

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

BRIEF ON BEHALF OF
APPELLEE

v.

Docket No. ARMY 20190556

Private (E-2)
LEEROY M. SIGRAH
United States Army,
Appellant

Tried at Fort Campbell, Kentucky, on
4 April, 8 July, and 13–15 August
2019 before a general court-martial
appointed by Commander, Fort
Campbell, Colonel Matthew Calarco
and Colonel Jacqueline Tubbs,
Military Judges, presiding.

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

Assignment of Error I

**THE MILITARY JUDGE ERRED BY FAILING TO
PROVIDE APPROPRIATE RELIEF UNDER RULE
FOR COURTS-MARTIAL 914(e).**

Assignment of Error II

**THE GOVERNMENT VIOLATED APPELLANT’S
DUE PROCESS RIGHTS WHEN IT FAILED ITS
DUTY UNDER *BRADY V. MARYLAND* TO TURN
OVER FAVORABLE AND MATERIAL
INFORMATION IN ITS POSSESSION TO THE
DEFENSE.**

Assignment of Error III

**APPELLANT’S CONVICTIONS ARE FACTUALLY
INSUFFICIENT.**

Assignment of Error IV¹

**DILATORY POST-TRIAL PROCESSING MERITS
RELIEF WHERE 302 DAYS ELAPSED FROM
SENTENCING TO DOCKETING AT THE ARMY
COURT.**

¹ The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests an opportunity to respond to appellant's additional briefing on the claimed error.

Table of Contents

<u>Table of Authorities</u>	iv
<u>Statement of the Case</u>	1
<u>Statement of Facts</u>	1
I. Drinks and Cards with Friends.....	2
II. Appellant Sexually Assaulted SPC [REDACTED] as She Slept.	4
III. Appellant Repeatedly Apologized and then Threatened to Harm Himself After SPC [REDACTED] Refused to Speak with Him.....	5
IV. SPC [REDACTED] Reported the Sexual Assault.....	6
<u>Errors and Argument</u>	11
Assignment of Error I: The Military Judge Erred by Failing to Provide Appropriate Relief Under Rule for Courts-Martial 914(e)	7
Assignment of Error II: The Government Violated Appellant’s Due Process Rights When it Failed its Duty Under <i>Brady v. Maryland</i> to Turn Over Favorable and Material Information in its Possession to the Defense	20
Assignment of Error III: Appellant’s Convictions are Factually Insufficient	32
Assignment of Error IV: Dilatory Post-Trial Processing Merits Relief Where 302 Days Elapsed From Sentencing to Docketing at the Army Court	39
<u>Conclusion</u>	45

Table of Authorities

Supreme Court of the United States

<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	23
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	40
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	20, 23
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	23

U.S. Court of Appeals for the Armed Forces

<i>United States v. Arriaga</i> , 70 M.J. 51, 57 (C.A.A.F. 2011)	42, 43
<i>United States v. Ashby</i> , 68 M.J. 108 (C.A.A.F. 2009)	40
<i>United States v. Bright</i> , 66 M.J. 359 (C.A.A.F. 2008)	32
<i>United States v. Clark</i> , 79 M.J. 449 (C.A.A.F. 2020)	12
<i>United States v. Claxton</i> , 32 M.J. 159 (C.M.A. 1991)	44
<i>United States v. Coleman</i> , 72 M.J. 184 (C.A.A.F. 2013)	20
<i>United States v. Garlick</i> , 61 M.J. 346 (C.A.A.F. 2005)	25, 31
<i>United States v. Grostefon</i> , 12 M.J. 431 (C.M.A. 1982)	ii
<i>United States v. Hart</i> , 29 M.J. 407 (C.M.A. 1990)	20
<i>United States v. Hurt</i> , 27 C.M.R. 3 (U.S. C.M.A. 1958)	37
<i>United States v. Jarie</i> , 5 M.J. 193 (C.M.A. 1978)	15
<i>United States v. King</i> , 78 M.J. 218 (C.A.A.F. 2019)	37
<i>United States v. Marsh</i> , 21 M.J. 445 (C.M.A. 1986)	13, 19
<i>United States v. Moreno</i> , 63 M.J. 129 (C.A.A.F. 2006)	39, 40, 43
<i>United States v. Muwwakkil</i> , 74 M.J. 187 (C.A.A.F. 2015)	7, 11, 13
<i>United States v. Olson</i> , 74 M.J. 132 (C.A.A.F. 2015)	7
<i>United States v. Simon</i> , 64 M.J. 205 (C.A.A.F. 2006)	40
<i>United States v. Tardif</i> , 57 M.J. 219 (C.A.A.F. 2002)	44
<i>United States v. Toohey</i> , 63 M.J. 353 (C.A.A.F. 2006)	43
<i>United States v. Turner</i> , 25 M.J. 324 (C.M.A. 1987)	32, 33
<i>United States v. Washington</i> , 57 M.J. 394 (C.A.A.F. 2002)	32

Service Courts of Criminal Appeals

<i>United States v. Banks</i> , 75 M.J. 746 (Army Ct. Crim. App. 2016)	43
<i>United States v. Brooks</i> , 79 M.J. 501 (A. Ct. Crim. App. 2019)	11, 12
<i>United States v. Clark</i> , 2019 CCA LEXIS 247 (A. Ct. Crim. App. June 10, 2019)	15, 16
<i>United States v. Craion</i> , 64 M.J. 531 (A. Ct. Crim. App. 2006)	32
<i>United States v. Davis</i> , 75 M.J. 537 (Army Ct. Crim. App. 2015)	33
<i>United States v. Ellis</i> , 77 M.J. 671 (A. Ct. Crim. App. 2018)	24, 25, 29

<i>United States v. Garman</i> , 59 M.J. 677 (A. Ct. Crim. App. 2003)	44
<i>United States v. Gilchrist</i> , 61 M.J. 785 (Army Ct. Crim. App. 2005)	32
<i>United States v. Hotaling</i> , 2020 CCA LEXIS 449 (Army Ct. Crim. App. 11 Dec. 2020)	42, 44, 45
<i>United States v. Jimenez-Victoria</i> , 75 M.J. 768 (Army Ct. Crim. App. 2012). 33, 34	
<i>United States v. Lewis</i> , 38 M.J. 501 (A.C.M.R. 1993)	12
<i>United States v. Ogunlana</i> , 2008 CCA LEXIS 123 (A.F. Ct. Crim. App. Mar. 21, 2008)	28
<i>United States v. Rankin</i> , 63 M.J. 552 (N-M. Ct. Crim. App. 2006)	33
<i>United States v. Roxas</i> , 41 M.J. 727 (N-M Ct. Crim. App. 1994)	12
<i>United States v. Stanley</i> , 43 M.J. 671 (Army Ct. Crim. App. 1995)	33
<i>United States v. Trigueros</i> , 69 M.J. 604 (Army Ct. Crim. App. 2010).	33

Other Courts of Appeal

<i>Dyer v. MacDougall</i> , 201 F.2d 265 (2d Cir. 1952)	33
<i>Groves v. United States</i> , 564 A.2d 372, 378 (D.C. 1989)	15
<i>United States v. Sterling</i> , 742 F.2d 521 (9th Cir. 1984)	12

Uniform Code of Military Justice

Article 32, UCMJ, 10 U.S.C. § 832	13
Article 39, UCMJ, 10 U.S.C. § 839	7, 22, 27, 31, 41
Article 59, UCMJ, 10 U.S.C. § 859	16
Article 60, UCMJ, 10 U.S.C. § 860	41, 44
Article 62, UCMJ, 10 U.S.C. § 862	16
Article 66, UCMJ, 10 U.S.C. § 866	16, 32, 33, 39, 40, 41, 44
Article 120, UCMJ, 10 U.S.C. § 920	1
Article 128, UCMJ, 10 U.S.C. § 928	1

Military Rules and Regulations

Military Rule of Evidence 412	27
<i>Manual for Courts-Martial, United States</i> , pt. IV, ¶ 45	34
Rule for Courts-Martial 914	<i>passim</i>
Rule for Courts-Martial 1104	41, 43
Rule for Courts-Martial 1106	23, 31

Statement of the Case

On 14 August 2019, a panel with enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2016). [UCMJ].² (R. at 595). On 15 August 2019, the panel sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for twelve years, and a dishonorable discharge. (R. at 666).

The convening authority took no action on appellant's sentence on 3 December 2019. (Initial Action). The military judge entered judgment on 16 January 2020. (Judgment). This court returned appellant's case to the convening authority for his action pursuant to Rule 35 of this court's Rules of Appellate Procedure on 29 May 2020. The convening authority approved appellant's adjudged sentence on 4 June 2020. (Final Action). The military judge entered the judgment on 8 June 2020. (Modified Judgment of the Court).

² The panel acquitted appellant of one specification of assault consummated by battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2016).

Statement of Facts

I. Drinks and Cards with Friends.

Specialist [SPC] [REDACTED] SPC AD, and SPC CB³ were all assigned to the same unit and worked in the same office in 2016. (R. at 296). The three became fast friends; SPC AD and SPC CB were roommates, and SPC [REDACTED] who lived only a few doors down, often played video games and cooked meals in the common area of her friends' living quarters.⁴ (R. at 291, 494). Appellant, new to Fort Campbell was introduced to the group by SPC AD. Appellant and SPC AD were from the same Micronesian island and had known each other for approximately six years, attended church together, and even referred to each other as "cousins." (R. at 436, 460).

On 2 February 2018, SPC AD and SPC CB played cards and drank in their common area with appellant. Specialist [REDACTED] was out with a different group of friends celebrating a colleague's impending permanent change of station. (R. at 290). Specialist AD invited SPC [REDACTED] to join them upon her return to the barracks. (R. at 463; Pros. Ex. 2 at 10). Appellant messaged SPC [REDACTED] while she was at the

³ Specialist CB was promoted to Sergeant prior to trial; however, for purpose of consistency, he will be referred to as SPC CB. (R. at 493).

⁴ Specialist AD and SPC CB's suite consisted of two separate bedrooms, as well as a shared kitchen, living room, and bathroom. (R. at 294–50; Pros. Ex. 1).

farewell celebration and repeatedly asked whether she was drunk and encouraged her to drink more prior to her arrival.⁵ (Pros. Ex. 2 at 10, 13, 14).

At approximately 0215, SPC [REDACTED] messaged appellant to inform him that she was on her way back to the barracks from the farewell party. (Pros. Ex. 2 at 15). Specialist [REDACTED] consumed seven whiskey shots at the party and she then drank two beers in SPC AD and SPC CB's room. (R. at 298). Because of her alcohol consumption and the early morning hour, SPC [REDACTED] could not walk back to her room. (R. at 298). Specialist AD realized that SPC [REDACTED] was "a little bit too drunk," so he told her to "crash in [his] room." (R. at 465). Specialist [REDACTED] had known SPC AD and SPC CB since 2016 so she felt safe resting in their barracks. (R. at 299). Specialist [REDACTED] went into SPC AD's bedroom, removed her boots, and fell asleep. (R. at 299). Specialist CB followed suit and went to bed, while SPC AD and appellant continued to drink. (R. at 466),

As they drank, appellant asked SPC AD whether he could have sex with SPC [REDACTED] (R. at 466). Specialist AD thought that appellant was joking, as he knew that appellant was engaged to another woman, so he responded "[y]eah, you can do

⁵ Appellant and SPC [REDACTED] communicated through Facebook Messenger, a social media application that allows users to send messages to one another. (R. at 316, 323).

it.” (R. at 466–67). Appellant walked into SPC AD’s bedroom as SPC AD nodded off to sleep at the kitchen table.⁶ (R. at 467).

II. Appellant Sexually Assaulted SPC [REDACTED] as She Slept.

Specialist [REDACTED] woke when she felt the bed rocking. Despite the darkness of the room, she was able to make out the silhouette of the person with a wide body and shaved head pressed on top of her. (R. at 300–01, 303). As the figure “mov[ed] up and down . . . along [her] body,” SPC [REDACTED] realized that her legs were spread open and that her yoga pants and underwear had been removed from her right leg, exposing her vagina. (R. at 301, 444). Specialist [REDACTED] “realized that something was completely wrong, . . . pushed the person off of [her] and that’s when [she] heard him say, ‘Okay, I’m sorry. I’m just going to sleep beside you.’” (R. at 301). Specialist [REDACTED] recognized appellant’s voice. (R. at 306). When SPC [REDACTED] tried to get clothed and move away from the bed, appellant grabbed her by the waist and attempted to keep her in bed. (R. at 304). Specialist [REDACTED] kept struggling against his grasp and was able to leave the bedroom. (R. at 304).

When SPC [REDACTED] left the bedroom, she found SPC AD asleep at the kitchen table. (R. at 305). After she saw SPC AD asleep on the kitchen table, SPC [REDACTED] realized it was appellant, with his wide body and shaved head, who had been on

⁶ Later that day, appellant admitted to SPC AD that he had sex with SPC [REDACTED] (R. at 469).

top of her in the bedroom.⁷ (R. at 305). Specialist [REDACTED] then went to her room and cried herself to sleep. (R. at 306). She woke a few hours later and experienced vaginal soreness,⁸ the same pain she felt after previous, unrelated, sexual encounters. (R. at 311).

III. Appellant Repeatedly Apologized and then Threatened to Harm Himself After SPC [REDACTED] Refused to Speak with Him.

Later that day, appellant messaged SPC [REDACTED] “I fucked up. U [sic] have all the reasons in this world to hate. I’m very sorry. I really am. u [sic] don’t have to reply. I just wanna say how sorry and stupid I am.” (Pros. Ex. 2 at 15) (emojis omitted). Appellant sent several more messages throughout the evening, alternating between apologizing and admitting to “feel[ing] guilty as fuck.” (Pros. Ex. 2 at 15–16, 18–19). During the early morning hours of 4 February 2019, appellant messaged SPC [REDACTED] “[l]ast night was the best night of [my] life” and insisted upon speaking with SPC [REDACTED] in person. (Pros. Ex. 2 at 39). At first, SPC

⁷ Appellant had a shaved head at the time of the incident. (R. at 305). Appellant described himself as “big” and shared that his high school basketball team nicknamed him “The Great Wall of China.” (R. at 633). Specialist [REDACTED] described SPC AD as “skinnier” with spikey hair and SPC CB as tall and thin, with curly hair. (R. at 305).

⁸ Specialist [REDACTED] described soreness in and around her vulva, as well as tenderness in her right breast and red marks on her lips. (R. at 508–09).

█ tried to defuse the situation by telling appellant that she could not speak with him because she was FaceTiming with her boyfriend.^{9 10} (Pros. Ex. 2 at 32).

Undeterred, appellant continued to plead with SPC █ to allow him to sleep next to her “for the last time.” (Pros. Ex. 2 at 29). Specialist █ refused, and appellant responded with several thinly veiled references to committing suicide. (R. at 321; Pros. Ex. 2 at 29, 30, 31, 33, 34). Appellant’s threats of self-harm led SPC █ to enlist SPC AD’s help to calm appellant. (R. at 323).

IV. SPC █ Reported the Sexual Assault.

Specialist █ was in denial about the sexual assault. (R. at 325). She did not want to “go through the whole process of it, of reporting it and talking to authorities, to [her] chain of command, and to the lawyers and to do this whole court-martial” (R. at 325). However, approximately one week after the incident, SPC █ confided in a group of her coworkers, and they encouraged her to report the incident. (R. at 326). She realized that she could not simply forget that she was sexually assaulted, so she reported the attack to her battalion’s Sexual Assault Response Coordinator. (R. at 436).

⁹ FaceTime is an electronic application that allows users to conduct video conferences on their mobile devices.

¹⁰ Specialist █ did not have a boyfriend at the time, however, she often used a non-existent boyfriend to deflect unwanted male attention. (R. at 325).

Assignment of Error I

THE MILITARY JUDGE ERRED BY FAILING TO PROVIDE APPROPRIATE RELIEF UNDER RULE FOR COURTS-MARTIAL 914(e).

Standard of Review

A military judge's decision whether to strike testimony under Rule for Courts-Martial 914 is reviewed for an abuse of discretion. *United States v. Muwwakkil*, 74 M.J. 187, 191 (C.A.A.F. 2015). An abuse of discretion occurs when a military judge's findings of facts are clearly erroneous or his conclusions of law are incorrect. *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015).

Additional Statement of Facts

At the end of the government's direct examination of SPC [REDACTED] appellant requested an Article 39(a) session to discuss his motion for relief under Rule for Courts-Martial [R.C.M.] 914. (R. at 326).

I. The Video Recordings of SPC AD, SPC CB, and SPC [REDACTED]

Special Agent [SA] DM, the lead investigator in this case, explained that at the time of the interviews, the cameras in Fort Campbell Criminal Investigation Command [CID]'s interview rooms used VICON NET,¹¹ a system that continuously recorded the visual component of a video, regardless of whether there

¹¹ Fort Campbell CID has since discontinued the use of the VICON NET system. (Gov. App. Ex. 1).

was any activity in the room.¹² (R. at 335, 343, 363). The cameras then transmitted the video data to a centralized server maintained at the Fort Campbell's CID office. (R. 339). The video remained on the centralized server until the server reached its storage capacity, at which point the older video data was automatically overwritten by newer data. (R. at 339–40, 354). Special Agent DM testified that video data would remain on the server for approximately thirty to forty-five days, depending on the volume of activity within the CID office. (R. at 340, 378).

Special Agent DM also explained that CID policy required special agents to download subject/suspect interviews from the server onto a DVD within twenty-four hours of the interview but there was no such regulatory requirement to download victim or witness interviews. (R. at 339, 362). Special Agent DM further testified, “[individual special agents] do not have the authority to just go in and [download victim interviews] and save [them] to a disc . . .” (R. at 370). In fact, a Special Agent would need authorization from multiple parties, including the Special Agent in Charge, the Special Victims Prosecutor [SVP], and the Special Victims Counsel [SVC], in order to download, save, and store a victim interview.¹³

¹² In contrast to the perpetual video recording of the interview room, special agents had to manually activate the camera's audio recording capability. (R. at 343).

¹³ Special Agent RP testified that a special agent would need the unanimous concurrence from the SVP, SVC, Trial Counsel, and the victim prior to downloading a victim interview. (R. at 384–85).

(R. at 370, 373). Special Agent DM confirmed neither he nor any of the other special agents, had downloaded the video data of SPC [REDACTED]'s, SPC CB's, or SPC AD's interviews. (R. at 340, 342). He also testified that he queried the CID server for the videos that day, and his search yielded no results. (R. at 341).

II. The Contemporaneous Written Sworn Statements.

Criminal Investigation Division interviews generally consist of several distinct phases: an introductory rapport-building period, a period where the interviewee provides information about the allegation, a chance for the interviewee to memorialize that information in a narrative statement, and a written question and answer period where the SA asks for further information or clarification. (R. at 358–59). Then, the interviewee and SA both review the interviewee's written statement to ensure its accuracy prior to the interviewee swearing to the veracity of his or her "statement." (R. at 359–61).

Special Agent DM testified that he used the same protocol when he conducted SPC AD's, SPC CB's, and SPC [REDACTED] interviews. (R. at 361). SA RP completed the question and answer portion of SPC [REDACTED] interview as SA DM left the room to conduct appellant's interview. (R. at 347–48). Although SA SM and RP admitted that the sworn statements did not capture every word that an interviewee may have uttered, they maintained that the interviewees' sworn

statements encompassed “the incident that occurred and allegations, everything that happened.” (R. at 346, 361, 387, 389–90).

III. The Military Judge’s Ruling.

Appellant argued that the military judge should order the panel to disregard SPC [REDACTED] testimony because of “CID’s either intentional or specifically [sic] decision . . . not to download and save [SPC [REDACTED]’s recorded video audio interview”¹⁴ (R. at 400). The government conceded that the video-recorded interviews were statements under R.C.M. 914 and that the government could not produce the statements, as they no longer existed. (R. at 406–07). Nonetheless, the government argued the deletions were not done in bad faith and that the witnesses’ written statements were thorough, comprehensive, and detailed. (R. at 407). The government maintained that appellant was not prejudiced because appellant could cross-examine SPC [REDACTED] SPC AD, and SPC CB based upon their written sworn statements. (R. at 408). The military judge recessed the court-martial overnight to consider appellant’s R.C.M. 914 motion. (R. at 409–10).

The following morning, the military judge noted that she considered SPC [REDACTED]’s, SPC AD’s, and SPC CB’s sworn statements, marked as appellate Exhibits

¹⁴ Appellant requested similar relief for SPC AD’s and SPC CB’s expected testimony, as their respective video interviews were also automatically overwritten and lost. (R. at 342, 406). Alternatively, appellant also requested that the military judge declare a mistrial (R. at 405).

IX, X, and XI, respectively. (R. at 410). She then denied appellant's R.C.M. 914 motion and said she would supplement her ruling with written findings of fact and conclusions of law prior to authentication of the record. (R. at 410). The record does not contain the military judge's written findings.

Law and Argument

I. The Purpose and Scope of the *Jencks* Act and R.C.M. 914.

“The purpose of both the Jencks Act and R.C.M. 914 is ‘to further the fair and just administration of criminal justice by providing for disclosure of statements for impeaching government witnesses.’” *United States v. Brooks*, 79 M.J. 501, 506 (A. Ct. Crim. App. 2019) (quoting *Muwwakkil*, 74 M.J. at 191). To that end, R.C.M. 914 entitles an opposing party to witness's statements, in the possession of the United States, relating to the witness's testimony. R.C.M. 914(a). “[A]n audio recording of a witness interview is a “statement” for both Jencks Act and R.C.M. 914 purposes.” *Brooks*, 79 M.J. at 506.

II. Remedies for Violations and the test for Prejudice.

It is well settled that “the Jencks Act, R.C.M. 914, and the remedies therein extend to lost or destroyed statements of witnesses previously in the possession of the United States” *Brooks*, 79 M.J. at 506. A military judge shall strike a witness's testimony or “declare a mistrial *if* required in the interest of justice” should the opposing party fail to produce a *Jencks Act* statement. R.C.M. 914(e)

(emphasis added). However, “[t]he ‘strike’ or ‘mistrial’ remedy is not absolute.

‘A trial court has the discretion not to impose sanctions for noncompliance with the dictates of the *Jencks Act*.’” *Brooks*, 79 M.J. at 506 (quoting *United States v. Sterling*, 742 F.2d 521, 524 (9th Cir. 1984)); *see also United States v. Lewis*, 38 M.J. 501, 508 (A.C.M.R. 1993) (“Not every situation in which a party fails to produce a pretrial statement of a testifying witness mandates striking the testimony of the witness”).

“Not every failure to comply with the Jencks Act is necessarily prejudicial. The court must weigh all the circumstances of the case to determine the appropriate course and determine if there is possible prejudice to the defendant.” *United States v. Roxas*, 41 M.J. 727, 730 (N-M Ct. Crim. App. 1994).

III. The Military Judge did not Abuse Her Discretion in Denying Appellant’s R.C.M. 914 Motion.

The government does not dispute that the video-recorded interviews qualified as statements under R.C.M. 914 or that the interviews were overwritten and thus, were lost. *See United States v. Clark*, 79 M.J. 449, 452 (C.A.A.F. 2020) (adopting the military judge’s characterization of evidence as “lost,” where CID failed to preserve a disc containing a segment of the appellant’s interview). However, the military judge did not err in denying appellant’s R.C.M. 914 motion because the loss of the interviews was not due to bad faith.

“The *Jencks Act* jurisprudence of the Supreme Court and our Court . . . has recognized a judicially created good faith loss doctrine.” *Muwwakkil*, 74 M.J. at 193 (citing *United States v. Marsh*, 21 M.J. 445, 451 (C.M.A. 1986)). Even where the government has committed a *Jencks Act* violation by negligently causing a good faith loss of materials, the *Jencks Act* does not necessarily dictate the drastic remedy of striking a witness’s testimony, as would otherwise be required when statements are lost due to “deliberate suppression or bad-faith destruction.” *Marsh*, 21 M.J. at 451.

In *Marsh*, the tape-recorded Article 32, UCMJ, testimony of two witnesses was lost prior to trial. The Court found that although the tapes were lost due to government negligence, the government’s conduct was not grossly negligent and thus did not amount to a suppression of the witnesses’ statements.¹⁵ *Id.* at 452. The Court also noted that despite the loss of the interviews, appellant was still able to effectively cross-examine the witnesses with the summarized transcripts of their Article 32, UCMJ, testimony. *Id.* Accordingly, the court held that the military judge did not abuse his discretion in denying appellant’s motion to strike the witnesses’ testimony. *Id.*

¹⁵ Of note, the proposed 2020 changes to Rule 914(e) incorporate this judicially-created “gross negligence” standard. See 85 Fed. Reg. 7737 (available at www.federalregister.gov/documents/2020/02/11/2020-02685/manual-for-court-martial-proposed-amendments).

As a preliminary matter, appellant does not allege that the loss of the interviews was due to bad faith. Rather, appellant contends that the special agents negligently failed to preserve the interviews. However, the record shows that SA DM and SA RP strictly adhered to established CID policy throughout the interview process, and thus could not have acted negligently. Criminal Investigation Division regulations required special agents to download subject interviews onto DVDs within twenty-four hours of subject's interview. (R. at 339, 362). Appellant's interview was indeed recorded onto a DVD. (Pros. Ex 7 for identification). The special agents also explained their standard witness interview practices and confirmed that they abided by these standards during each of the witness interviews, culminating in the production of three written sworn statements. (R. at 358–61, 524). It is undeniable that the special agents followed CID procedure and thus acted reasonably with respect to the lost interviews.

Appellant implies that the special agents' failure to disobey their governing directives and proactively preserve the video-recorded interviews precludes the government from availing itself of the good faith exception. (Appellant's Br. at 19–20). Appellant ignores the passive nature of the recording system involved here; the VICON NET system recorded video data constantly, even in the absence of activity in the interview rooms. Additionally, CID policy required a special agent to first secure concurrence from the SAC, SVP, SVC, the victim, and the

trial counsel prior to downloading these non-subject interviews. (R. at 370, 373, 384–85, 526, 528). Further, the automatic nature of the server’s data overwriting process and the resultant deletion of video files is more akin to “those routine administrative procedures designated as being in ‘good faith’” than the “optional practice of discretionary destruction of notes” that the Court of Military Appeals found disqualified the government from invoking the good faith doctrine in *United States v. Jarie*. 5 M.J. 193, 195 (C.M.A. 1978); *see also Groves v. United States*, 564 A.2d 372, 378 (D.C. 1989) (finding no evidence of bad faith in the erasure of a witness’s tape recorded call to the police where erasure “occurred in accordance with routine administrative procedures after a sixty-day period”). Accordingly, this court should find that the military judge did not err in denying appellant’s R.C.M. 914 motion.

IV. Appellant was Not Prejudiced by the Absence of the Recorded Interviews.

Appellant’s argues that the prejudice he suffered “was the military judge’s failure to grant one of R.C.M. 914’s two prescribed remedies for a violation of the rule,” (Appellant’s Br. at 20), and thus seemingly invites this court to adopt the same limited concept of prejudice that it expressly repudiated in *Clark*. *United States v. Clark*, 2019 CCA LEXIS 247, at *11 (A. Ct. Crim. App. June 10, 2019) ([memo op.](#)) (citations omitted). In *Clark*, appellant argued the military judge’s failure to grant either of R.C.M. 914’s available remedies in the face of an R.C.M.

914 violation required the court to set aside the findings of guilt and sentence.

Clark, 2019 CCA LEXIS, at *11. This court found the logic of C.A.A.F.’s review in *Muwwakkil* of a R.C.M. 914 issue in the context of an Article 62 government appeal was inapplicable to a case directly reviewed under Article 66, UCMJ.

Clark, 2019 CCA LEXIS, at *12. Accordingly, the court held that the Article 59, UCMJ prejudice analysis is the appropriate standard to measure prejudice.

“A finding 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.” Article 59, UCMJ; *see also Clark*, 79 M.J., at 455 (citations omitted). Appellate courts “evaluate prejudice from an erroneous evidentiary ruling by weighing (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.*

A. The Government’s Case was Strong, Especially Relative to Appellant’s Weak Defense.

The government’s case was strong. Appellant inundated SPC [REDACTED] with Facebook messages that alternated between pleading for SPC [REDACTED] forgiveness, admitting feelings of guilty, and expressing a desire to harm himself. He told SPC [REDACTED] that he was not sure that he could “stop worry[ing] bout [sic] it,” because “[i]t really happen [sic].” (Pros. Ex. 2, p. 16). Appellant said, “[he] fe[lt] guilty as fuck.” (Pros. Ex. 2, p. 16). Contrary to appellant’s later assertion that he merely

lay beside SPC [REDACTED] his messages evince a consciousness of guilt consummate with gravity of sexual assault. His feelings were well placed; he felt guilty because he was guilty.

Furthermore, although appellant sexually assaulted SPC [REDACTED] in the dark, she nevertheless accurately identified appellant as her attacker by his distinguishable frame and haircut. Specialist [REDACTED] also recognized appellant's voice as she attempted to escape. Although appellant sexually assaulted SPC [REDACTED] while she lay unconscious and thus was unable to perceive appellant penetrating her with his penis, SPC [REDACTED] testified about the soreness and discomfort she felt inside and outside of her vulva the following day, a pain she previously only felt after sexual intercourse. Additionally, appellant's frantic and frequent Facebook messages begging for SPC [REDACTED] forgiveness revealed his consciousness of guilt. Finally, SPC [REDACTED] testified credibly and had no discernible reason, such as a desire for an expedited transfer or avoid punishment for her own misconduct, to fabricate her allegations against appellant.

Conversely, appellant's case was incredibly weak. Appellant only called one witness, SA DM, during its case in chief and did not attempt to admit any other evidence. Appellant's defense strategy focused upon the exaggerating importance of minor inconsistencies in SPC [REDACTED] testimony, her flippant use of emojis, and behavior seemingly inconsistent with victimhood.

B. The Materiality and Quality of the Witnesses' Testimony.

As the complaining witness, SPC [REDACTED] testimony was material to the government's case and was of more than sufficient quality to convince panel of appellant's guilt beyond a reasonable doubt. Nonetheless, appellant, armed with SPC [REDACTED] comprehensive written sworn statement, subjected SPC [REDACTED] to a scathing cross-examination and highlighted multiple instances of her inconsistent behavior and her incomplete statements to CID regarding her relationship status.

Appellant's attempts to paint SPC AD as the linchpin of the government's case fails because SPC AD's testimony was of limited materiality, especially given its poor quality. Appellant's defense counsel negated any damage that SPC AD's testimony may have wrought through his effective cross-examination, which exposed inconsistencies in SPC AD's testimony, his faulty memory, and his alleged motive to fabricate. Accordingly, the military judge's refusal to strike SPC AD's testimony did not prejudice appellant.

Specialist CB's testimony was immaterial at best and thus did not prejudice appellant. Specialist CB testified he went to bed prior to everyone else and thus had no personal knowledge of the sexual assault. (R. at 497). Rather than being prejudicial, SPC CB's testimony about SPC [REDACTED] low level of intoxication actually contradicted that of SPC [REDACTED] and SPC AD. (R. at 496, 504). Additionally, SPC CB's testimony that SPC AD did not respond to SPC CB's

attempts to talk about the sexual assault was consistent with appellant's theory that SPC AD was SPC [REDACTED] attacker. (R. at 505).

Lastly, as SPC [REDACTED] SPC AD, and SPC CB testified, their sworn statements captured everything that was discussed during their respective CID interviews. (R. at 462, 495). Special Agent DM and SA RP both testified that SPC [REDACTED] written sworn statement captured "everything that happened" surrounding her oral allegation of sexual assault. (R. at 347, 387, 389). The special agents explained that prior to swearing a witness to their written statement, each witness jointly reviews his or her statement with the special agent, witnesses are "given a [sic] time to review [their written statement], make sure it's true and accurate, and everything is inclusive in its entirety, make sure nothing is misrepresented and it, you know, as depicted as the individual would have stated." (R. at 390).

Appellant possessed each witnesses's sworn statement and effectively used them during cross-examination to impeach the witnesses on inconsistencies contained therein. *See Marsh*, 21 M.J. at 452. Accordingly, "[t]rial defense counsel was not significantly encumbered in his examination of government witnesses because of the unavailability" of the video-recorded interviews. *Marsh*, 21 M.J. at 452. Thus, appellant was not prejudiced by the military judge's refusal to strike the witnesses' testimony or to declare a mistrial; this court should affirm appellant's conviction and sentence.

Assignment of Error II

THE GOVERNMENT VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT FAILED ITS DUTY UNDER *BRADY V. MARYLAND* TO TURN OVER FAVORABLE AND MATERIAL INFORMATION IN ITS POSSESSION TO THE DEFENSE.

Standard of Review

Whether the government has complied with its disclosure obligations stemming from the Due Process Clause as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) [hereinafter *Brady*] is a question of law that is reviewed de novo.

A *Brady* violation is reviewed for harmless error, defined as whether “there is a ‘reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.’” *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (citations omitted); *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990) (“Where there is no request or only a general request, the failure will be ‘material only if there is a reasonable probability that’ a different verdict would result from disclosure of the evidence”).

Additional Statement of Facts

On 12 February 2018, SA DM interviewed appellant. (R. at 335; Pros. Ex. 7 for Identification). Special Agents collected a buccal swab from appellant pursuant to a military magistrate’s authorization that same day. (Search and Seizure Authorization, (12 February 2018)). Special agents also collected buccal

swabs from SPC [REDACTED] and SPC AD, and collected SPC AD's bedding. (Agent's Investigative Report [AIR] (27 February 2018), p. 4–5; Def. Ex B for Identification). On 26 February, SA DM requested a forensic laboratory DNA examination of SPC AD's bedding. (AIR, p. 5). The DNA report, completed on 12 June 2018, revealed the presence of DNA material from appellant and SPC AD on SPC AD's bedding. (App. Ex. XXVII, p. 2). The DNA report also indicated the presence of SPC AD's semen on several sections of his own bedding. (App. Ex. XXVII, p. 2).

Appellant submitted a discovery request on 7 May 2019, requesting among other things, “a complete copy of any law-enforcement investigation” related to appellant's court-martial and any notice of a result of any scientific test. (App. Ex. XXVII, p. 1, 3). On 12 May 2019, the government responded in pertinent part, “a complete copy of the CID case file . . . is available for inspection by Defense at CID Fort Campbell, Kentucky. The point of contact for inspecting the files is SA [RP]” and that a hard copy of the investigation had been provided to appellant on 1 October 2018, with digital media delivered the following day. (App. Ex. VIII at 9). The government indicated that it was unaware of any information responsive to appellant's request for result of any scientific tests, but that it would permit

“inspection of any such documents once the Government completes contracting with experts.”¹⁶ (App. Ex. VIII at 12).

After the military judge announced appellant’s sentence and excused the panel members, appellant requested a fifteen-minute recess to “consult [their] technical chain” about “some matters that were recently brought to the attention of the defense.” (R. at 667). When the court-martial reconvened, appellant presented the military judge with a copy of the DNA report. (R. at 668; App Ex. XXVII). Appellant informed the military judge that he first became aware of the DNA report’s existence during a conversation with SA DM the night prior to trial. (R. at 670). Appellant maintained that he did not raise the issue at the time because SA DM claimed that the DNA report only contained inculpatory information. (R. at 670). Appellant stated he received a copy of the DNA report during the panel’s sentencing deliberations, and that his initial review indicated that the DNA report contained exculpatory information. (R. at 670). Appellant informed the military judge, “[t]he defense needs more time to find out if this evidence is, in fact, material,” and that he would request a post-trial Article 39(a), UCMJ session if his research indicated he was entitled to relief under *Brady*. (R. at 672). Appellant did not request a post-trial Article 39(a), UCMJ session. However, appellant included

¹⁶ The record of trial does not contain any indication that the government contracted with any experts and the government did not call any experts to testify during the court-martial.

the DNA report with his R.C.M. 1106 matters, along with a request for clemency. (Post-Trial Matters).

Law and Argument

Pursuant to *Brady*, “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. *Brady* does not require a prosecutor “to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed would deprive the defendant of a fair trial” *United States v. Bagley*, 473 U.S. 667, 675 (1985). To establish a *Brady* violation, a defendant must make each of the three showings: (1) the evidence at issue is “favorable to the accused, either because it is exculpatory, or because it is impeaching;” (2) the government suppressed the evidence, “either willfully or inadvertently;” and (3) the information was material in that “prejudice . . . ensued.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

I. The Government did Not Suppress the DNA Report.

Other than making a passing reference to “government’s malfeasance” (Appellant’s Br. at 29), appellant does not attempt to prove that the government suppressed or withheld the DNA report. This omission is both telling and understandable – as the government did not suppress the DNA report. Criminal

Investigation Command's entire investigative file on appellant, which included the Forensic Lab Request and the DNA report, was available for appellant's inspection as early as 12 May 2019. (App. Ex. VIII, p. 9; Gov. App. Ex. 2). The defense team seemingly did not avail themselves of the opportunity to personally inspect CID's investigative file. (App. Ex. VIII, p. 9). "The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." *United States v. Ellis*, 77 M.J. 671, 676 (A. Ct. Crim. App. 2018). The government met its discovery obligations by affording appellant access and opportunity to inspect the CID case file. The government did not suppress the DNA report.

Appellant's defense counsel asserted he had only been informed of the existence of the DNA report on the night prior to trial.¹⁷ However, appellant had at least three independent means through which he should have known of the existence of the DNA report prior to night before trial. The first and most direct avenue would have been to personally review the CID case file, as discussed above. Second, the discovery provided to appellant included multiple documents that clearly indicated that a DNA test had at least been requested: an entry in SA

¹⁷ The record does not indicate why appellant's defense counsel relied upon SA DM's opinion regarding the inculpatory or exculpatory nature of the DNA report instead of requesting to inspect the report himself. Similarly, the record does not indicate that appellant sought a continuance to review the DNA report.

DM's AIR noting his submission of a Forensic Laboratory Examination Request on 26 February 2018, the actual Forensic Laboratory Examination Request, the military magistrate's search and seizure authorization form authorizing CID to collect a buccal swab from appellant, and the discovery's table of contents, which referenced each of these substantive documents.¹⁸ (Table of Contents; AIR, p. 5).

Finally, appellant was the subject of the buccal swab and thus he could have provided his defense team with notice that a DNA test had likely been performed. Appellant had multiple forms of notice available to him and thus cannot now credibly claim that the government suppressed the DNA report. *See United States v. Garlick*, 61 M.J. 346, 351 (C.A.A.F. 2005) (finding that appellant's due process rights were not violated by the government's failure to disclose misstatements in a search affidavit where appellant had knowledge of the relevant information before trial).

II. The DNA Report was Not Favorable to Appellant.

"Evidence is favorable if, among other things, it impeaches the government's case." *Ellis*, 77 M.J. at 675 (citations omitted). Appellant contends that possession of the DNA report at trial would have enabled appellant to impeach SPC AD's

¹⁸ Appellant's trial exhibits included an evidence/property custody form documenting the receipt of SPC AD's bedding, which is another indication that materials would likely be submitted for DNA examination. (Def. Ex. B for identification).

testimony in myriad ways, thereby creating a doubt about appellant's guilt. However, appellant's argument fails because he assigns a talismanic value to "the great weight traditionally afforded to DNA report evidence" without due consideration for the context in which it was discovered. While the DNA report indicated the presence of SPC AD's semen in his own bed, it did not and could not identify when the semen was deposited. Moreover, SPC AD is a young male soldier, and it should come as no surprise that SPC AD's semen was detected on his bedding in his own bedroom, the one place where a soldier has some privacy. Lastly, appellant gives short shrift to the DNA report's other conclusion: appellant's DNA was also present on SPC AD's bedding. (App. Ex. XXVII). This evidence places appellant on SPC AD's bed and thus corroborates SPC [REDACTED] allegation that appellant sexually assaulted her.

Appellant contends that he could have used the DNA report to further expose SPC AD's alleged ulterior motive for dissuading SPC [REDACTED] from reporting the sexual assault: that is – SPC AD was the perpetrator who wanted to prevent an investigation and CID's inevitable discovery of the evidence SPC AD "deposited" in his own bed. (Appellant's Br. 30). Appellant asserts that SPC AD's alleged lack of support of SPC [REDACTED] desire to report the sexual assault was proof of his consciousness of guilt. (Appellant's Br. at 30). However, appellant's speculation about SPC AD's alleged scheme to hide his guilt is unconvincing for several

reasons. First, SPC AD's hesitation about the investigation into appellant's misconduct was due to the fact that SPC AD did not want his friend of six years "to get in trouble." (R. at 436). More importantly, the fact that SPC AD consented to the collection of his DNA does not comport with his alleged concern about CID discovering the presence of his semen in his own bed.

Next, appellant alleges that the DNA report would have allowed the panel to make the "small inferential step" that SPC AD "waffl[ed] on whether he was present in the bed with SPC [REDACTED] because he sexually assaulted her. (Appellant's Br. at 31). Again, appellant attaches undue significance to the unremarkable presence of SPC AD's DNA on his bed, while ignoring the fact that the DNA report also places appellant in SPC AD's bed, thereby corroborating SPC [REDACTED] allegation. Specialist [REDACTED] described her attacker as wide, with a shaven head. This description fit only one person in the room with her that night: appellant.

It is evident that SPC AD did not perfectly recollect the events of the night in question; defense counsel refreshed his memory on several occasions during cross-examination, and the military judge's written ruling on appellant's Military Rule of Evidence [Mil. R. Evid.] 412 motion remarked upon SPC AD's lack of independent memory during the pretrial Article 39(a) session one month prior to trial. (R. at 472, 474; App. Ex. III (sealed)). However, when panel members asked

SPC AD whether he was in bed with SPC [REDACTED] on the night of the sexual assault, his answer was clear and emphatic: “[he] wasn’t.”

Appellant contends the DNA report would have also allowed him to argue that the only physical evidence of sexual activity on SPC AD’s bed belonged to SPC AD. (Appellant’s Br. at 32). The presence of SPC AD’s semen on his bedding is admittedly the only physical evidence of sexual activity on SPC AD’s bed. However, as discussed above, the DNA report does not indicate when SPC AD deposited his semen onto his bed. Absent a temporal link to the sexual assault, the only thing that the DNA report demonstrates is that SPC AD’s seminal fluid transferred to his bed at some point in time. This fact does not make it more likely that SPC AD sexually assaulted SPC [REDACTED]. *See generally United States v. Ogunlana*, 2008 CCA LEXIS 123, at *4 (A.F. Ct. Crim. App. Mar. 21, 2008) ([unpub. op.](#)) (affirming appellant’s attempted rape and indecent assault convictions despite the fact that semen found in room where the attack occurred did not belong to the appellant).

Lastly, appellant asserts that he could have used the DNA report to impeach SPC AD and thus undermine SPC AD’s testimony that appellant voiced his interest in sex with SPC [REDACTED] and that appellant admitted to having sex with her.¹⁹

¹⁹ Specialist CB testified that appellant made a joke about SPC [REDACTED] vagina. (R. at 502).

(Appellant's Br. at 33). Appellant reasons that absent SPC AD's testimony about appellant's admissions, the government would have no evidence that appellant actually penetrated SPC [REDACTED] (Appellant's Br. at 34–35). Appellant's argument fails simply because the DNA report has no bearing upon the most integral aspect of the government's case: SPC [REDACTED] credible testimony. As discussed above, SPC [REDACTED] identified appellant's silhouette moving up and down on her body while she lay with her legs spread and vagina exposed. (R. at 301, 444). She recognized appellant's voice as he attempted to apologize for unwelcome advances. (R. at 306). After escaping appellant's grasp and exiting SPC AD's bedroom, SPC [REDACTED] found SPC AD asleep on the kitchen table, thereby eliminating him as the potential assailant. (R. at 467). Specialist [REDACTED] testified that the following day, she felt pain in her vagina that she previously felt after having sex and that the pain did not exist prior to the sexual assault. (R. at 311). The DNA report was not favorable to appellant, and this court should find that appellant is not entitled to *Brady* relief.

III. The DNA Report was Not Material and would not have Affected the Panel's Finding of Guilty.

“Evidence is material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Ellis*, 77 M.J. at 675 (internal quotation and citations omitted). For the reasons stated above, the DNA report was not favorable to appellant. Consequently, this

unfavorable evidence would not have created a reasonable probability that the panel would arrived at a different result.

Appellant's theory of defense focused upon shifting the panel's attention from appellant to SPC AD. During his opening argument, he alerted the panel to the fact that CID had advised SPC AD of his rights "for the same offense that [appellant] stands [sic] trial today" and that CID collected SPC AD's DNA. (R. at 266). Appellant also predicted that SPC AD would admit to lying down with SPC [REDACTED] on the night of the sexual assault. (R. at 266–67). During cross-examination, appellant reminded the panel that SPC AD had been advised of his rights because of his suspected involvement in SPC [REDACTED] sexual assault allegation and that CID collected his DNA. (R. at 477–78). Appellant insinuated that SPC AD was worried about the possibility he could face criminal sanction if SPC [REDACTED] reported the sexual assault and that these same concerns led him to omit details from his written sworn statement. During his closing argument, appellant revisited these themes and punctuated his assertions by asking, "[s]hould this case be called the *United States v. [SPC AD]?*" (R. at 556).

The DNA report would have only been of marginal benefit to appellant: the DNA report would not have explained why appellant apologized so profusely to SPC [REDACTED] in the hours following the sexual assault, it would not explain why SPC [REDACTED] saw appellant's silhouette pressed against her while she lay partially naked,

nor would it explain why she heard appellant's voice apologizing as she tried to escape. Any effect that the DNA report may have had would have been nominal at best, as it was also cumulative to the evidence and argument that the panel ultimately found unconvincing. Marginal and nominal effects do not combine to provide a reasonable probability that the panel would have arrived at different verdict.

Lastly, appellant informed the military judge that he would request a post-trial Article 39(a), UCMJ session if his review of the DNA report led him to believe he was entitled to relief under *Brady*. (R. at 672). The record does not reflect that appellant ever requested a post-trial Article 39(a) session, which is indicative of the fact that appellant is not entitled to relief.²⁰ *See Garlick*, 61 M.J. 351 (finding government's erroneous non-disclosure of potential Brady material harmless beyond a reasonable doubt in part because appellant discovered government's erroneous non-disclosure after the trial, yet declined to raise the matter in a post-trial 39(a), UCMJ session). Appellant's *Brady* claim must fail because he has neither proven that the government suppressed the DNA report, that the DNA report was favorable to him, or that the DNA report was material. Accordingly, this court should affirm appellant's conviction and sentence.

²⁰ Appellant requested relief from the convening authority in his R.C.M. 1106 submission. (Post-Trial Matters).

Assignment of Error III

APPELLANT’S CONVICTIONS ARE FACTUALLY INSUFFICIENT.

Standard of Review

Military appellate courts conduct a de novo review of factual sufficiency.

United States v. Bright, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

This court should affirm the findings and sentence because the evidence is factually sufficient to support the findings of guilty for sexual assault.

Article 66(c), UCMJ, confers upon service courts a fact-finding power to “evaluate not only the sufficiency of the evidence but also its weight.” *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). “The test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses,” this court is convinced of appellant’s guilt beyond a reasonable doubt. *United States v. Craion*, 64 M.J. 531, 534 (A. Ct. Crim. App. 2006) (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.” *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). Proof beyond a

reasonable doubt does not require that the evidence be free from all conflict.

United States v. Trigueros, 69 M.J. 604, 612 (Army Ct. Crim. App. 2010) (quoting *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006)).

While weighing the evidence, a reviewing court must be mindful that it did not personally observe and hear the witnesses. Article 66, UCMJ; *Turner*, 25 M.J. at 325. This court has explained that where “witness credibility plays a critical role in the outcome of trial this Court should hesitate to second-guess the trial court’s findings.” *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995). Judge Learned Hand wrote that:

the carriage, behavior, bearing, manner and appearance of a witness -- in short, his ‘demeanor’ -- is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale.

Dyer v. MacDougall, 201 F.2d 265, 268–69 (2d Cir. 1952) (emphasis added). This Court, sitting en banc, explained, “the degree to which we ‘recognize’ or give deference to the trial court’s ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue.” *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015); see also *United States v.*

Jimenez-Victoria, 75 M.J. 768, 771 (Army Ct. Crim. App. 2012) (affirming where the findings turned on witness credibility).

I. The Evidence Was Factually Sufficient to Prove Appellant’s Guilt beyond a Reasonable Doubt.

The panel convicted appellant of one specification of sexual assault.²¹ (R. at 603). The elements of the offense are:

- (i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva or anus or mouth by any part of the body or by any object;
- (ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring;
- (iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring.
- (iv) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

10 U.S.C. § 920, *MCM*, pt. IV, ¶45.b.(4)(e). Appellant only argues that the government failed to prove the first element—penetration of the vulva with any part of the body—beyond a reasonable doubt. (Appellant’s Br. 36). Accordingly,

²¹ The amended specification reads, “In that [appellant], U.S. Army, did, at or near Fort Campbell, Kentucky, on or about 2 February 2018, commit a sexual act upon Specialist [REDACTED] by causing penetration of Specialist [REDACTED]’s vulva with [appellant]’s penis, when [appellant] knew or reasonably should have known that Specialist [REDACTED] was asleep, unconscious, or otherwise unaware that the sexual act was occurring, and that [appellant] did so with an intent to ~~abuse, humiliate, harass and degrade SPC [REDACTED]~~ and to arouse and gratify the sexual desire of [appellant] and Specialist [REDACTED] (R. at 603).

the remainder of this analysis focuses upon appellant's use of his penis to penetrate SPC [REDACTED] vulva.

Appellant points to SPC [REDACTED] inability to recall appellant penetrating her as the reason why "this court cannot be satisfied beyond a reasonable doubt that appellant penetrated SPC [REDACTED] vulva with his penis, as required by statute." (Appellant's Br. at 36). Appellant seeks to discredit SPC [REDACTED] credibility by juxtaposing the "exquisite detail" (Appellant's Br. at 37) in which she recalled seemingly minor details such as the events preceding and following appellant's sexually assaulted with her inability to recall the "most significant fact," (Appellant's Br. at 37) appellant penetrating her vulva with his penis.

However, SPC [REDACTED] inability to recall appellant penetrating her is intuitively understandable: she was asleep while the penetration occurred. (R. at 498). Furthermore, when SPC [REDACTED] awoke to the motion of the bed and appellant's wide body pressed upon her, she was "confused and scared." (R. at 303). Rather than perfecting the memory of exactly how appellant violated her, SPC [REDACTED] was justifiably preoccupied with repelling appellant as he "mov[ed] up and down . . . along [her] body" while she lay with her legs spread open and her vagina exposed. (R. at 301, 444). Perhaps SPC [REDACTED] may have been better able to collect her thoughts had she not been forced to struggle out of appellant's grasp in order to leave the room. (R. at 304).

The evidence overwhelming supports the conclusion that it was appellant who sexually assaulted SPC [REDACTED]. Specialist [REDACTED] testified that the silhouette pressed on top of her, gliding along her body while she lay with her legs spread and vagina exposed, had a wide body, and a shaven head. (R. at 301, 303, 444). Appellant had a shaved head at the time of the incident and his noticeably “big” body earned him “The Great Wall of China” in high school. (R. at 305, 633). As SPC [REDACTED] attempted to break free from his grasp, she clearly recognized appellant’s voice as he apologized and stated that “[he was] just going to sleep beside [her].” (R. at 305–06). Appellant’s later Facebook messages, pleading with SPC [REDACTED] to let him “hold [her] n [sic] sleep,” tellingly echo the sentiment he expressed immediately after he sexually assaulted her. (Pros. Ex. 2 at 29). Moreover, appellant’s frantic and frequent pleas for SPC [REDACTED] forgiveness seem disproportionate to his professed sin of simply “laying bside [sic] [SPC [REDACTED]] rather his Facebook messages belie a consciousness of guilt consummate with his actual conduct of sexually assaulting SPC [REDACTED] while she slept. (Pros. Ex. 2 at 50)

Similarly, the evidence unequivocally establishes that appellant penetrated SPC [REDACTED] vulva with his penis. After fleeing from appellant and entering her room, SPC [REDACTED] noticed vaginal soreness. (R. at 311). She described the sensation as “the sort of pain and soreness [she] would feel after [she] had sexual intercourse” and that the soreness existed inside and outside of her vulva. (R. at

311–12). The circumstantial evidence clearly indicates that appellant penetrated SPC [REDACTED] vulva with his penis. *See United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (recognizing “that the government is free to meet its burden of proof with circumstantial evidence”); *United States v. Hurt*, 27 C.M.R. 3, 31 (U.S. C.M.A. 1958) (finding that the circumstantial evidence was sufficient to convict appellant of rape and murder, despite the fact that appellant did not confess and no one witnessed him committing the crimes).

Lastly, the evidence simply does not support appellant’s allegation that SPC AD sexually assaulted SPC [REDACTED]. Specialist AD’s “skinnier” build and “spikey” hair stand in stark contrast to SPC [REDACTED] description of an attacker with a wide build and shaved head.^{22, 23} (R. at 305). Moreover, appellant’s contention that SPC [REDACTED] could not credibly identify her attacker’s voice as appellant’s voice (Appellant’s Br. 37) is not compelling. Specialist [REDACTED] may have only socialized with appellant on a handful of occasions, but she had spent nearly two years working with SPC AD; surely, she would have been able to identify SPC AD’s

²² Photos of SPC AD and appellant were not admitted into evidence. However, pictures of appellant, showing his shaved head and larger body size, were taken during CID’s investigation. (Pre-trial Allied Papers). More importantly, the panel had the opportunity to observe SPC AD and appellant, as well as assess their size and build relative to one another.

²³ Photos of appellant’s arm reveal the presence of four parallel, superficial cuts. (Pre-trial Allied Papers). These cuts may be consistent with SPC [REDACTED] claim that she struggled free from appellant’s grasp. (R. at 304).

voice if he was indeed her attacker. (R. at 296). Appellant's attempts to characterize SPC AD's alleged ambivalence towards SPC [REDACTED] desire to report the sexual assault as evidence of SPC AD's guilt (Appellant's Br. at 38) is easily dismissed: as SPC [REDACTED] explained, SPC AD's initial reluctance stemmed from the fact that "he didn't want his cousin, or friend, to get in trouble." (R. at 436). Finally, SPC AD could not have been SPC [REDACTED] attacker, as he was also asleep while the sexual assault occurred. (R. at 305, 467). In fact, when SPC [REDACTED] finally escaped from appellant's grasp, she exited SPC AD's room to find SPC AD asleep on the kitchen table. (R. at 305).

Appellant employs a *res ipsa loquitor* theory of criminal liability in asserting that the presence of SPC AD's semen on his bedding indicates that it was SPC AD, and not appellant, who sexually assaulted SPC [REDACTED] (Appellant's Br. at 38). However, the seeming importance of this evidence completely evaporates upon considering its location: SPC AD's semen was found on his own bedding in his own barracks room. It should not come as a surprise that a young male soldier like SPC AD may have deposited his reproductive materials in his bedroom, the one place where a young male soldier has complete privacy.

The evidence supports the conclusion, beyond a reasonable doubt, that appellant penetrated SPC [REDACTED] vulva with his penis. Accordingly, this court should find that appellant's conviction was factually sufficient.

Assignment of Error IV

DILATORY POST-TRIAL PROCESSING MERITS RELIEF WHERE 302 DAYS ELAPSED FROM SENTENCING TO DOCKETING AT THE ARMY COURT.

Standard of Review

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

Additional Statement of Facts

The trial adjourned on 15 August 2019. (R. at 666). Appellant submitted his post-trial matters on 15 September 2019. (Post-Trial Matters). On 3 December 2019, the staff judge advocate (SJA) signed her clemency advice. (SJA Clemency Advice). That same day, the convening authority took no action on appellant's sentence. (Initial Action). On 16 January 2020, the military judge entered judgment. (Entry of Judgment). On 9 March 2020, the court reporter certified the record of trial. (Post-Trial Processing Time Memorandum).

This court returned appellant's case to the convening authority for his action pursuant to Rule 35 of this court's Rules of Appellate Procedure on 29 May 2020. The convening authority approved appellant's adjudged sentence on 4 June 2020. (Final Action). The military judge entered the judgment on 8 June 2020. (Modified Judgment of the Court). This court docketed appellant's case on 12 June 2020.

Law and Argument

Claims of post-trial delay fall into two distinct categories: determining whether appellant suffered a due process violation under the Constitution and determining sentence appropriateness under Article 66(c), UCMJ. *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006).

I. The post-trial delay did not violate appellant's due process rights.

Prior to the implementation of the new post-trial processing procedure in 2019, a presumption of unreasonable delay in post-trial processing existed where more than 120 days elapsed between sentencing and action and “where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action.” *Moreno*, 63 M.J. at 142. In assessing whether a facially unreasonable delay resulted in a due process violation, the court weighs the four factors outlined in *Barker v. Wingo*, 407 U.S. 514 (1972). *United States v. Ashby*, 68 M.J. 108, 124 (C.A.A.F. 2009). The four-factor analysis examines: 1) the length of the delay; 2) the reasons for the delay; 3) the appellant's assertion of the right to a timely review and appeal; and 4) prejudice. *Moreno*, 63 M.J. at 135–38 (citing *Barker*, 407 U.S. at 530). The court balances all four factors, with “no single factor being required to find that post-trial delay constitutes a due process violation.” *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

The current version of the UCMJ, however, only vests courts of criminal appeals with the ability to “provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial *after the judgment was entered into the record* under” Article 60c, UCMJ. Article 66(d)(2), UCMJ (emphasis added). Consequently, the appropriate statutory guideposts for service courts to assess alleged post-trial delay is the time from entry of judgment (EOJ) to certification and from certification to receipt of record by the court of criminal appeals. Any excessive delay from trial to EOJ is more appropriately addressed by post-trial motion made pursuant to Rule for Court-Martial (R.C.M.) 1104(b)(1)(E).

Beyond the plain language and express direction of Article 66(d)(2), UCMJ, there is another compelling reason why service courts should use EOJ as the starting point for their assessment of post-trial delay. Prior to EOJ, “the military judge may direct a post-trial Article 39(a) session.” Rule for Courts-Martial [R.C.M.] 1104(a)(1); *see also* Art. 60(b), UCMJ. “Post-trial motions may be filed by either party or when directed by the military judge to address such matters as . . . [a]n allegation of error in the post-trial processing of the court-martial.” R.C.M. 1104(b). Prior to EOJ, the military judge continues to exercise significant control over the court-martial—to include the ability to provide relief in the form of a recommendation for a suspended sentence. *See* R.C.Ms. 1101(a)(5), 1107, 1109(f). Thus, because EOJ is the point at which an appellant no longer has the

ability to seek relief from the military judge, under the Military Justice Act of 2016, the starting point for assessing post-trial delay by a service court should be—and is—EOJ.

A. The length of the post-trial processing of appellant’s case.

Here, although 302 days elapsed between the adjudged sentence and the docketing of this case by this court, only 148 days elapsed between entry of judgment and docketing.²⁴ See UCMJ, art. 66(d)(2) (providing that this court may only provide appropriate relief for delay after entry of judgment). Regardless of whether the length of the post-trial processing time weighs in appellant’s favor, appellant is not entitled to relief because he fails to establish that the delay violated his due process rights upon consideration of all the *Barker* factors.

B. The record attempts to describe the delay.

The SJA attributed the delay to multiple deployments, an unprecedented “increase in volume and complexity of cases,” and unforeseen personnel changes, including “the unexpected resignation of the post-trial paralegal.” (Post-Trial Processing Time Memorandum). While these circumstances do not excuse the delay, they provide context for the challenges this OSJA faced during the post-trial processing of appellant’s case. See *United States v. Hotaling*, 2020 CCA LEXIS 449, at *7 (Army Ct. Crim. App. 11 Dec. 2020) ([mem. op](#)) (citing *United States v.*

²⁴ Only four days elapsed between the modified entry of judgment and docketing.

Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011)). Consequently, the second *Barker* factors weighs slightly in appellant's favor.

C. Appellant did not assert his speedy post-trial rights.

In this case, appellant did not assert his right to timely post-trial processing. Appellant also did not file any post-trial motion raising any delay post-trial processing time prior to entry of judgment pursuant to R.C.M. 1104(b)(1)(E). Accordingly, this factor weighs in favor of the government. *Moreno*, 63 M.J. at 138.

D. There was no prejudice to appellant.

Appellant also fails to demonstrate any form of prejudice, just as the record fails to reveal any.²⁵ In the absence of a finding of prejudice, courts should “find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). Here, the government’s delay in processing appellant’s case is not so egregious that it impacts public perception and creates a due process violation. *See United States v. Banks*, 75 M.J. 746, 751–52 (Army Ct. Crim. App. 2016) (finding no due process violation for post-trial processing of 440

²⁵ Appellant hints at “the potential prejudice involved” (Appellant’s Br. at 45) without further elaboration.

days where there was no reasonable explanation for the delay, the appellant did not demand speedy post-trial review, and the appellant did not establish prejudice).

E. The totality of the circumstances, including the post-trial processing, supports the appropriateness of the sentence.

“In any case before the Court of Criminal Appeals under subsection (b), the Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under [Article 60c].” Article 66(d)(2), UCMJ. At the heart of the sentence review “is to ‘do justice.’” *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). This court looks at the totality of the circumstances to determine what sentence should be approved in light of the post-trial processing. *United States v. Garman*, 59 M.J. 677, 678 (A. Ct. Crim. App. 2003). There is no “bright-line time limit for post-trial processing” that results in an inappropriate sentence; rather, this court considers various factors such as the length of the record and existence of post-trial processing errors to determine sentence appropriateness. *Id.* at 681–82. Even “unacceptably slow” post-trial processing does not immediately render a sentence inappropriate. *Id.* at 683.

The government recognizes the number of dilatory post-trial processing cases out of Fort Campbell’s OSJA in which this court has granted relief. *See Hotaling*, 2020 CCA LEXIS 449, at *10-11. This court has sent a clear message to

the installation that “[t]he time is now to improve post-trial processing.” *Hotaling*, 2020 CCA LEXIS, at *11. Relief in this case is not necessary to continue to further that message. Appellant faced a maximum punishment of confinement for thirty years for sexually assaulting a fellow soldier as she slept, yet received only twelve years’ confinement. (R. at 642, 666). Appellant’s sentence is appropriate even in light of the dilatory post-trial processing. Consequently, this court should decline to provide set aside appellant’s sentence.

Conclusion

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



CPT, JA
Appellate Attorney, Government
Appellate Division



MAJ, JA
Branch Chief, Government
Appellate Division



ILLIAMS
LTC, JA
Deputy Chief, Government
Appellate Division



FOR
STE T
COL,
Chief, Government Appellate
Division

CERTIFICATE OF SERVICE, U.S. v. SIGRAH (20190556)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
[REDACTED] on the 4th day of March, 2021.

[REDACTED]
DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[REDACTED]