18, 221). In the early morning hours of 5 May 2018, mere hours after she gave him her key card,

appellant used the key card to enter her barracks room and they had sexual intercourse.

The military judge's exclusion of evidence that these two individuals had engaged in physical amorous conduct with each other, in the same location (PV2 ■■■'s barracks room), less than 48 hours before the charged sexual intercourse, hamstrung the defense's ability to present a credible theory of consent. Absent the ability to explore the history of intimacy between these two individuals, the defense was placed in the untenable position of arguing that appellant had entered the barracks room of a female soldier whom he had only met a few days prior, in the middle of the night, and simply spontaneously began having consensual sex with her. In a vacuum, this is a farfetched theory. The defense had no way to explain why PV2 ■■■ would be interested in a spontaneous late-night rendezvous with a man she had just met. Nor could the defense explain the contextual significance of PV2 ■■■ giving appellant the key to her barracks room. The defense was left to present an inherently unbelievable theory of spontaneous consent. Unsurprisingly, as shown by the verdict, the panel did not believe it.

This landscape would have been completely altered had the military judge allowed evidence of the prior sexual encounter between these two individuals on 3 May 2018. With the benefit of this evidence, the defense would have a unified and

logical story to tell: On 3 May 2018 they had an initial sexual encounter in PV2 ■■■'s barracks room, on 4 May 2018 PV2 ■■■ gave appellant a copy of the key card to her barracks room, and, shortly thereafter, they rendezvoused in that same barracks room to take their physical intimacy to the next level. With this background, the defense narrative transforms from farfetched and fanciful to perfectly plausible, even perfectly natural.

Common sense and general knowledge of ways of the world tell us that it is extremely common for individuals, especially young ones, to engage in lessor forms of sexual conduct on one date and then escalate to sexual intercourse on a future date. This is simply the natural “continuation of consensual sexual interactions.” *Thomas*, 2019 CCA LEXIS 78 at *20. This evidence would have explained why PV2 ■■■ gave appellant the key card to her barracks room on 4 May 2018 (the same room where they had the sexual encounter on 3 May 2018). It would have explained why appellant used the key card to enter the room late at night. And it would have explained why PV2 ■■■ would be interested in engaging in a consensual sexual rendezvous with appellant. In short, this evidence could not have been more relevant to the defense’s theory of consent.

The military judge did acknowledge that the evidence of prior consensual sexual behavior between appellant and the named victim had some relevance as to

consent. (App. Ex. XXXV) (sealed). However, the military judge greatly minimized the relevance of this evidence throughout his ruling. (App. Ex. XXXV) (sealed).

The military judge's minimization of the relevance of this evidence is erroneous and, frankly, perplexing. Indeed, it is difficult to imagine a scenario in which Mil. R. Evid. 412(b)(1)(B) evidence would have more probative value than here. The military judge cited *Andreozzi* for the proposition that similarity between prior sexual behavior and the charged conduct is important to determining its probative value. In apparent reliance on *Andreozzi*, the military judge's only explanation for his conclusion that the evidence was of minimal probative value was the supposed dissimilarity between the two encounters. This conclusion was error.

As an initial matter, contrary to the military judge's analysis, the two sexual encounters were actually remarkably similar. Both involved physical sexual conduct between PV2 [REDACTED] and appellant; both took place in the same location (PV2 [REDACTED]'s barracks room); and both occurred within 48 hours of each other. Indeed, the only notable difference is that the first involved a physical sexual encounter short of sexual intercourse while the second involved sexual intercourse.

Additionally, a litany of cases demonstrate that prior consensual sexual activity under Mil. R. Evid. 412(b)(1)(B) need not involve the same specific sexual conduct as charged. To the contrary, the exclusion of evidence of prior consensual sexual activity has been ruled an abuse of discretion even when the prior sexual activity differed significantly from the charged acts (certainly much more significantly than in the present case). *See, e.g., United States v. Zak*, 65 M.J. 786 (Army Ct. Crim. App. 2007) (exclusion of evidence of prior “sexual massage” was error when appellant was charged with nonconsensual sexual intercourse); *United States v. Lopez*, ARMY 20100457, 2013 CCA LEXIS 603, *5-8, *17-*23 (Army Ct. Crim. App. 2013) (mem. op.) (exclusion of evidence of prior kissing and digital penetration was error when appellant was charged with nonconsensual sexual intercourse);² *United States v. Rankin*, No. AMC 39486, 2019 CCA LEXIS 486 (A.F. Ct. Crim. App. 2019) (exclusion of evidence of “playful” “flirting” during a previous overnight camping trip was error when appellant was charged with nonconsensual digital penetration while victim was asleep);³ *United States v. Harrington*, No. AMC 39223, 2018 CCA LEXIS 456 (A.F. Ct. Crim. App. 2018)

² Available at: <https://advance.lexis.com/api/permalink/761838ee-db03-4b0d-8f88-53e6bd8b4bad/?context=1000516>.

³ Available at: <https://advance.lexis.com/api/permalink/4e90dad1-e1b0-42f0-9e11-4e143f7180d5/?context=1000516>.

(exclusion of evidence of prior sexual “body shots” was error when appellant was charged with nonconsensual sexual intercourse);⁴ and *United States v. Gordon*, NMCCA 200600942, 2007 CCA LEXIS 415, *12-19 (N.M. Ct. Crim. App. 2007) (exclusion of evidence of prior sexual intercourse on the basis of military judge’s conclusion that “there were significant differences between the two incidents” was error).⁵

The heart of the military judge’s error seems to be overreliance on the mantra from *Andreozzi* that the “[r]elevance of prior sexual activity between an accused and an alleged victim is increased by the degree of its similarity to the charged conduct, and whether the sexual activity is distinctive and unusual.” *Andreozzi*, however, involved a particularly bizarre set of facts in which similarity of prior sexual activity was of unique significance. In *Andreozzi*, the accused was charged with entering the house of his estranged wife without permission, brandishing a pistol, biting her to the point of bleeding, threatening to kill her, proposing a “game” in which his estranged wife had to answer his questions and

⁴ Available at: <https://advance.lexis.com/api/permalink/bb358175-35e0-4cda-9afb-70891c8ff693/?context=1000516>.

⁵ Available at: <https://advance.lexis.com/api/permalink/2317b6bc-066e-4df6-8862-a0f090d96ae5/?context=1000516>.

obey his orders, and then forcing her into various sexual acts to include sodomy and masturbation. *Id.* at 734-737.

The defense in *Andreozzi* attempted to introduce evidence under Mil. R. Evid. 412(b)(1)(B) that, prior to the charged dates, the couple had engaged in somewhat similar sexual acts together, to include sodomy and masturbation at the accused's direction. *Id.* The military judge refused to admit the evidence, reasoning that the prior acts were too dissimilar to the charged offenses to be more than minimally relevant. *Id.* On appeal, this Court "*disagree[d]* with the military judge that the evidence of appellant's prior sexual activity with [his wife] . . . was not relevant to show her consent to sexual activity on [the charged date]." *Id.* at 739 (emphasis added). Nevertheless, this Court found that the prior sexual behavior was of limited relevance because it lacked any of the un rebutted bizarre characteristics of the charged acts:

The defense did not assert that in November 1997 appellant entered [his wife's] residence without her consent, or that the sexual activity was forcible, part of any "game," or involved threats or a firearm. The evidence was un rebutted that on 20 January 1998, appellant: (1) entered [his wife's] locked residence in her absence and without her permission; (2) upon her discovery of his presence, grabbed and held [his wife], cutting her lip and establishing his dominance and control; (3) threatened to kill anyone who came to her residence; and (4) used a firearm to frighten and coerce [his wife]. Under these circumstances, the excluded evidence was more dissimilar than similar, and had minimal relevance and low probative value to the issue of consent.

Id.

The present case could scarcely be more factually distinguishable from *Andreozzi*. First, the charged sexual acts in the present case do not involve unique or distinctive acts such as those in *Andreozzi*. Rather, while details are scarce, there is no indication that the charged sexual act in question was anything more distinctive than vaginal intercourse.

As such, unlike in *Andreozzi*, the relevant question was only whether the named victim would be likely to consent to sexual conduct with appellant, not whether she would be likely to consent to a particularly uniquely or distinctive type of sexual conduct with appellant. Because there were no distinctive or unique aspects to the charged sexual act, the degree of similarity between it and past sexual interactions between the two participants was of much less importance than in the factually unique case of *Andreozzi*. Here the relevance of the sexual history between the two, from the defense perspective, was simply that one consensual sexual encounter progressed to another consensual sexual encounter. The fact that the two encounters did not involve the same specific act (i.e. sexual intercourse) was unimportant. Indeed, the fact that the first sexual encounter involved a “lower” level of sexual activity that then progressed into a “higher” level of sexual

activity (sexual intercourse) is exactly what would be expected as the natural progression of a new sexual relationship.

Second, unlike in *Andreozzi* where the two individuals involved had an extensive and obvious history (to include being married), the two individuals in the present case were mere coworkers who had only met a few days prior to the charged sexual intercourse. As such, the question in *Andreozzi* was not simply whether the victim was likely to engage in a consensual sexual relationship with the accused, but whether she was likely to consensually engage in a unique and bizarre “game” mixing sex, threats, firearms, and violence.

In the present case, the situation is wholly different. Not only were appellant and PV2 [REDACTED] never married, but they had only met a few days prior to the charged sexual intercourse. As such, it was much more vital for the defense to be able to place 5 May 2018 in the context of the rapidly developing sexual relationship between the two. In a vacuum, it would be completely unnatural for appellant to enter PV2 [REDACTED]’s barracks room in the middle of the night and spontaneously erupt into consensual sex with her, especially given that he had only met her a few days prior. However, this was the untenable position defense was left to argue because of the military judge’s total exclusion of the sexual history between the two.

The opinion of the Air Force Court of Criminal Appeals in *United States v. Thomas* is particularly on point with the present case. 2019 CCA LEXIS 78 (A.F. Ct. Crim. App. 2019).⁶ The military judge in *Thomas* made a similar error to the military judge in the present case by overlying on *Andreozzi* in a case that was factually dissimilar to *Andreozzi*. The two individuals at issue in *Thomas* had a history of sending “sexually-charged text messages” and, on one occasion, engaging in mutual masturbation over a live audio and video feed. *Id.* at *3. Subsequently, *Thomas* and the named victim had sexual intercourse. *Id.* at *6-*7. The named victim had no memory of the sexual intercourse due to alcohol consumption. *Id.* The defense theory was consent. *Id.* at *9-*12. The military judge excluded evidence of the prior sexual interactions under Mil. R. of Evid. 412(b)(1)(B) because they were dissimilar to charged conduct (sexual intercourse) and too remote in time (at least six months prior). *Id.* at *10-11. The military judge did, however, allow cross examination about the prior sexual interactions under Mil. R. of Evid. 412(b)(1)(C) because, to the extent she minimized or omitted such interactions, cross examination was relevant to the purpose of challenging her credibility). *Id.* at *11. Setting aside Thomas’ convictions, the

⁶ While *Thomas* is not controlling precedent, its factual similarity to the present case makes it notable and, hopefully, useful to this Court.

court held that the military judge erred by not allowing the evidence in under Mil. R. of Evid. 412(b)(1)(B). *Id.* at *20 (“The Defense's theory of the case was that Appellant and TSgt █████ engaged in consensual sexual intercourse on the night of 28-29 August 2015, which came about as a *continuation of consensual sexual interactions* that dated back to October 2014. Evidence of those interactions was therefore relevant and significant for the Defense's case.”) (emphasis added). Of particular note to the present case, specifically rejected the government’s argument that exclusion was proper under *Andreozzi*, due to the dissimilarity between the prior conduct (sexual text messages) and the charged conduct (sexual intercourse). *Id.* at 20-21 (internal citations omitted).

The argument for admission in the present case was certainly far stronger than it was in *Thomas*. While in *Thomas* the prior sexual activity was over six months removed from the charged sexual activity, in the present case it was removed by less than 48 hours. Additionally, while in *Thomas* the prior sexual activity involved no physical sexual conduct, in the present case it involved significant physical sexual conduct between the same two individuals in the same location (PV2 █████’s barracks room). As such, if it was reversible error for the military judge to exclude the Mil. R. Evid. 412(b)(1)(B) in *Thomas*, it is even more so in the present case. Additionally, the present case is even more ripe for reversal

in that the military judge excluded the evidence entirely, whereas in *Thomas* the military judge partially granted the defense motion, by allowing the evidence in under Mil. R. Evid. 412(b)(1)(C) but not Mil. R. Evid. 412(b)(1)(B).

Mil. R. Evid. 412(b)(1)(C)

The military judge further erred by denying appellant the opportunity to use this evidence under Mil. R. Evid. 412(b)(1)(C) to effectively confront his accuser through cross examination and to testify effectively in his own defense.

PV2 ■■■ did not disclose the prior history of consensual sexual conduct between herself and appellant in any of her statements to law enforcement, the government, or third parties. This is a major credibility issue that appellant was constitutionally entitled to explore on cross examination for the purpose of challenging her credibility. *See, e.g., Thomas*, 2019 CCA LEXIS 78, at *11 (military judge allowed defense to cross examine alleged victim about prior sexual interactions as a form of impeachment under Mil. R. Evid. 412(b)(1)(C) because the fact that she had minimized these prior interactions impacted her credibility).

Similarly, the defense was precluded from effectively cross examining PV2 ■■■ about giving appellant a key to her barracks room, which she admitted to having lied about in previous statements, without the context provided by the previous sexual encounter that had taken place in her barracks room the day

before. The exculpatory value of PV2 [REDACTED]'s admitted lie about giving her barracks room key to appellant would have been exponentially increased by this context.

Furthermore, the military judge's ruling precluded appellant's ability to testify effectively in his own defense. Appellant would not have been able to explain why he entered PV2 [REDACTED]'s barracks room on the night in question without the context provided by their previous sexual history, in that same room, from less than 48 hours prior. Similarly, appellant would not have been able to explain the significance of PV2 [REDACTED] giving him a key to her barracks room immediately preceding the charged events in the absence of this vital context.

The defense specifically raised these issues in its motion to admit evidence under Mil. R. Evid. 412, citing confrontation, cross examination, PV2 [REDACTED]'s divergent prior statements, and PV2 [REDACTED] giving appellant a key card to her barracks room. (App. Ex. XV) (sealed).

Unfortunately, the military judge's ruling does not seem to address the Mil. R. Evid. 412(b)(1)(C) cited in the defense motion at all. (App. Ex. XXXV) (sealed). It is difficult to analyze the military judge's rationale in excluding this evidence under Mil. R. Evid. 412(b)(1)(C) because no rationale is provided. The military judge's ruling should be given minimal deference as it fails to address or analyze these issues.

Regardless of the level of deference afforded the military judge's decision to exclude this evidence under Mil. R. Evid. 412(b)(1)(C), such exclusion was error. Indeed, it is difficult to imagine a more clear-cut case of required Mil. R. Evid. 412(b)(1)(C) evidence than an alleged victim who omitted the crucial fact that she and her alleged assailant had a history of consensual sexual conduct from all of her multiple statements to law enforcement, the government, and third parties.

Mil. R. Evid. 403 Balancing

Finally, the military judge erred in his application of the Mil. R. Evid. 403 balancing test. While the military judge stated that Mil. R. Evid. concerns abounded, he only cited one such concern: namely, that the fact finder would unfairly interpret PV2 [REDACTED]'s statements about her sexual preferences as an invitation for sexual abuse. This is a valid Mil. R. Evid. 403 concern, but it only applies to one small portion of the Mil. R. Evid. 412 evidence under consideration (PV2 [REDACTED]'s statements about her sexual preferences). The military judge could easily have tailored his ruling to his analysis by merely excluding these statements under Mil. R. Evid. 403. There was no need to exclude the entirety of the sexual encounter, to include the physical sexual encounter (which had nothing to do abuse or violence towards PV2 [REDACTED]), on these grounds. Indeed, appellant's position is

that these statements are far less relevant than the fact that appellant and PV2 [REDACTED] engaged in a physical sexual encounter on 3 May 2018; Clearly a physical sexual encounter is much more relevant than a seemingly off-hand comment about sexual preferences. Instead of tailoring his ruling to only exclude the statements, however, the military judge used this Mil. R. Evid 403 analysis to exclude all evidence of the 3 May 2018 sexual encounter. The only Mil. R. Evid. 403 concern cited by the military judge had no relation to the main issue being considered: the fact that these two individuals had engaged physical sexual conduct with each other less than 48 hours prior to the charged sexual intercourse.

With respect to the physical sexual conduct at issue, the military judge articulated no Mil. R. Evid. 403 balancing test whatsoever. Appellate courts “give military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing.” *Manns*, 54 M.J. at 166 (internal citations omitted). In this case, we have no record of the military judge conducting a Mil. R. Evid. 403 balancing with respect to the physical sexual conduct. As such, less deference should be given. Regardless of the level of deference, however, it was an abuse of discretion to exclude the evidence of physical sexual conduct based on Mil. R. Evid. 403 in the absence of any valid concern about unfair prejudice under that rule.

There is little, if any, prejudice to the fact that PV2 ■■■, an independent unmarried young adult, engaged in consensual physical sexual conduct on 3 May 2018 with another independent unmarried young adult. No reasonable fact finder would hold such a common and vanilla fact against her, nor have an overly emotional reaction thereto. Conversely, the probative value of the context provided by evidence of this sexual history, as explored above, is high, particularly in light of the fact that PV2 ■■■ deceptively failed to disclose this sexual history in any of her prior statements.

Prejudice / Harmless Error

The improper exclusion of this evidence under Mil. R. Evid. 412(b)(1)(C) was not harmless beyond a reasonable doubt. The additional impeachment value of cross examining the alleged victim on why she failed to disclose the sexual history between her and appellant in any of her reports of sexual assault, in and of itself, is more than sufficient to raise a reasonable doubt as to the outcome had this evidence been admitted, especially on top of the already weak government case. Similarly, had appellant been allowed to effectively testify in his own defense, it may have changed the outcome.

Additionally, the improper exclusion of this evidence under Mil. R. Evid. 412(b)(1)(B) had a substantial influence on the findings, as all four of the factors for evaluating prejudice favor appellant.

First, as discussed at length in A.E. VIII, the government's case had substantial weaknesses.

Second, as addressed in the prejudice section of A.E. I, the defense case was correspondingly strong. The full analysis will not be repeated here, however, it does bear repeating that the defense called a witness who testified that, the day after the charged sexual encounter, PV2 [REDACTED] told him that there had been a sexual encounter between herself and appellant, that she regretted it, and that she was concerned about her reputation. (R. at 445). This witness specifically testified that PV2 [REDACTED] made it explicitly clear that the sexual encounter had been consensual. (R. at 445). The erroneous exclusion of the Mil. R. Evid. 412(b)(1)(B) evidence supporting a theory of consent was particularly prejudicial given the synergy such evidence would have had with the witness testimony presented by the defense that the named victim had directly stated the charged sexual intercourse had been consensual.

Third, the excluded evidence was material. As explored at length above, the introduction of this evidence would have completely altered the landscape of the

defense's theory of consent. With the benefit of this evidence, the defense would have a unified and logical story to tell: On 3 May 2018, they had an initial sexual encounter in PV2 ■■■'s barracks room. Late in the evening of 4 May 2018, PV2 ■■■ gave appellant a copy of the key card to that same barracks room. Then, shortly thereafter, appellant used that key card to enter her barracks room and they took their physical intimacy to the next level. With this background, the defense narrative would have been transformed from farfetched to perfectly natural. What is more, as discussed in the following assignment of error, the exclusion of the 3 May 2018 sexual encounter was used as an artificial barrier to appellant presenting exculpatory evidence about the res gestae of the charged offense itself.

Fourth, and finally, the quality of the evidence in question was strong. This was much more than a bare assertion of the 3 May 2018 sexual encounter in question. Rather, the defense stood ready to call two witnesses to corroborate the encounter by testifying to the physical marks it left on appellant's body. (App. Ex. XV) (sealed). Assistant trial counsel acknowledged that government witness interviews had confirmed that witness(es) would testify to this effect. (R. at 390) (sealed). Furthermore, the government provided defense with Brady disclosures that PV2 ■■■ acknowledged several aspects of the defense proffer, none of which

she had disclosed until directly questioned by the government. (App. Ex. XXXIV, Encl. 1) (sealed).

Conclusion

The military judge's Mil. R. Evid. 412(b)(1)(B) analysis was fatally flawed. The military judge conducted no discernable Mil. R. Evid. 412(b)(1)(C) analysis at all. The military judge's minimal Mil. R. Evid. 403 analysis applied only to one minor portion of the proffered Mil. R. Evid. 412 evidence at issue. The error was not harmless.

Appellant requests this Court set aside the finding of guilty as to the Specification of Charge I.

V. WHETHER THE MILITARY JUDGE ERRED BY PREVENTING THE DEFENSE FROM PRESENTING EVIDENCE OF PARTICIPATION AND CONSENT DURING THE RES GESTAE OF THE CHARGED SEXUAL OFFENSE.

Standard or Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Kohlbeke*, 78 M.J. at 333 (C.A.A.F. 2019) (internal quotation marks and citations omitted). A military judge abuses their discretion if their findings of fact are clearly erroneous or their conclusions of law are incorrect. *Id.* at 333-34 (internal quotation marks and citations omitted).

Where constitutionally required evidence is improperly excluded, appellate courts test for prejudice by determining whether the error was harmless beyond a reasonable doubt. *Ellerbrock*, 70 M.J. at 318 (internal citations omitted).

Law

“Evidence of sexual behavior that is inextricably intertwined with the charged sexual misconduct does not fall under the prohibition of Mil. R. Evid. 412 because it is not ‘*other* sexual behavior.’” *United States v. Taylor*, ARMY 20160744, 2018 CCA LEXIS 499, *11 (Army Ct. Crim. App. 2018) (mem. op.) (emphasis in original).⁷ Such inextricably intertwined behavior is part of the res gestae of the alleged offense. *Id.* (citing *United States v. Gaddy*, ARMY 20150227, 2017 CCA LEXIS 179, *6 (Army Ct. Crim. App. 2017) (summ. disp.)).⁸

“It is undeniable that a defendant has a constitutional right to present a defense.” *United States v. Bess*, 75 M.J. 70, 74 (C.A.A.F. 2016) (quoting *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001)). This right “has many

⁷ Available at: <https://advance.lexis.com/api/permalink/f3afee2c-53d3-468d-a704-53d4bd4a2b09/?context=1000516>.

⁸ Available at: <https://advance.lexis.com/api/permalink/bb175d98-f126-479d-a7ac-9cef0278cc61/?context=1000516>; <https://advance.lexis.com/api/permalink/47cce9c2-d08f-47f7-a4f3-311dc4f7bd3e/?context=1000516>.

aspects” and is rooted in multiple constitutional causes. *Id.* at 74-75 (internal citations omitted).

Argument

During a pre-trial hearing, defense counsel sought to introduce evidence on marks PV2 [REDACTED] left on appellant’s body on 3 May 2018. (App. Ex. XV; R. at 28-48). Defense counsel argued that PV2 [REDACTED] had left similar marks on appellant’s body both during the 3 May 2018 romantic encounter *and* during the charged sexual offense on 5 May 2018. (R. at 40-41) (sealed). The military judge interjected that, to the extent such marks were left during the charged sexual sexual offense, they constituted part of the *res gestae* of the alleged offense. *Id.* The military judge specifically stated that such evidence did not fall under Mil. R. Evid. 412. *Id.*

Thereafter, the military judge ruled that the 3 May 2018 sexual encounter would be excluded in its entirety under Mil. R. Evid. 412, to include the evidence that PV2 [REDACTED] had left physical marks on appellant’s body during this encounter. (App. Ex. XXXV) (sealed).

At trial, defense counsel attempted to introduce evidence, through an eye witness, that appellant had physical marks on his body in the immediate aftermath

of the charged offense (R. at 388). Assistant trial counsel objected on Mil. R. Evid. 412 grounds. (R. at 388-89).

An Article 39a session was held to discuss the issue. (R. at 390-394). Defense counsel argued that he should be allowed to present evidence about physical marks left on appellant's body during the *res gestae* of the charged offense. (R. at 390) (selaed). The military judge (a different military judge than had made the Mil. R. Evid. 412 ruling) harshly chastized defense counsel for not informing the court that they would go into Mil. R. Evid. 412 evidence. (R. at 391) (selaed). Defense counsel responded, echoing the prior millitary judge's statements during the origional Mil. R. Evid. 412 hearing nearly verbatim, that this was not Mil. R. Evid. 412 evidence at all, as it constituted part of the *res gestae* of the charged offense. *Id.*

At this juncture, assistant trial counsel stated that the defense had never put on any evidence at the Mil. R. Evid. 412 hearing about physical marks on appellant resulting from the charged offense on 5 May 2018, despite the fact that the prior military judge had explicitly cut defense counsel off at the hearing on this topic, stating that evidence of marks left during the *res gestae* of the offense did not fall under Mil. R. Evid. 412. (R. at 392) (sealed). The military judge at trial asked defense counsel what evidence could link the physical marks on appellant's body to

the 5 May 2018 encounter (as opposed to the 3 May 2018 encounter). (R. at 393) (sealed). Defense counsel could not profer any way to deferentiate between marks cuased on 3 May 2018 and marks caused on 5 May 2018 and stated he would move on. (R. at 393) (sealed).

There can be no question that appellant was constitutionally entitled to present evidence that the alleged victim (whom the government portrayed as asleep and catatonic during the charged offense) had, in fact, participated in the charged sexual act, to such an extent that her participation left physical marks on appellant's body. The military judge who conducted the original Mil. R. Evid. 412 hearing explicitly stated on the record that such evidence would fall outside of the rubric of Mil. R. Evid. 412 and constitute the res gestae of the offense. (R. at 40-41) (sealed). That is to say, such evidence would be admissable.

The defense was under no obligation to notice evidence of the res gestae of the offense, under Mil. R. Evid 412 or any other rule. That said, defense counsel specifically raised this issue at the Mil. R. Evid. 412 hearing and the military judge at tjat time specifically stated that it would constitute res gestae of the offense. (R. at 40-41) (sealed). Therefore, to the extent there was any obligation to raise this issue and obtain a ruling, defense counsel had already done so long before trial began.

Despite the facts that this evidence was unquestionably admissible, the defense had raised the issue long before trial, and the prior military judge had as much as stated on the record that it was admissible, it was still erroneously excluded.

The Article 39a session, held by a different military judge, in the midst of trial, was, frankly, rather difficult to decipher. (R. at 390-94) (sealed). The heart of the issue, however, seems to have been a discussion about how to differentiate between physical marks left on appellant's body on 3 May 2018 (which had been excluded by the Mil. R. Evid. 412 ruling) and physical marks left on appellant's body on 5 May 2018, less than 48 hours later. *Id.* The short answer, of course, was that there was no way to differentiate between the two. There was no indication that there was any difference in type or location between the physical marks from the two encounters, and no reason to believe that the very slight age difference would make them visually distinguishable. Even were there some discernable distinction, there would be no expectation that the lay witnesses who saw the marks would be able to differentiate between them. In short, the military judge was asking the defense to do the impossible: to segregate evidence of physical marks left on appellant's body during the res gestae of the 5 May 2018 charged

offense from evidence of near identical marks left less than 48 hours prior. There was no possible way the defense could do this.

Because the defense was unable to segregate this unsegregatable evidence, the military judge excluded it all together. This was error.

The military judge should have allowed defense to present the evidence that appellant had physical marks on his body (distinctive physical marks such as one may receive from consensual sexual activity) in the immediate aftermath of the charged assault. To the extent that the defense was unable to present direct evidence tying these marks to the charged offense itself, such evidence should still have been admitted as circumstantial evidence.

Indeed, this is the very definition of circumstantial evidence. As the adage goes, “if there was evidence the street was wet in the morning, that would be circumstantial evidence . . . it rained during the night.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para 7-3 (10 Sep. 2014) [Benchbook]; (R. at 469). If, as in this case, there was evidence that appellant had marks on his neck and chest in the morning, that would be circumstantial evidence that someone had aggressively kissed him the night before. Defense would then be allowed to argue reasonable inferences from that evidence, to include that PV2 [REDACTED] had participated in the 5 May 2018 sexual encounter. *See* R.C.M. 919(b)

(“Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party’s theory of the case.”).

The only obstacle to the defense presenting this evidence was the military judge’s ruling excluding evidence of similar marks being left on appellant’s body on 3 May 2018. Given that ruling, both sides would have been precluded from pointing to the 3 May 2018 encounter as a potential source of the marks. This may have left the panel with an incomplete picture, but, to the extent it did, it was purley due to the military judge’s ruling excluding evidence of the 3 May 2018 encounter (over defense objection). Leaving the panel with an incomplete picture is, by neccesity, a consequence of evidentiary limitations imposed by Mil. R. Evid. 412. This is simply part of the trade off inhearent behind the policy considerations undergirding that rule. This dynamic cannot be used as both a sword and a shield to prevent the defense from discussing the res gestae of a charged offense. The fact that the panel may have been left with an incomplete picture about all possible sources of the marks on appellate’s body, as a result of the Mil. R. Evid. 412 ruling, should not have been allowed to form an artificial barrier to the defense’s ability to present evidence about the res gestae of the charged offense.

If the government felt it was unfair to hide from the panel a possible alternative source of the marks (namely the 3 May 2018 sexual encounter), then the government should have raised that issue. The government was on notice from the prior Article 39a session and the military judge's Mil. R. Evid. 412 ruling that the 3 May 2018 sexual encounter would be excluded, but that the marks from the 5 May 2018 sexual encounter would not be excluded as they were part of the res gestae. The government did not raise this issue at the original Mil. R. Evid. 412 hearing, nor at any point between that hearing and the trial. Instead, the government did not raise issue until the middle of trial, at which point they asked a different military judge to overrule the prior military judge's clear statements that this evidence of the res gestae of the offense would not be excluded under Mil. R. Evid. 412.

As explored in the previous assignment of error, the exclusion of evidence of the 3 May 2018 sexual encounter was, in itself, error. This encounter should have been admissible under both Mil. R. Evid. 412(b)(1)(B) and (b)(1)(C). Assuming, *arguendo*, however, that the exclusion of the 3 May 2018 encounter was not error, it was still improper to use the exclusion of evidence about that date as an artificial barrier to appellant's constitutional right to present exculpatory evidence about the res gestae of the offense itself.

Turning briefly to prejudice, it certainly cannot be said that the exclusion of evidence that alleged victim participated in and consented to the charged sexual activity was harmless beyond a reasonable doubt. This evidence, for which the defense stood ready to call corroborating witnesses, goes to the very heart of the issue in controversy.

Appellant requests this Court set aside the finding of guilty as to the Specification of Charge I.

**VI. WHETHER THE MILITARY JUDGE ERRED
BY IMPOSING A TIME LIMIT ON DEFENSE
COUNSEL’S CLOSING ARGUMENT.**

Standard of Review

Appellate courts review a military judge’s decision to limit time allotted for closing arguments for an abuse of discretion. *United States v. Payne*, NMCCA 200501454, 2009 CCA LEXIS 107, *11 (N.M. Ct. Crim. App. 2007) (citing *United States v. Gravitt*, 17 C.M.R. 249, 257 (C.M.A. 1954)).⁹

⁹ Available at: <https://advance.lexis.com/api/permalink/b9ee4249-921d-484b-b9ed-93ff29d42a78/?context=1000516>. Of note, while appellant would generally not cite to an unpublished opinion by another service court as the primary source for a standard of review, this is the only recent precedent appellant can locate specifically stating the standard of review for a military judge’s imposition of a time limit on closing arguments. Perhaps this lack of recent precedent illustrates how unusual it is for a military judge to impose such a time limit.

Law

“The accused has a constitutional right to present argument through counsel before deliberation on findings.” *United States v. Bonilla*, ARMY 20131084, 2016 CCA LEXIS 590, *16 (Army Ct. Crim. App. 2016) (mem. op.) (citing *Herring v. New York*, 522 U.S. 853, 858 (1975)) (additional internal quotation marks and citations omitted);¹⁰ *see also Bess*, 75 M.J. at 75 (“The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor.”) (internal quotation marks and citations omitted).

The accused's right to present a closing argument, however, is not absolute. *Bonilla*, 2016 CCA LEXIS 590 at *16. The military judge has the authority to exercise reasonable control over closing arguments. R.C.M. 801(a)(3); R.C.M. 919 discussion. This includes the authority to set "time limits for argument." R.C.M. 801(a)(3) discussion.

In determining whether a military judge abused their discretion by imposing a time limitation on trial defense counsel's closing argument, courts look to whether the military judge “gave reasonable advanced warning to both

¹⁰ Available at: <https://advance.lexis.com/api/permalink/6c017d5f-8f5f-4ed8-a22a-c845aecfe98d/?context=1000516>

counsel.” *Payne*, 2009 CCA LEXIS 107 at *11 (citing *United States v. Dock*, 20 M.J. 556, 557 (A.C.M.R. 1985)).

This Court’s predecessor strongly cautioned against imposing time limits on closing arguments with inadequate notice to counsel:

We begin with the reminder that closing argument is a valuable right and with a caution against unexpected time constraints on argument. While a judge may restrict argument to reasonable limits in the exercise of sound discretion, unexpected constraints obviously can curtail an argument's effectiveness. A counsel who has been forewarned of reasonable time limits on argument can preserve the effectiveness of his argument by tailoring it in advance. This may or may not be possible on the spur of the moment.

Dock, 20 M.J. at 557.

Argument

The presentation of evidence in this case ended on 25 September 2019 at 1659. (R. at 456). After a short recess, the parties reconvened for an Article 39a session at 1727 hours. (R. at 457). At this session, the military judge questioned the parties about which exhibits would go the panel, instructions, and the findings worksheet. (R. at 456-63). Even though closing arguments would begin the following morning, the military judge provided no warning to the parties that he intended to impose a time limit on closing arguments. (R. at 456-63).

The parties reconvened for another Article 39a session at 0903 the next morning. (R. at 464). At this juncture, immediately before closing arguments

were set to begin, the military judge for the first time brought up the subject of time limits for closing arguments:

MJ: Trial counsel, how long do you intend to argue for?

TC: Maybe 15-20 minutes, Your Honor.

MJ: Defense Counsel?

DC: Maybe 30 minutes to an hour.

MJ: I can't envision an hour-long close, defense counsel. So be prepared for an instruction to wrap it up in 5 minutes, if I feel you're taking too long. Understood?

DC: Yes, Your Honor.

(R. at 465).

The military judge did not provide a specific time limit.

Thereafter, during the defense closing statement, the military judge interjected, stating "Counsel, you're 25 minutes in." (R. at 500). At this juncture, the defense counsel had not even begun to address the Specification of Charge II (the false official statement charge). Almost immediately after the judge's interjection, defense counsel transitioned his argument away from the sexual assault charge in order to address the false official statement charge. (R. at 501). Defense counsel spent approximately three pages of transcript on the false official

statement charge. (R. at 501-03). Defense counsel then spent approximately one and one forth pages of transcript on brief concluding remarks. (R. at 503-05).

Defense counsel stated, in his post-trial submissions under R.C.M. 1106, that the interruption and time constraint caused him to lose track of his thoughts and accidentally skip over portions of his closing argument. (Post-Trial Matters, page 6). Defense counsel also stated that the military judge, during bridging the gap, acknowledged the defense closing argument was rushed and that he might be “partially to blame” for imposing a time limit. (Post-Trial Matters at 6-7).

The military judge’s imposition of a time limit on defense counsel’s closing argument was unreasonable for two reasons: (1) the military judge failed to inform counsel of his intent to impose a time limit until immediately before closing arguments were set to begin, and (2) the military judge failed to provide a concrete time limit which would have allowed counsel to adequately plan. As a result, defense counsel had no opportunity to “preserve the effectiveness of his argument by tailoring it in advance.” *Dock*, 20 M.J. at 557.

The military judge had every opportunity to give counsel adequate warning of his intent to impose time limits on closing arguments. This could have been done in a pretrial order, an email prior to trial, or at any of the numerous R.C.M. 802 or Article 39a sessions held in this case. Indeed, the parties conducted an

Article 39a session immediately after the presentation of evidence ended on 25 September 2019. (R. at 457). The sole purpose of this Article 39a session was to plan the order of march for the next morning's activities, which would, of course, include closing arguments. It was foreseeable that counsel would spend the evening prior to closing arguments preparing their closing arguments. This would have been the reasonable time for the military judge to forewarn them that he intended to take the unusual step of imposing a time limit on closing arguments. Inexplicably, however, the military judge made no mention of his intent to impose time limits at any of these opportunities, and allowed counsel to leave the courtroom on 25 September 2019 in total ignorance of the fact that time limits would be imposed on their arguments the following morning. It was not until the Article 39a session on the morning of 26 September 2019, immediately before closing arguments were set to begin, that the military judge broached the subject of time limits for the first time. Informing counsel about a time limit immediately before closing arguments is clearly not the "reasonable advanced warning" contemplated by *Payne*. Rather, the military judge prejudiced appellant by providing inadequate notice, exactly the practice this Court's predecessor warned against in *Dock*.

Additionally, the military judge failed to provide a concrete time limit which would have allowed counsel to adequately plan. Despite explicitly addressing the subject of time limits, the military judge did not actually set a concrete time limit.

At the 25-minute mark, the military judge interjected during the defense closing, stating “Counsel, you’re 25 minutes in.” (R. at 500). At this point, per the military judge’s earlier instructions, the defense counsel was required to “wrap it up in 5 minutes . . .” It would have been vastly preferable for the military judge to inform defense counsel of a specific time limit prior to the closing arguments beginning, in order to allow him to tailor his argument in advance. It seems that the military judge intended to limit the defense closing to 30 minutes (as he gave the 5 minute warning after 25 minutes). It is unclear, however, why the military judge did not simply inform counsel during the earlier discussion that he would be limiting argument to 30 minutes. Instead, the military judge’s vague last-minute instructions left defense counsel to guess how long he would have to argue.

In sum, the military judge’s imposition of a time limit was unreasonable because it failed to give defense counsel the adequate notice required to effectively adjust. This is exactly the practice warned against by this Court’s predecessor in *Dock*.

Furthermore, the record reflects that defense counsel's argument suffered as result. At the point where the military judge interjected, the defense counsel had not even begun to address The Specification of Charge II (the false official statement charge). (R. at 500). Almost immediately after the judge's interjection, defense counsel, by necessity, truncated his argument on The Specification of Charge I (the sexual assault charge), and transitioned to the false official statement charge. (R. at 501). Defense counsel stated, in his post-trial submissions under R.C.M. 1106, that the interruption and time constraint caused him to lose track of his thoughts and accidentally skip over portions of his closing argument. (Post-Trial Matters, page 6). Defense counsel also stated that the military judge, during bridging the gap, acknowledged the defense closing argument was rushed and that he might be "partially to blame" for imposing a time limit. (Post-Trial Matters, page 6-7). Additionally, it is clear from a review of the closing argument that the defense counsel did, indeed, miss key points. For example, nowhere in his closing argument did defense counsel mention that PV2 ■■■ admitted giving Appellant a key to her barracks room on the evening in question (despite previously lying about it).

Appellant does not argue that the military judge lacked the authority to impose a reasonable time limit. Rather, it was the method in which the military

judge imposed the time limit that was unreasonable; the military judge failed to give defense counsel the adequate notice required to effectively adjust. As a result, just as this Court's predecessor warned in *Dock*, defense counsel was unable to tailor his argument in advance and Appellant's constitutional right to present argument through counsel before deliberation on findings was unreasonably impinged.

Appellant requests this Court set aside the findings of guilty as to all charges and specifications.

VII. WHETHER THE SPECIFICATION OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT

Standard of Review

This Court reviews the legal and factual sufficiency of the evidence de novo. *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

Law

Article 66, UCMJ, mandates that this Court review the legal and factual sufficiency of the evidence and affirm only those findings of guilty that this Court finds correct in law and in fact. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for legal sufficiency is "whether, considering the

evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt.” *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). On review for legal sufficiency, every reasonable inference from the evidence must be drawn in favor of the prosecution. *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).

Both factual and legal sufficiency review is limited to the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66, UCMJ, 10 U.S.C.A § 866; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973); *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (internal citations omitted). The test for factual sufficiency is, “whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this court is] convinced of [appellant’s] guilt beyond a reasonable doubt.” *Walters*, 58 M.J. at 396 (citing *Turner*, 25 M.J. at 325)). “In sum, to sustain appellant’s conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *Gilchrist*, 61 M.J. at 793 (citing *United States v. Roukis*, 60 M.J. 925, 930

(Army Ct. Crim. App. 2005)). Further, “[a]n appellate tribunal must independently evaluate the evidence to determine whether or not an accused has been deprived of his right to have the court-martial consider all reasonable alternatives of guilt.” *United States v. Clark*, 48 C.M.R. 83, 87 (C.M.A. 1973).

Argument

The Specification of Charge I is legally and factually insufficient because of insurmountable weaknesses in the government’s case.

First, and perhaps most significantly, the named victim admitted to lying directly about the charged assault in *multiple* prior statements. She admitted that she had made up false stories about being pushed and held down because she did not want to admit to giving appellant a key to her room. (R. at 217-18, 221, 354). She similarly admitted to lying about appellant spending the night in her room. (R. at 143, 221). She also admitted that she had inaccurately reported to CID that she had gone straight back to her room after hanging out at the smoke pit on 4 May 2018. (R. at 140-41, 212).

Second, the named victim’s testimony was directly contradicted on multiple points by other witnesses. SPC [REDACTED] and SPC [REDACTED] both directly contradicted her story about going to the shoppette. (R. at 140, 422, 440). SPC [REDACTED] directly contradicted her story about sleeping on the floor in the male

motel room. (R. at 149, 240, 410). SPC [REDACTED] directly contradicted her testimony that he noticed her crying on the car ride back from the concert. (R. at 151, 442-43). Most significantly of all, SPC [REDACTED] testified that, during the car ride back, PV2 [REDACTED] told him that there had been a sexual encounter between herself and appellant, that she regretted it, and that she was concerned about her reputation. (R. at 445). SPC [REDACTED] specifically testified that PV2 [REDACTED] made it explicitly clear that the sexual encounter had been consensual. (R. at 445).

In sum, PV2 [REDACTED]'s testimony as to critical events on 4 May, 5 May, and 6 May was directly contradicted by multiple other witnesses. This cannot but cast substantial doubt on the accuracy of her testimony as to charged sexual intercourse on 5 May, especially given, as above, that she directly acknowledged lying about the charged assault on 5 May in multiple prior statements.

Third, PV2 [REDACTED]'s testimony was impeached on multiple collateral matters. PV2 [REDACTED] testified that she was "excited to deploy" and denied stating she wanted to get out of the deployment until after the charged assault. (R. at 251). When confronted with text messages on cross examination, however, she acknowledged telling her father on the very first day she arrived at Fort Sill that she wanted to get out of the deployment. (R. at 251-53). Similarly, PV2 [REDACTED] denied being excited about being discharged via a MEDBOARD. (R. at 255). However, when

confronted, she acknowledged sending a text message to a friend saying “They are med boarding me, it’s lit”). (R. at 256).

Fourth, PV2 ■ acknowledged significant memory problems on the stand. (R. at 199-01, 203). On 13 and 15 July, PV2 ■ met with government counsel and stated that her memory was not clear on the night of the incident. (R at 201-02). She acknowledged telling the government that she did not remember much of the night of the incident. (R. at 201-02). She also acknowledged spontaneously telling CID that she had “bad memory.” (R. at 199-200).

Fifth, PV2 ■ admitted to deleting or disposing of multiple pieces of critical supposed evidence. Perhaps most implausibly, PV2 ■ claimed to have had text messages from appellant in which he admitted to assaulting her. (R. at 258). However, she claimed she had deleted these messages. (R. at 258). No such messages were recovered during a forensic examination of her phone. (R. at 315). Similarly, PV2 ■ claimed that she was wearing a tampon during the charged assault, but acknowledged she did not keep it or photograph it. (R. at 229-30). PV2 ■ further admitted to deleting the original photos depicting bruising on her legs. (R. at 225). As such, she acknowledged that there was no way to determine the date the photos were originally taken. (R. at 162).

Sixth, multiple motives to fabricate were presented at trial. On the first day of in-processing at Fort Sill, PV2 [REDACTED] learned she was scheduled to deploy and texted her father that she thought she could get out of the unwanted deployment. (R. at 251-52). As discussed above, PV2 [REDACTED]'s testimony on the topic of wanting to get out of the deployment was impeached on the stand. At this time, PV2 [REDACTED] was in a relationship and, almost immediately following the charged sexual intercourse, she wrote a poem largely focused on her boyfriend. (R. at 173, 362). In one of her acknowledged false versions of the charged assault, PV2 [REDACTED] falsely claimed to have protested "please don't do this, I have a boyfriend." (R. at 354). SPC [REDACTED] testified that PV2 [REDACTED] directly told him that she was worried about her reputation after having consensual sex with Appellant. (R. at 445). PV2 [REDACTED] underwent a MEDBOARD and received a 70 percent disability rating paycheck every month. (R. at 255-56). She texted her friend on 21 September 2018 "they are med boarding me, it's lit". (R. at 256).

As discussed above, PV2 [REDACTED]'s testimony on being excited about the MEDBOARD was also impeached on the stand. PV2 [REDACTED] engaged in underage drinking immediately upon her arrival to Fort Sill and, apparently, continued to do so thereafter, culminating in her arrest for, inter alia, underage drinking on 2 July 2018. (R. at 194-95, 369). Two days after her arrest, PV2 reached out to CID SA

█████ to participate in the investigation. (R. at 195). PV2 █████ did not disclose to SA █████ that she was arrested less than two days prior. (R. at 309). PV2 █████ received an Article 15 for this incident. (R. 371). PV2 █████ also failed the APFT (apparently multiple times) and there was consideration of chaptering her for APFT failure. (R. at 131-32, 172).

Seventh, and finally, PV2 █████ engaged in conduct wildly inconsistent with her accusations. The day following the sexual intercourse in question, PV2 █████'s PV2 █████ accompanied Appellant on a lengthy out-of-state trip, sitting in the passenger seat of his car both ways. (R at 144-45, 232). She took, posed for, and posted pictures and videos showing her relaxed and at ease. (Def. Ex. N) (selfie); (Pros. Ex. 1) (dancing video).

Upon returning to the motel the very night following the alleged assault, PV2 █████ affirmatively chose to stay in the male hotel room, with appellant, rather than the female hotel room next door. (R. at 149). Furthermore, PV2 █████'s account of sleeping "on the bathroom kitchen floor," and specific denial of getting back on the pullout bed with appellant, was directly contradicted by another of the female Soldiers in the group, SPC ██████████, who testified that upon entering the male room the next morning she saw PV2 █████ and appellant sleeping on the same pullout bed together. (R. at 410). PV2 █████ later got a ride to the SHARP

office from appellant, despite the fact that he was the very individual who she claimed had assaulted her. (R. at 153).

PV2 ■■■ testified that, after the assault, she was scarred of appellant and, specifically, terrified of Appellant's "bright red" car. (R. at 245-46). However, on cross examination she acknowledged that, in addition to riding to and from the concert in Kansas in appellant's car, she continued to receive rides to work from appellant in the aftermath of the purported sexual assault. (R. at 245-46). She also acknowledged continuing to have additional casual social interactions with appellant, to include purchasing a TV stand from him on 15 May 2018. (169-70, 245-46, 270). This Court has recognized the significance of voluntary post-assault conduct between an alleged victim and her alleged assailant to the legal and factual sufficiency review calculation. *See, e.g., United States v. Parker*, 54 M.J. 700, 707-709 (Army Ct. Crim. App. 2001).

Appellant requests this Court set aside the finding of guilty as to the Specification of Charge I.

VIII. WHETHER THE SPECIFICATION OF CHARGE II IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews the legal and factual sufficiency of the evidence de novo. *Gilchrist*, 61 M.J. at 793 (citing *Washington*, 57 M.J. at 399).

Law

Adopted from A.E. VII above, with the following additions:

“A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge.” *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019) (quoting *United States v. Lubasky*, 68 M.J. 260, 264 (C.A.A.F. 2010)) (additional internal quotations marks and citations omitted). “Where a variance exists, R.C.M. 918(a)(1) permits a fact finder to enter findings of guilty with exceptions and substitutions, so long as the ‘[e]xceptions and substitutions [are] not . . . used to substantially change the nature of the offense.’” *Id.* However, “exceptions and substitutions pursuant to R.C.M. 918 may only ‘be made by the fact finder at the findings portion of the trial.’” *Id.* (quoting *Lubasky*, 68 M.J. at 265).

Argument

The Specification of Charge II is legally and factually insufficient because the government failed to introduce any evidence that the accused made the charged statement.

The Specification of Charge II alleged that the accused said: ““No”” or words to that effect when asked *if you had seen* Private [REDACTED] between on or about 4 May 2018 and on or about 6 May 2018.” (Charge Sheet) (emphasis added). A review of the allied papers reveals that appellant did indeed tell CID that he had not seen PV2 [REDACTED]. during 5-6 May 2018:

SA [REDACTED]: So just to clarify, you didn’t meet with PVT [REDACTED] on the night of 4-5 May, and 5-6 May 18?

Appellant: No.

SA [REDACTED]: The first time you *saw* her was Monday morning (7 May 18)?

Appellant: Yes.

(Sworn Statement, 8 June 2018, page 3)¹¹ (emphasis added); *see also* (Pros. Ex. 22 for ID) (video of CID agent taking written sworn statement from appellant).

¹¹ Of note, appellate defense counsel cannot locate a marked copy of Pros. Ex. 23 for ID within the record of trial. However, it is clear from context, including the notation “Refused to Sign,”

Appellant concedes that the government possessed evidence that he made the charged statement. Candidly, it is also clear that the government possessed evidence that the statement was false. However, the government failed to introduce the charged statement itself into evidence at trial. As such, the Specification of Charge II is missing an element (that appellant made the statement in question) and must be set aside as both legally and factually insufficient.

The only portion of appellant's statement to CID that the government did enter into evidence was a seventy-nine second audio clip. (Pros. Ex. 26). This audio clip cut off *before* appellant made the charged statement. It is axiomatic that evidence not presented at trial cannot be used to sustain a conviction. *Bethea*, 46 C.M.R. at 224 ("Undeniably, evidence not presented at the trial cannot be used to support or reverse a conviction.").

The seventy-nine second audio clip that government introduced into evidence contained only three questions by SA [REDACTED]: (1) whether appellant had spent time with PV2 [REDACTED], (2) whether appellant had sex with PV2 [REDACTED], and (3) whether appellant had forced himself upon PV2 [REDACTED] (Pros. Ex. 26). Appellant

that the 8 June 2018 sworn statement contained within the allied papers is the same document as Pros. Ex. 23. Appellant has filed a motion to consider contemporaneously with this brief, asking the court to consider this statement as a substitute for Pros. Ex. 23 for ID.

responded “no” to each of these questions.” (Pros. Ex. 26). A review of the allied papers reveals that these three questions directly proceeded the above-quoted exchange in which appellant denied have *seen* PV2 [REDACTED]. during the relevant dates. (Sworn Statement, 8 June 2018, page 3); *see also* (Pros. Ex. 22 for ID). However, the audio clip entered into evidence cuts off before the exchange about having *seen* PV2 [REDACTED]. (Pros. Ex. 26).

Neither spending time with someone, nor having sex with someone, nor forcing oneself upon someone are even roughly synonymous with “seeing” someone. To the contrary, “seeing” someone is much broader than any of the questions asked by SA [REDACTED] on Pros. Ex. 26. Obviously, one can see someone without spending time with them or having sex with them.

There was no evidence introduced at trial that appellant was asked whether he had seen PV2 [REDACTED] or that he denied having seen her. As such, the specification, as worded, is missing an element, and, by definition, is both legally and factually insufficient. A reasonable fact finder could not have found all the essential elements beyond a reasonable doubt because the government failed to introduce any evidence of an element. Similarly, this Court cannot be convinced of appellant’s guilt based on the evidence presented at trial, because no evidence was presented at trial that Appellant made the charged statement.

As a result of the government's failure to enter the relevant portion of appellant's statement to CID into evidence, there was a variance between the pleadings and the proof. When such a variance exists in the context of a False Official Statement prosecution under Article 107, UCMJ, the fact finder may, under some circumstances, use exceptions and substitutions to reconcile the variance. *See, e.g., United States v. Willis*, 50 M.J. 841, 843-44 (Army Ct. Crim. App. 1999) (affirming military judge's use of exceptions and substitutions to reconcile pleadings with proof because "the plain meaning of the language alleged to be false" was not altered by the exceptions and substitutions). Of course, exceptions and substitutions are not permitted if the variance is fatal. *Id.*

It is possible, though by no means certain, that the Specification of Charge II could have been saved through the use of exceptions and substitutions at the trial level. For example, the fact finder may have excepted the words "when asked if you had seen Private [REDACTED]" and substituted the words "when asked if you had spent time with Private [REDACTED]" or substituted the words "when asked if you had sex with Private [REDACTED]." Had the fact finder made such exceptions and substitutions, the pleadings would have matched the proof. The question would then be whether the exceptions and substitutions created a fatal variance. Appellant's position is that such exceptions and substitutions would create a fatal variance because

“seeing” someone is so much broader than spending time with someone or having sex with someone. However, the government did not argue for findings by exceptions and substitutions, nor did the fact finder make exceptions or substitutions to the charged language. As such, the question of whether the use of exceptions and substitutions could have saved the Specification of Charge II at trial is merely academic, as they certainly cannot be used to save this specification at the current procedural posture. *See English*, 79 M.J. at 119 (“exceptions and substitutions pursuant to R.C.M. 918 may only ‘be made by the fact finder at the findings portion of the trial.’”) (quoting *Lubasky*, 68 M.J. at 265). As exceptions and substitutions are no longer a possibility, the only option at this procedural posture is to conclude that the Specification of Charge II is missing an element and, as such, is both legally and factually insufficient.

As a final note, while it is not necessary for this Court to determine why the government failed to enter the charged statement into evidence, it seems quite clear from the record how and why this failure occurred. A brief review may provide helpful context. The government seems to have entered trial with a two-part plan as to how they would enter appellant’s statements to CID into evidence. Specifically, they planned to (1) enter appellant’s written sworn statement (Pros. Ex. 23 for ID) and/or (2) enter a video of appellant’s CID interview (Pros. Ex. 22

for ID). Both Pros. Ex. 23 and 22 for ID contained the charged statement (in which appellant denied having *seen* PV2 [REDACTED]). However, as is so often the case in both war and litigation, the government's plan did not survive first contact with their opponent. The military judge sustained defense objections to both Pros. Ex. 23 and 22 for ID. (R. at 289, 292-95). After the government was unable to play a third exhibit, Pros. Ex. 25, in a format the military judge could hear, the military judge grew frustrated with the delay and instructed the government to move forward with their presentation of evidence. (R. at 297) ("At this point, we've taken too much time on this issue, and we're going to drive on.").

It appears that it was at this juncture that the government counsel, undoubtedly juggling innumerable other duties during a complex contested panel case, created Pros. Ex. 26, the seventy-nine second audio clip that was ultimately introduced into evidence. (R. at 356-57). In the fog of litigation, it appears that the government simply made a mistake by failing to ensure that the newly created Pros. Ex. 26 captured the charged statement by appellant.

Appellant requests this Court set aside the finding of guilty as to the Specification of Charge II.

Conclusion

WHEREFORE, appellant requests this this Court set aside the findings and sentence.¹²



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¹²Pursuant 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.

APPENDIX

Groستefon Matters

Pursuant to *United States v. Groستefon*, 12 M.J. 431 (C.M.A. 1982), appellant, SPC Nicholas R. St. Jean, through appellate defense counsel, personally requests this Court consider the following matters:

1. This court-martial did not conform to *Ramos v. Louisiana* because it did not require a unanimous panel for conviction.

The military judge did not instruct the members that a unanimous vote was required to convict appellant. (R. at 507). Furthermore, from the record of trial, it is unclear whether appellant's panel was unanimous or not; however, the UCMJ's allowance for non-unanimous verdicts places it at odds with the Supreme Court's recent decision holding that non-unanimous verdicts are a violation of the Constitution. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020).

“Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable.” *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004). “In general, the Bill of Rights applies to members of the military absent a specific exemption or certain overriding demands of discipline and duty.” *United States v. Easton*, 71 M.J. 168, 174–75 (C.A.A.F. 2012) (internal quotations omitted) (quoting *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953))).

Though the “Sixth Amendment right to trial by jury does not apply to courts-martial,” if the accused is tried by a panel, this Court should hold that *Ramos* requires that panel to be unanimous in its verdict. *Ramos*, 140 S. Ct. at 1397; *United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001). This situation is analogous to *United States v. Commisso*, where the C.A.A.F. held that since the accused has a regulatory right to a panel, a fair and impartial panel was a matter of due process and “sine qua non” for a fair court-martial despite the Sixth Amendment right to trial by jury not applying to courts-martial. 76 M.J. 315, 321 (C.A.A.F. 2017). Therefore, the requirement that the court-martial panel be unanimous in its verdict arises out of the Due Process Clause of the Fifth Amendment, as informed by *Ramos*, rather than the Sixth Amendment. In light of this constitutional violation, this Court should set aside the findings and sentence.

2. The convening authority failed to take action on the sentence, thereby depriving the Army Court of jurisdiction under Article 66, UCMJ.

The convening authority referred all of appellant’s charges to trial on 3 May 2019. (Charge Sheet). The allegations for which appellant was found guilty occurred prior to 1 January 2019. (Statement of Trial Results; Charge Sheet). After the trial, the convening authority took “no action” on the sentence. (Action).

Section 6.(b) of Executive Order 13825, 83 Fed. Reg. 9889 (1 March 2018), mandates convening authorities take action on the sentence where some of the

misconduct took place prior to 1 January 2019, but the charges were referred after 1 January 2019. Without an approved sentence, no sentence could be validly entered into the record under Article 60c, UCMJ (2018) because the Judgment requires post-trial action by the convening authority. Accordingly, this Court lacks jurisdiction to consider this case pursuant to Article 66(d)(1), UCMJ (2018).

The appropriate remedy is to remand the case to the convening authority to determine what, if any, clemency should be provided. Appellant is prejudiced because where a convening authority's action is defective, only "some colorable showing of possible prejudice" is required to obtain relief. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). This exceedingly low threshold ensures that appellate courts does not usurp the convening authority's unique clemency role. Appellant submits he has satisfied the low standard of showing "some colorable showing of possible prejudice." Accordingly, appellant requests this Court grant meaningful relief.

3. The dilatory post-trial processing in this case warrants relief.

Whether an appellant has been deprived of his due process right to a speedy appellate review is a question of law that is reviewed de novo. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.G. 2006)). The convening authority's failure to take action within 120 days of the completion of trial creates a rebuttable presumption of

unreasonable delay and triggers the four factor analysis under *Barker v. Wingo*, 407 U.S. 514, 530–32 (1972); *Moreno*, 63 M.J. at 142. Those four factors are “(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.” *Arriaga*, 70 M.J. at 56–58; *see also Moreno*, 63 M.J. at 142.

Notably, while the appellant’s assertion of the right to timely review and appeal is a factor, the responsibility of the convening authority to promptly complete post-trial processing is not dependent upon a request to do so from the accused. *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004).

Furthermore, regarding the fourth factor, there are three enumerated sub-factors including preventing oppressive incarceration pending appeal, minimization of anxiety awaiting the outcome of an appeal, and ensuring the appellant’s grounds for appeal and defenses are minimally impaired. *Moreno*, 63 M.J. at 138–39.

Ultimately, intervention is also necessary when the SJA “fails to document an acceptable explanation for the untimely post-trial processing” and “the delay is so egregious that tolerating it would adversely affect the public’s perception of fairness and integrity.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006); *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001). In such cases, one need not find actual prejudice in order to grant relief for excessive post-trial delay. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F.

2002). The Army Court is empowered to decide what findings and sentences “should be approved” based on the record, which includes excessive post-trial delay. *Id.* “Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency.” *United States v. Ponder*, ARMY 20180515, 2020 CCA LEXIS 38 at *3 (Army Ct. Crim. App 10 Feb. 2020) (summ. disp.) (quoting *Bauerbach*, 55 M.J at 507).¹

1. Length of Delay

The 280 days from sentencing to action is unreasonable on its face and triggers the full *Barker/Moreno* analysis. *See Arriaga*, 70 M.J. at 56. However, the delay in this case is even more unreasonable considering the trial defense counsel submitted the Post-Trial Matters on 26 September 2019 and the military judge entered judgment on 31 October 2019. (Post-Trial Matters; Entry of Judgment). The accused had no representation for approximately eight months until this Court received his case and an appellate defense counsel was detailed.

2. Reasons for the Delay

The government may overcome the presumption of unreasonableness by providing legitimate reasons for the delay. *Arriaga*, 70 M.J. at 57. Here, the office of the staff judge advocate offered none.

¹ Available at: <https://advance.lexis.com/api/permalink/2b6f5d79-bfd6-4ca1-8e82-5696e089990c/?context=1000516>.

3. Assertion of the Right to a Timely Review and Appeal

This factor requires this Court to examine whether appellant objected to the delay in any way or otherwise asserted his right to a timely review. *Arriaga*, 70 M.J. at 57. Though there was none here, this should only “slightly” weigh against the appellant especially in light of the lapse in appellant’s representation. *Arriaga*, 70 M.J. at 57; *see also Bodkins*, 60 M.J. at 324.

4. Prejudice

To find prejudice in this case, this Court need not look any farther than the government’s violation of SPC St. Jean’s due process rights, that is, his “anxiety awaiting the outcome of [his] appeal[.]” while simultaneously hampering his ability to raise substantive errors before this Court. *Arriaga*, 70 M.J. at 55, 57; (Post-Trial Matters; Appellant’s Brief).

5. Relief Even When There is no Prejudice

Even without prejudice, this Court can grant relief for unreasonable post-trial delay. *Toohey*, 63 M.J. at 362. As the court held in *Bodkins* and *Tardif*, “In performing its affirmative obligation to consider sentence appropriateness, the court must take into account ‘all the facts and circumstances reflected in the record, including [any] unexplained and unreasonable post-trial delay.’” *Bodkins*, 60 M.J. at 324 (quoting *Tardif*, 57 M.J. at 224). Here, 280 days is an unacceptable denial of due process rights, especially in light of the eight months the government

deprived appellant of his right to representation by a military attorney at no cost to the appellant between the entry of judgement and receipt of the case by this Court. (Entry of Judgment).

Most importantly, this is just the latest case in a long string of examples of unacceptable dilatory post-trial processing from offices of the staff judge advocate. *See, e.g., United States v. Feeney-Clark*, ARMY 20180694, 2020 CCA LEXIS 256, *6 (Army Ct. Crim. App. 29 July 2020) (mem. op.) (303 days was “anything but the example of diligence and efficiency expected of the military.”);² *United States v. Diaz*, ARMY 20180556, 2020 CCA LEXIS 154, *1, *3 (Army Ct. Crim. App. 11 May 2020) (summ. disp.) (Reducing appellant’s confinement by 60 days for 308 days of post-trial delay.);³ *United States v. Notter*, ARMY 20180503, 2020 CCA LEXIS 150, *1–*2 (Army Ct. Crim. App. 4 May 2020) (mem. op.) (Relief for 336 days of post-trial delay.);⁴ *Ponder*, 2020 CCA LEXIS at *3 (Relief for delay of 296 days.); *United States v. Kizzee*, ARMY 20180241, 2019 CCA LEXIS 508, *7 (Army Ct. Crim. App. 12 Dec. 2019) (summ. disp.) (Awarding credit for a 274-day delay).⁵

² Available at: <https://advance.lexis.com/api/permalink/fd6af617-70fc-4b8c-9b58-3e4c183515f3/?context=1000516>.

³ Available at: <https://advance.lexis.com/api/permalink/5b9b4501-8f05-4bb6-99ea-3e648f52032c/?context=1000516>.

⁴ Available at: <https://advance.lexis.com/api/permalink/21927e91-ed52-4b2a-ae0b-877cca168d28/?context=1000516>.

⁵ Available at: <https://advance.lexis.com/api/permalink/927e6c8a-7b80-4641-8d60-850c055b721d/?context=1000516>.

As this Court noted in *Ponder*, “[i]ncidents of poor administration reflect adversely on the United States Army and the military justice system.” *Ponder*, 2020 CCA LEXIS 38 at *4 (quoting *United States v. Carroll*, 40 M.J. 554, 557 n. 8 (A.C.M.R. 1994)). Like *Ponder*, *Diaz*, *Notter*, and *Kizzee*, appellant’s case calls for relief to “assur[e] that justice is done” by granting meaningful relief to his sentence to confinement. See *Bauerbach*, 55 M.J. at 507. Given the length of appellant’s sentence and the pervasiveness of the post-trial problems throughout the Army, this Court should have grant sentence relief.

4. The military judge erroneously allowed a prior consistent statement to be admitted over defense objection.

Defense counsel objected to a witness, Ms. ■■■, testifying to an allegedly prior consistent statement by PV2 ■■■. (R. at 283). Despite defense counsel’s timely objection that it was improper bolstering and the fact that defense counsel’s cross-examination centered around PV2 ■■■ being a liar, the military judge did not force the government to explain the admissibility of the evidence under Mil. R. Evid. 801 or give a thorough ruling.

PV2 ■■■’s statement elicited through Ms. ■■■ should not have been admitted because the “fact that a statement was repeated in the past, without more, is not very probative in rehabilitating the credibility of the witness’ in-court testimony.” *United States v. Finch*, 78 M.J. 781, 787 (Army Ct. Crim. App. 2019). After all, if a witness is attacked with a reputation for being a liar, the fact that he or she

repeated a lie does not rehabilitate his or her credibility.” *Id.*; *see also United States v. McCaskey*, 30 M.J. 188, 191 (C.M.A. 1990). Moreover, the military judge’s ruling should be given no deference because he failed to place any findings of fact or conclusions of law on the record. *United States v. Flesher*, 73 M.J. 303, 311, 312 (C.A.A.F. 2014).

5. The fact that PV2 [REDACTED]’s initial outcry to law enforcement was scripted should weigh heavily in appellant’s favor in the court’s factual sufficiency review.

PV2 [REDACTED] admitted in her testimony that she read from a script when she reported the alleged offense to law enforcement. (R. at 198, 200). In light of the contradictory nature of the evidence, that is, PV2 [REDACTED] alleged she experienced this traumatic event, but she needed to read from a script in reporting it, this should weigh heavily in favor of appellant. Furthermore, despite using this script, she still managed to give approximately nine different inconsistent statements about this event, as highlighted during her testimony under cross-examination. (R. at 181, 189, 211-13, 217-19, 238).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on March 1, 2021.



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