IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee v. Staff Sergeant (E-6) **LADONIES P. STRONG,** United States Army Appellant	**BRIEF ON BEHALF OF APPELLANT** Docket No. ARMY 20200391 Tried at Fort Stewart, Georgia, on 16 December 2019, 14-18 July 2020, and 20 July 2020, before a general court-martial appointed by the Commander, Fort Stewart, Georgia, Colonel G. Bret Batdorff, military judge, presiding.

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

Assignment of Error[1]

APPELLANT'S CONVICTIONS FOR NEGLIGENT HOMICIDE AND PREVENTION OF AN AUTHORIZED SEIZURE OF PROPERTY ARE LEGALLY AND FACTUALLY INSUFFICIENT.

Statement of the Case

On 18 July 2020, a panel with enlisted representation sitting as a general court-martial convicted Staff Sergeant (SSG) LaDonies P. Strong, appellant, contrary to her pleas, of one specification of prevention of an authorized seizure of

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally asserts those matters set forth in the Appendix.

property, in violation of Article 131e, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 931e, and one specification of negligent homicide in violation of Article 134, UCMJ. (R. at 1251). The panel acquitted appellant of two specifications of dereliction of duty, and one specification each of reckless operation of a vehicle, and involuntary manslaughter in violation of Articles 92, 113, and 119, UCMJ. (R. at 1251). Appellant elected to be sentenced by the members. (App. Ex. LVI). The panel sentenced appellant to be reduced to the grade of E-1, confined for three years, and discharged from the service with a bad-conduct discharge. (R. at 1410). The convening authority approved the findings[2] and sentence. (Action). On 9 September 2020, the military judge entered the Judgment of the court. (Judgment).

Statement of Facts

A. Firebreak #20 – the "least dangerous" route.

On 6 June 2019, cadets at the United States Military Academy at West Point, NY (West Point) woke early and prepared for a full day of summer training. (R. at 647). Each summer, the rising senior cadets at West Point face their "last crucible," formally known as Cadet Leadership Development Training (CLDT). (R. at 629-30). The training involved a wide variety of "soldier skills" like land

[2] The convening authority erroneously approved the findings in violation of Article 60a, UCMJ and Rule for Courts-Martial 1109(b). (Action).

navigation and marksmanship. (R. at 630). That day, the cadets planned to practice land navigation skills before facing a test the following day. (R. at 329-30). The cadets had been staying in barracks at Camp Buckner, which is a training site a few miles away from West Point's main campus. (R. at 647). The land navigation site is on top of a mountain, a few kilometers northwest of Camp Buckner. (R. at 853, 904; Pros. Ex. 18).

Appellant was not stationed at West Point. (R. at 846-47). However, her unit, Golf Company, Task Force 1-28, had been tasked with supporting CLDT that summer. (R. at 896). As the Forward Support Company (FSC), appellant's unit provided logistical support in the form of supplies, transportation, etc. (R. at 896). On 6 June 2019, their mission was to transport the cadets from Camp Buckner to the land navigation site. (R. at 432). About ten days prior to the mission, appellant's company commander, Captain (CPT) [redacted], conducted a "leader's recon" of the various routes between Camp Buckner and the land navigation site. (R. at 902-03). None of the routes were ideal because the land navigation site was situated in "very mountainous terrain [with] very few avenues of approach, and the few [routes] that were available were met with a lot of steep grades, some sheer drop offs, [and] a couple of water—possible water obstructions[.]" (R. at 902).

Because of the harsh terrain, CPT [redacted] goal for the leader's recon was to simply identify the "least dangerous route." (R. at 904). Ultimately, CPT [redacted] chose Firebreak #20 because it had the "least amount of possible water obstructions." (R. at 904). Appellant's First Sergeant (1SG), 1SG [redacted], agreed Firebreak #20 was the "better route" but was still concerned about the hilly terrain and "cliffs with no guardrails[.]" (R. at 852). When she raised those concerns, she was told that Firebreak #20 had been used in the past. (R. at 852-53). Captain [redacted] also considered alternate modes of transportation; however, West Point leadership did not authorize any of those. (R. at 905). For example, CPT [redacted] considered dropping off the cadets at the base of the mountain. (R. at 905). The West Point staff did not authorize that method because, the year prior, a cadet died from a heat injury while walking up the mountain. (R. at 905). Captain [redacted] also considered using contracted busses, but West Point staff did not authorize that method either. (R. at 905).

Captain [redacted] performed a "risk assessment" for the mission involving Firebreak #20. (R. at 906). He identified several potential risks, including the possibility of a "vehicle accident/rollover." (Pros. Ex. 20). However, CPT [redacted] did not specifically identify any risks associated with wet or unstable soil. (Pros. Ex. 20). Similarly, CPT [redacted] did not identify any risks associated with two-way traffic on narrow roads. (Pros. Ex. 20). Throughout the summer, the drivers and

truck commanders (TCs)[3] in Task Force 1-28 complained about "oncoming vehicles" while navigating firebreaks and routes in the area. (R. at 920). Captain [redacted] noted that concern to West Point leadership but they told him, "that kind of thing happens every year, and the SOP was just to put [sic] one vehicle—pull over to the side and then let the other vehicle pass." (R. at 920-21).

B. While appellant drove the vehicle, her assistant looked for bears.

On the morning of 6 June 2019, the drivers in appellant's unit woke up around 0430 hours. (R. at 551). They departed their lodging area at Camp Natural Bridge and headed towards Camp Buckner to pick up the cadets for land navigation training. (R. at 433-34). The soldiers were driving various models of Medium Tactical Vehicles (MTVs). (R. at 833). Appellant's vehicle, a model 1085 MTV, was a standard vehicle with an extra axle and an elongated bed. (R. at 833, 844). Two soldiers were assigned to each vehicle: a driver and a TC. (R. at 866-67). Many of the TCs had very little training because the unit did not have enough TCs to meet mission requirements. (R. at 467, 914-15). According to one of the platoon sergeants, the unit was stretched so thin that anyone could fill in as a

[3] The role of TC is to be the "eyes and the ears" for the driver of a vehicle. (R. 866). The TC is supposed to watch out for traffic and other obstructions. (R. at 866). Additionally, because the TC sits on the right-hand side of the vehicle, they are supposed to watch the right-hand side of the road. (R. at 866). One of the drivers in appellant's unit testified that drivers had to rely on their TC to see the edge of the road on Firebreak #20 because the vehicles were so big. (R. at 950).

TC, even if they were not licensed. (R. at 820). For example, the TC assigned to appellant's vehicle, Private First Class (PFC) [redacted], didn't even know what a TC was – he had to "google" it. (R. at 467).

Appellant and PFC [redacted] were in the last vehicle in a convoy of approximately eight vehicles. (R. at 432, 538). When they arrived at Camp Buckner, the cadets entered the vehicles and sat on benches along the truck bed. (R. at 633). The cadets wore their standard Personal Protective Equipment (PPE): Advanced Combat Helmets (ACH), eye protection, and gloves. (R. at 633). However, there were no seatbelts[4] in the back of the MTVs. (R. at 928). After appellant and PFC [redacted] picked up the cadets at Camp Buckner, they travelled on a "hardball" road for approximately one minute before reaching the start of Firebreak #20. (R. at 434).

Firebreak #20 is a one-lane dirt and gravel road that twists and turns through mountainous, wooded terrain. (R. at 375, 742). The route was rife with rocks, bumps, and holes in the ground. (R. at 375, 643). The ride was not pleasant; when a vehicle hit a hole on Firebreak #20, it would "jump" the cadets in the back and they would "complain." (R. at 460). The road was also wet that morning because it rained the night before. (R. at 643). Because of the rain, CPT [redacted] had been

[4] The MTVs were each equipped with a "troop strap" which is a strap that extends across the rear of the vehicle to prevent a person from falling out. (R. at 650, 928). However, there were no individual seatbelts. (R. at 928).

watching the weather "intently" but never canceled or modified the mission. (R. at 922).

The convoy moved slowly on Firebreak 20. (R. at 880). In fact, because of the terrain, the vehicles often could not travel more than ten or fifteen miles-per-hour. (R. at 922). While appellant was driving the vehicle, PFC [redacted] did nothing to assist her. (R. at 674, 734). Instead, he looked for bears in the woods. (R. at 674, 734). When appellant's defense counsel asked PFC [redacted] if he told law enforcement officers he was "playing a game called 'find the bear in the woods[,]'" PFC [redacted] responded, "I don't remember, honestly. It probably was the best way to describe it." (R. at 468).

At one point, appellant's vehicle approached the shoulder[5] of Firebreak #20. Despite seeing the vehicle get close to the edge, PFC [redacted] said nothing to appellant. (R. at 439). Second Lieutenant (2LT) [redacted] – who was a cadet at the time – was riding in the vehicle in front of appellant's vehicle. (R. at 332). The "flap" on the back of his vehicle was up, so he could see out of the back. (R. at 332). Second Lieutenant [redacted] observed appellant's vehicle approach the right side of the road. (R. at 335). He testified, "it looked like the right tires just kind of stopped and started sliding down." (R. at 335). When appellant's defense counsel asked if

[5] At trial, the parties used the terms "shoulder" and "berm" interchangeably to describe the edge of Firebreak #20. (R. at 391, 398, 418, 785, 795).

it looked like a "sinking ship[,]" 2LT [redacted] replied, "[e]xactly." (R. at 355). Private First Class [redacted] confirmed the vehicle was not moving forward before it rolled over: "[i]t wasn't moving forward. It was—the tire was stuck in the dirt. The tire wouldn't move. The tire was stuck. The back tire, it was scrapping [sic] against dirt, it couldn't move." Ultimately, the vehicle flipped 180 degrees and landed on its roof. (R. at 375).

All of the cadets survived the accident except for Cadet (CDT) [redacted]. When the vehicle flipped onto its roof, it landed on a large boulder. (R. at 619). Because the vehicle's roof was made of fabric, the boulder protruded through the roof, pinning CDT [redacted] between the bed of the MTV and the boulder. (R. at 619). Lieutenant Colonel (LTC) [redacted], a forensic pathologist, performed an autopsy on CDT [redacted] the day after the accident. (R. at 723-25; Pros. Ex. 16). He determined the "manner of death" was "accident" and the "cause of death" was "traumatic asphyxia."[6] (R. at 728-79).

C. Private First Class [redacted] blames appellant for the accident.

Once the vehicle came to a rest, other soldiers in the convoy rushed over to help. (R. at 540). When PFC [redacted] exited the vehicle, he immediately blamed appellant for the accident. (R. at 555). He kept repeating, "[i]t was all her fault; it

[6] Lieutenant Colonel [redacted] explained that traumatic asphyxia occurs when an object lands on an individual's chest and abdomen, preventing them from breathing normally. (R. at 729).

was all her fault; it was all her fault." (R. at 555). At trial, PFC [redacted] claimed appellant was using her Apple watch while driving. (R. at 437). He testified that appellant had her forearm on the steering wheel while she was tapping the screen of her watch. (R. at 437-39). However, at the scene of the accident, PFC [redacted] did not mention a watch; instead, he told people that appellant was using her *phone*. (R. at 444-45). Private First Class [redacted] claimed he mixed up the words "phone" and "watch" because he was panicking. (R. at 444).

D. Army CID agents seize appellant's phone.

Based on PFC [redacted] allegations, Army Criminal Investigation Command (CID) agents sought and obtained a search authorization for appellant's cell phone. (R. at 984-95). At 2307 hours on 6 June 2019, Special Agent (SA) [redacted] went to appellant's barracks and seized her phone. (Pros. Ex. 24). Approximately one hour later, an unknown[7] individual remotely[8] erased the contents of the phone. (R. at 1024; Pros. Ex. 24; App. Ex. XIV, p. 4). According to SA [redacted], a digital forensic examiner (DFE), "the time of the factory reset was actually while the device was [en] route" to CID. (R. at 1026).

[7] The government introduced evidence that someone with access to appellant's Apple account remotely erased the data on the phone. (R. at 1030).
[8] The CID agents placed the phone in a "Faraday bag" which should have blocked any electronic signal from reaching the phone. (App. Ex. XIV, p. 4). However, upon closer inspection, the agents discovered the Faraday bag was faulty. (App. Ex. XIV, p. 4).

Next, CID agents obtained search warrants for data associated with appellant's Apple and Verizon accounts. (App. Exs. XIII-XV). The agents hoped they would find a "backup" of the data on appellant's phone stored on Apple's iCloud[9]. (App. Exs. XIII-XV). However, when the agents reviewed the data seized pursuant to the Apple search warrant, they discovered the most recent "backup" of appellant's phone occurred sometime in May of 2019, which was three or four weeks prior to the accident. (R. at 1028-29).

At trial, the government introduced an excerpt of appellant's Verizon cell phone records. (Pros. Ex. 11). Ms. [redacted], a records custodian for Verizon, testified[10] that the records showed appellant's phone was both sending and receiving data around the time of the accident. (R. at 585; Pros. Ex. 11). Additionally, Ms. [redacted] testified that a user's activity from an Apple watch would be reflected in the Verizon records if it was using the phone's data connection. (R. at 581-82). However, Ms. [redacted] was unable to determine whether the data usage was active or passive. (R. at 584). Ms. [redacted] explained that cell phones can transfer data even when the user is not actively engaging the phone. (R. at 593). For example, a person's phone might transfer data when it

[9] The Apple iCloud is large computer database where Apple users can remotely store and backup data from their Apple devices like Apple watches and iPhones.
[10] The government did not qualify Ms. [redacted] as an expert witness.

receives a new email or updates the current weather on the "weather app" even though the user is not even touching the phone. (R. at 588-94).

E. Army CID and the New York State Police conduct a joint investigation.

Both Army CID and New York State Police (NYSP) investigators responded to the scene of the accident. (R. at 374, 762). Army CID was the lead law enforcement organization for the investigation and SA [redacted] was the lead case agent. (R. at 761). None of the West Point CID agents had any experience in conducting an accident reconstruction. (R. at 783). Because of CID's inexperience, the NYSP Accident Reconstruction Unit offered to assist in the investigation. (R. at 764-65). Investigator (INV) [redacted] from the NYSP performed the accident reconstruction and testified as an expert witness at trial. (R. at 373). However, INV [redacted] had no experience investigating MTV rollovers or accidents occurring on dirt firebreaks. (R. at 392-93).

Investigator [redacted] "walked the scene" and found a few tire marks that went off the roadway and transitioned into "furrows." (R. at 375). He explained that furrows happen when tires are "digging up the ground." (R. at 375). According to INV [redacted], the "primary cause" of the accident was "driver error for failure to maintain control of the vehicle and traveling the vehicle off the travel portion of the roadway." (R. at 381). Because Firebreak #20 is an unimproved dirt road,

INV [redacted] made a subjective determination about which portion of the road was the traveled portion:

> you know, it's a firebreak road so it's hard to define whether one lane, two lane. I say, for the most part, this road some parts are wider, some parts are narrower. I would call it a one lane and just by the way you see the way the vehicles traveled and the disturbed, where you can see that the other tactical vehicles that have driven in the past. It looks to be a one way…
>
> Again, when I took the measurements at the scene, I took it from the perspective of what's traveled. Again, it is not an ordinary road. It's not, one, a major highway or a side road. We have a true edge of pavement with, there—it isn't true. So, what I did was I marked the parts that were travelled both passed those leaves you drive a vehicle over, but the perspective of the driver they're not driving over there. They're driving in the travelled portion.

(R. at 397-99). Investigator [redacted] measured the roadway at the accident site and determined it was 14.7 feet wide. (R. at 385). Appellant's MTV was approximately eight feet wide. (R. at 386).

According to INV [redacted], appellant did not apply the brakes prior to the rollover. (R. at 389-90). He came to that conclusion because he observed tire marks and furrowing[11] just prior to the point of the rollover. (R. at 389-90). Although he had never driven an MTV before, INV [redacted] claimed that if appellant applied the brakes, the tires would have "locked up" and created a straight line

[11] Investigator [redacted] claimed that the tires were both sliding and furrowing into the ground as the vehicle went down the embankment. (R. at 1110).

instead of furrowing. (R. at 390, 393). Nevertheless, INV [redacted] testified that appellant's vehicle became unrecoverable just past where he observed tire marks:

> I don't believe it was off balanced at the beginning. I believe just passed where the tire marks were beginning that's when it became unbalanced. Due to: One, the terrain, and two, the wet soil. It had rained the night before. At that point where the vehicle just started sliding, again, it was unrecoverable, in my opinion.

(R. at 424).

When appellant's vehicle began sliding, it caused the shoulder/berm of the road to collapse. (R. at 398) ("the whole tire took that whole berm down as it slid and furrowed in."). The collapsed shoulder is visible in several of the photos taken by law enforcement shortly after the accident. (Pros. Ex. 3, p. 3; Pros. Ex. 5, p. 2). Investigator [redacted] later clarified that the actual road did not collapse; only the shoulder collapsed when appellant's vehicle departed the travel portion of Firebreak #20. (R. at 391) ("there was no evidence that the road gave way. The shoulder or the embankment when traveled off of it, that gave way."). Investigator [redacted] did not perform any soil tests on the berm of Firebreak #20 to determine its ability to hold an MTV or any other vehicle. (R. at 397). Similarly, SA [redacted] did not perform any soil tests because that was "out of [his] scope." (R. at 784).

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

Law

A. Factual and Legal Sufficiency.

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." *Walters*, 58 M.J. at 395; *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

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 395. "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) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005).

The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean "an honest, conscientious doubt, suggested by the material evidence, or lack of it," and that the government must prove guilt "to an evidentiary certainty" and must exclude "every fair and reasonable hypothesis of the evidence except that of guilt." (Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 2-5 (29 Feb. 2020)).

B. Negligent homicide, Article 134, UCMJ.

The elements of negligent homicide are:

> (1) That a certain person is dead;
> (2) That this death resulted from the act or failure to act of the accused;
> (3) That the killing by the accused was unlawful;
> (4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and
> (5) That under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of nature to bring discredit upon the armed forces.

Manual for Courts-Martial, Part IV, ¶ 103.b (2019 ed.) (*MCM*, 2019). Here, the Specification of Charge II alleged, "In that Staff Sergeant (E-6) LaDonies P. Strong, U.S. Army, did, at or near West Point, New York, on or about 6 June 2019, unlawfully kill Cadet [redacted] by negligently causing a M1085 vehicle they were

riding in to roll over, and that said conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces." (Charge Sheet). The term "simple negligence" means "the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances." *MCM*, 2019, Part IV, ¶ 103.c(2).

Additionally, the accused's act or failure to act must have been a "proximate cause" of the death. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 3-85-1 (10 Sep. 2014). Accordingly, the death must have been the "natural and probable result" of the accused's act or failure to act. *Id*. The accused is not relieved of criminal responsibility simply because there exists a second proximate or direct cause of the death. *Id*. "The accused will, however, be relieved of criminal responsibility for the death of the victim if the death was the result of some unforeseeable, independent, intervening cause which did not involve the accused. If the victim died only because of the independent, intervening cause, the [act or failure to act] of the accused was not the proximate cause of the death, and the accused cannot be found guilty of negligent homicide." *Id*.

C. Prevention of authorized seizure of property, Article 131e, UCMJ.

The elements of preventing an "authorized seizure of property" are:

> (1) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;
> (2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof; and
> (3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property.

Manual for Courts-Martial, Part IV, ¶ 86.b(1)-(3) (2019 ed.) (*MCM*, 2019). Here, the Specification of Charge III alleged, "In that Staff Sergeant (E-6) LaDonies P. Strong, U.S. Army, did, at or near West Point, New York, on or about 7 June 2019, with intent to prevent its seizure, obstruct, obscure, and dispose of the digital content of her cellphone, property of Staff Sergeant (E-6) LaDonies P. Strong then knew a person authorized to make searches and seizures was endeavoring to seize." (Charge Sheet).

Argument

A. Appellant's conviction for negligent homicide is factually and legally insufficient.

The government failed to prove that appellant was negligent.[12] Regardless, the conviction is still factually and legally insufficient because appellant's actions

[12] It is unclear which, if any, of appellant's actions the panel determined to be negligent. The government's theory was that appellant negligently used her Apple watch while driving. (R. at 1166). However, the panel clearly rejected this theory since they acquitted her of dereliction of duty for using her Apple watch while driving. (R. at 1251). Even though the elements of negligent homicide and dereliction of duty are not identical, it would be logically inconsistent for the panel

were not the proximate cause of CDT [redacted] death. The unstable condition and eventual collapse of the dirt shoulder on Firebreak #20 was an unforeseeable and intervening cause which did not involve appellant. Therefore, no reasonable factfinder could have found all the elements of negligent homicide beyond a reasonable doubt. Similarly, this court should set aside appellant's conviction because the government failed to prove the elements of negligent homicide beyond a reasonable doubt.

1. The unstable condition of the shoulder on Firebreak #20 was an independent and intervening cause.

Although INV [redacted] faulted appellant for departing what *he* considered to be the "travel portion" of Firebreak #20, the vehicle did not immediately roll over when it crossed onto the shoulder or berm; instead, it began to slide and furrow into the dirt. (R. at 384, 408-09). Investigator [redacted] identified two factors that caused the vehicle to become unbalanced as it crossed onto the shoulder:

> I don't believe it was off balanced at the beginning. I believe just passed where the tire marks were beginning that's when it became unbalanced. Due to: *One, the terrain, and two, the wet soil*. It had rained the night before. At that point where the vehicle just started sliding, again, it was unrecoverable, in my opinion.

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to convict appellant of one but not the other if the panel believed appellant's use of her Apple watch constituted negligence. Therefore, the panel either found that appellant was not using her Apple watch while driving or determined that conduct not to be negligent.

(R. at 424) (emphasis added). Investigator [redacted] repeatedly emphasized that the terrain and wet soil – not the manner of appellant's operation of the MTV – caused the vehicle to become "unrecoverable." (R. at 424-25) ("like I said*, because of the terrain, the soil*, [the vehicle] was unrecoverable.") (emphasis added). Notably, 2LT [redacted], who witnessed the incident first-hand, thought the motion of the vehicle was "weird" because "it was sliding and not, like, rolling." (R. at 355). He further characterized the movement as a "slow slide." (R. at 335). When defense counsel asked if it looked like a "sinking ship[,]" 2LT [redacted] replied, "[e]xactly." (R. at 355). Appellant may have driven onto the shoulder of Firebreak #20; however, she did not cause the vehicle to roll over. Put differently, appellant's act of driving the MTV on the shoulder of Firebreak #20 was merely a contributing factor that could not have caused CDT [redacted] death but for the unstable condition of the shoulder.

This was not a situation where appellant performed a high-speed maneuver or caused the vehicle to launch off a cliff. In fact, PV2 [redacted] confirmed the vehicle was not moving forward when it rolled over. Specifically, he stated, "the tire was stuck in the dirt. The tire wouldn't move. The tire was stuck. The back tire, it was scrapping [sic] against the dirt, it couldn't move." (R. at 459). Significantly, the vehicle rolled over 180 degrees and came to a rest laterally aligned with the road. (R. at 375; Pros. Ex. 3, p. 3). Had appellant truly caused the rollover by driving the MTV off the cliff, it is highly unlikely the vehicle would have remained laterally

aligned with the road. Instead, the evidence is consistent with the "sinking ship" analogy: the unstable dirt caused appellant's vehicle to slowly slide and furrow until it became unbalanced and ultimately rolled over.

Indeed, INV [redacted] confirmed that the sliding and furrowing caused appellant's vehicle to roll over: "the vehicle just doesn't roll, the vehicle slides and furrows and the forces are really pushing laterally against that vehicle, *and that's what really ends up causing it to rotate and roll*." (R. at 409).

2. The unstable condition and eventual collapse of the shoulder on Firebreak #20 was unforeseeable.

At trial, witnesses widely agreed that Firebreak #20 was a dangerous route. (R. at 466, 865, 903). However, even appellant's chain of command did not identify the stability of the soil or the condition of the shoulder on Firebreak #20 as a substantial risk. For example, 1SG [redacted] had concerns about "cliffs with no guardrails" and recognized that the "road wasn't the greatest," but she never voiced any concern over unstable soil or terrain. (R. at 854-55). Captain [redacted] determined Firebreak 20 was the "safest" option simply because it had the "least amount of possible water obstructions." (R. at 904). When CPT [redacted] conducted a "Deliberate Risk Assessment," he did not identify unstable soil or terrain as a potential hazard. (Pros. Ex. 20).

Similarly, neither appellant nor her chain of command foresaw the danger created by the "wet soil" on Firebreak 20. (R. at 424-25). Captain [redacted] watched

the weather "intently" because he wanted to "get an idea of when [they] were going to begin executing the next troop transmissions [sic]." (R. at 922). Yet, even though it rained the night before the accident, neither CPT [redacted] nor West Point staff cancelled or modified the mission. (R. at 922).

Significantly, engineers at West Point made major improvements to Firebreak #20 after the accident in this case. (R. at 786, 932). Special Agent [redacted] testified, "it looked like the *entire* roadway" had been graded when he visited the scene after the accident. (R. at 786) (emphasis added). Mr. [redacted] testified, "[the engineers] reinforced some of the grades . . . with some larger rocks and boulders to reinforce the areas where vehicles would be crossing over." (R. at 932). The engineers also "put some engineer tape and orange cones across some areas that were identified as dangerous[.]" (R. at 932).

Had those improvements been made prior to 6 June 2019, this accident would not have occurred. Unfortunately, neither appellant nor her chain of command were aware of the hidden dangers on Firebreak #20. If the route had actually been safe to travel, there would be no need to make such substantial[13]

[13] Arguably, the West Point administration's negligence in failing to maintain the shoulder in a safe condition qualifies as a separate and distinct intervening cause. Although a reasonable person in appellant's position would not have foreseen the unstable condition of the soil, the West Point administration had a greater duty to inspect and maintain the shoulder in a safe condition. *See e.g., Klimek v. Ghent*, 114 A.D.2d 614, 616 (N.Y. App. Div. 1985) ("[a] municipality which provides a shoulder along a roadway must maintain that shoulder in a reasonably safe

improvements. Yet, when engineers inspected Firebreak #20, they specifically identified some portions as "dangerous." (R. at 932).

Moreover, if the stability of the shoulder on Firebreak #20 was truly a known and foreseeable risk when it was wet, both the West Point administration *and* appellant's chain of command would or should not have authorized the mission to proceed on the morning of the accident. Firebreak #20 is a "one way" road and vehicles often had to "pull off" to the side to let an approaching vehicle pass. (R. at 397, 752, 810, 942-43). Captain [redacted] testified, "the SOP was just to put one vehicle--pull over to the side and then let the other vehicles pass." (R. at 921). In fact, on the same day as the accident, one of the drivers in Task Force 1-28 had to move her vehicle to the side to let an approaching vehicle pass:

> Q. And did you--were you both moving as you passed or did one of you pull over to the side?
>
> A. I want to say both because we like kind of went to the side, and at the same time we were like trying to--as the HMMWV was passing by we'd go by some.

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condition for foreseeable uses, including its use resulting from a driver's negligence.") (citations omitted); *Favre v. Boh Bros. Constr. Co., L.L.C.*, (La. Ct. App. 2012), 90 So. 3d 481, 486 (department of transportation's "duty to maintain safe shoulders encompasses the foreseeable risk that for any number of reasons, whether as a result of inattentiveness or negligence, a motorist might find himself traveling on, or partially on, the shoulder.") (quotes and citations omitted). The West Point administration was in the best position to foresee and prevent the type of accident that occurred in this case. The administration brushed aside CPT [redacted] concerns about two-way traffic on firebreaks even though repairs clearly needed to be made on Firebreak #20. (R. at 786, 920, 932). Therefore, the West Point administration's negligence far exceeds appellant's alleged negligence.

(R. at 942-43). If two vehicles are passing on a "one way" fourteen-foot road, it is highly likely that one vehicle will travel on the shoulder for a period of time. Therefore, it is highly unlikely the mission would have continued had anyone recognized the dangerous condition of the shoulder on Firebreak #20. Put differently, knowing all they did about that area and that road, the West Point administration and appellant's chain of command proceeded with the mission. If they could not and did not foresee this event, certainly appellant could not have reasonably foreseen the hidden dangers on Firebreak #20.

"The test for foreseeability is 'whether a reasonable person, in view of all the circumstances, would have realized the substantial and unjustifiable danger created by his acts.'" *United States v. Oxendine*, 55 M.J. 323, 325 (C.A.A.F. 2001) (quoting *United States v. Henderson*, 23 M.J. 77, 80 (C.M.A. 1986)). Here, everyone foresaw the possibility that a vehicle might roll over or drive off a cliff with no guardrails. However, no one – including appellant – expected that a vehicle might suddenly sink like a ship if it slightly departed the narrow "traveled portion" of Firebreak #20. Again, the best evidence of this fact is that appellant and other drivers were told that driving off the traveled portion[14] of the road is

[14] First Sergeant [redacted] claimed she told the MTV drivers to let approaching vehicles pass by pulling over to the "high ground." (R. at 880). However, CPT [redacted] thought it was more appropriate for smaller vehicles, like HMMWVs, to pull over and allow larger vehicles, like MTVs, to pass. (R. at 921). Indeed, SFC

exactly what they *should* do when passing another vehicle. Oddly, the government also failed to present any evidence regarding the soil stability of the shoulder on Firebreak #20. Investigator [redacted] admitted it would have been possible to perform those types of tests but he did not have the training to perform them. (R. at 397).

The government failed to prove that appellant was negligent. Even if appellant was negligent, the government failed to prove that appellant's negligence was the proximate cause of CDT [redacted] death. The poor condition of the shoulder and the West Point administration's failure to improve or maintain it were intervening causes, completely outside appellant's control. Therefore, appellant's conviction is both legally and factually insufficient.

B. Appellant's conviction for prevention of an authorized seizure of property is legally and factually insufficient.

Assuming *arguendo* that appellant actually erased the data on her phone, she only did so *after* CID agents seized her phone and the data within it. Therefore, appellant could not have prevented the seizure of the data on her phone because it had already been seized. The plain language of Article 131e, UCMJ only criminalizes the destruction or removal of property when "one or more persons

---

[redacted] testified that when he approached appellant's convoy in his HMMWV, he pulled over on the "mountain" side while the convoy passed on the other side. (R. at 739, 752). Regardless of which vehicle occupies the "high ground," it is foreseeable that both vehicles would depart the middle traveled portion of Firebreak #20 when passing.

authorized to make searches and seizures are [1] seizing, [2] about to seize, or [3] endeavoring to seize" that property. Article 131e(a); *MCM*, 2019, Part IV, ¶ 86.b(1). Additionally, the statute requires an intent "to prevent the seizure" of property. Article 131e(a); *MCM*, 2019, Part IV, ¶ 86.b(2). Put simply, the possibility for anyone to commit this offense ends at the moment of seizure.

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Logically, a seizure must have a beginning and an end; otherwise, law enforcement agents would constantly be in the process of seizing property. *See Springer v. Albin*, 398 F. App'x 427, 435 (10th Cir. 2010) (for Fourth Amendment purposes, "[o]nce the act of taking the property is complete, the seizure has ended[.]"); *see also United States v. Eugene*, ARMY 20160438, 2018 CCA LEXIS 106, *6 (Army Ct. Crim. App. 28 Feb. 2018) (mem. op.), *aff'd*, 78 M.J. 132 (C.A.A.F. 2018) (consent to seize may not be withdrawn once the seizure has been "completed."). [15] Congress recognized this concept when it enacted the federal civilian corollary to Article 131e:

> Whoever, *before, during, or after* any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly

[15] https://www.jagcnet.army.mil/ACCALibrary/cases/opinion/file/legacy/2537

> attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 2232(a) (emphasis added). Unlike the civilian statute, Article 131e, UCMJ does not criminalize destruction or disposal of property once a seizure has ended.

In *United States v. Eugene*, this court found "meaningful interference occurred . . . when [PFC [redacted]] wife consented to seizure of [his] cellphone and provided it to CID." 2018 CCA LEXIS 106 at *7. This court stated that PFC [redacted] could not withdraw his wife's consent to seize the phone because "[t]he seizure was . . . complete." *Id*.

Here, once SA [redacted] took possession of appellant's phone, the seizure was complete. Appellant "attempted to retrieve" her phone after the seizure but SA [redacted] refused to give it back. (R. at 987). Accordingly, there is no question that SA [redacted] "meaningfully interfered" with appellant's "possessory interest" in the phone and the data therein. *Jacobsen*, 466 U.S. at 113.

Significantly, the government's own witness, SA [redacted], conceded that appellant's phone was erased after it had been seized. (R. at 1026) ("the time of

the factory reset was actually while the device was still in [sic] route."). In a sworn affidavit, SA [redacted] clearly explained the timeline of events:

> On 6 Jun 19, a search warrant to seize and search SSG Strong's Apple Watch and iPhone (Phone 1) was requested and issued by a part-time military magistrate. The warrant was executed and both devices were seized from SSG Strong pursuant to magistrate authorization and collected as evidence…On 7 Jun 19, this office transported both devices to the supporting CID Digital Forensic Examiner (DFE) who, upon receipt, identified that Phone 1 had been remotely reset, most likely by cellular signal, while in transit.

(App. Ex. XIV, p.4). At trial, the government alleged appellant erased her iPhone by using the "Find my iPhone" tool on Apple's website. Special Agent [redacted] walked the panel through the various steps appellant allegedly took to remotely erase her phone. (R. at 1044-69). He even created a timeline showing the exact time appellant's phone was "seized" and when it was "erased." (Pros. Ex. 24). According to SA [redacted] timeline[16], CID seized the phone at 23:07:00 on 6 June 2019 and the request to erase the phone was sent at 00:20:00 on 7 June 2019. (R. at 1059; Pros. Ex. 24).

Because the data on appellant's phone was erased more than one hour after it had been seized, no reasonable fact-finder could have found all the elements of

[16] Apparently, the records that CID received recorded the times using Pacific Daylight Time (PDT). (R. at 1044). Special Agent [redacted] translated the times into Eastern Daylight Time (EDT) when he created Prosecution Exhibit 24. (R. at 1044).

Article 131e, UCMJ beyond a reasonable doubt. Specifically, each element of Article 131e, UCMJ requires the existence of an impending or ongoing seizure. The language in Article 131e, UCMJ is clear. That said, even if there was an ambiguity, the rule of lenity demands that it be resolved in appellant's favor. *United States v. Davis*, 139 S. Ct. 2319, 2333, 204 L. Ed. 2d 757 (2019); *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008) (citation omitted); *see United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007) ("We have long adhered to the principle that criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused.").

Similar to *Eugene*, the seizure of appellant's phone was complete at the moment SA [redacted] took possession. Even if appellant did erase the data on her phone, she did not prevent the seizure of that data. Therefore, appellant's conviction is both factually and legally insufficient.

Conclusion

Based on the foregoing, appellant respectfully requests this court set aside the findings and sentence.

[redacted]

Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

[redacted]

Jonathan F. Potter
Senior Capital Defense Counsel
Defense Appellate Division

[redacted]

Michael C. Friess
Colonel, Judge Advocate
Chief
Defense Appellate Division

APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, through appellate defense counsel, personally requests this Court consider the following:

I. APPELLANT'S DEFENSE COUNSEL WERE INEFFECTIVE.

Defense counsel made *seven* critical errors that, taken together, fall below the *Strickland* standard. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, defense counsel failed to (1) challenge COL [redacted] for implied bias, (2) object to the introduction and publication of Pros. Ex. 27 (9-line audio recording), (3) object to the government's use of INV [redacted] as a conduit for hearsay, (4) object to Ms. [redacted] providing improper expert testimony, (5) object to CW3 [redacted] providing improper expert testimony, (6) object to overly prejudicial photos of CDT [redacted] remains, and (7) object to the introduction and publication of Pros. Ex. 32 (memorial video) at sentencing.

1. Defense counsel failed to challenge COL [redacted] for implied bias.

COL [redacted] stated he was the "command chaplain" for both the 3d Infantry Division and Fort Stewart. (R. at 83). Because the 1-28 Infantry Battalion was a subordinate unit, COL [redacted] received updates regarding the accident at West Point from the 1-28 Battalion chaplain. (R. at 83-85). COL [redacted] stated he was "aware of the events, what was happening, what was going on." (R. at 83). Significantly, the

1-28 Battalion chaplain's assistant actually traveled to West Point to work "with Soldiers in the chaplain capacity." (R. at 85). Although COL [redacted] wasn't provided specific details about the counseling because of "confidentiality[,]" he still received updates regarding "general counseling trends" related to the accident. (R. at 85).

At a minimum, COL [redacted] was privy to non-public information about the after-effects of the accident involving appellant. Defense counsel failed to question COL [redacted] about the type of information he learned when he was updated on "counseling trends." Further, defense counsel failed to ask COL [redacted] whether his knowledge of non-public information would influence his decision either on the merits or during sentencing. The information that COL [redacted] learned from his subordinate chaplains could have very well framed his views about the severity of the accident or caused him to view appellant in a negative light. Yet, defense counsel failed to follow-up on those important matters. Without any further information, defense counsel should have challenged COL [redacted] because a member of the public would have concerns about the fairness of the military justice system given COL [redacted] status and knowledge about the accident.

2. Defense failed to object to the introduction and publication of Pros. Ex. 27 (9-line audio recording).

Pros. Ex. 27 is an audio recording of a "9-line" medical evacuation (MEDEVAC) request that occurred shortly after the accident in this case. Initially, defense objected when they learned that the government planned on publishing the audio recording during its opening statement. (R. at 290). The military judge ruled that the trial counsel could publish the recording if he had a "reasonable belief" as an "officer of the court" that the evidence would be admitted during trial. (R. at 296). When defense counsel asked for clarification on that ruling, the military judge stated "I gave the guidance that I'm going to give." (R. at 297). Defense did not object any further and the government published the audio during its opening statement. (R. at 310). Then, during its case-in-chief, the government offered the audio recording for admission as evidence. (R. at 747). Defense counsel did not object.

The audio recording was far more prejudicial than probative. The government claimed they wanted to use the recording as evidence of the victims' injuries. (R. at 292). However, the parties stipulated to the nature and extent of the victims' injuries. Thus, the audio recording only served to inflame the passions of the panel members.

3. Defense failed to object to the government's use of INV[redacted] as a conduit for hearsay.

The government improperly used INV [redacted] as a conduit for inadmissible hearsay on multiple occasions. First, INV [redacted] improperly testified that, in addition to his inspection of appellant's vehicle, "there was another inspection done on the vehicle and that there was nothing that could've contributed to the accident." (R. at 382). Second, INV [redacted] improperly testified that "[b]ased on the CID interviews, *it was determined* that there was use of an Apple watch while driving." (R. at 391) (emphasis added). INV [redacted] spoke authoritatively on those matters as if they were conclusive facts. Yet, defense counsel failed to object to either instance of improper testimony. *See United States v. Blazier*, 69 M.J. 218, 225 (C.A.A.F. 2010) (expert witness may not act as a conduit for repeating testimonial hearsay).

4. Defense failed to object to Ms. [redacted] providing improper expert testimony.

The government never qualified Ms. [redacted] as an expert witness because she was merely a custodian of records for Verizon. (R. at 574). Yet, the trial counsel asked Ms. [redacted] a series of hypothetical questions about the transmission of data between electronic devices. (R. at 582-85). Even worse, Ms. [redacted] speculated about certain technical aspects of electronic data transmission. For example, the trial counsel asked Ms. [redacted] whether a phone would "upload" or "download" data while performing an update. (R. at 585). Ms. [redacted] responded:

> With updates, it would *more than likely* be the download because the updates download on the phone. *But, you know, it just I mean—you just never know.*

(R. at 585). That portion of testimony was critical because it lent credibility to the government's theory that appellant actively used an electronic device while driving. However, because Ms. [redacted] was not an expert witness, she should not have provided an opinion on matters that required technical knowledge. Mil. R. Evid. 701(c).

5. Defense failed to object to CW3 [redacted] providing improper expert testimony.

CW3 [redacted] is an automotive maintenance technician. (R. at 831). However, *the government never qualified her as an expert witness*. She performed an inspection of appellant's vehicle after the accident and, at trial, testified that she "didn't identify anything that was like catastrophic damage that would contribute to the rollover." (R. at 838). Later, the trial counsel emphasized that same point when he asked "did you identify any defects in the vehicle that could've caused this vehicle to rollover?" (R. at 840). CW3 [redacted] responded, "I did not." (R. at 839). Because CW3 [redacted] was not an expert witness, she should not have provided that expert opinion. Mil. R. Evid. 701(c). Even if the government had qualified CW3 [redacted] as an expert in automotive maintenance, it is not clear from

the record that she had the expertise to form an opinion on the likelihood of a roll over; CW3 [redacted] is a mechanic, not an engineer.

6. Defense failed to object to overly prejudicial photos of CDT [redacted] remains.

The government introduced several prejudicial photos of CDT [redacted] remains. (Pros. Ex. 13, pp. 8-10; Pros. Ex. 17). The photos had no probative value because there was no dispute that CDT [redacted] died as a result of the accident. Additionally, even if the photos had probative value, they were cumulative because the government admitted a complete copy of the autopsy report. (Pros. Ex. 16). Accordingly, the photos should have been excluded under Mil. R. Evid. 403.

7. Defense failed to object to the introduction and publication of Pros. Ex. 32 (CDT [redacted] memorial video).

During sentencing, the government admitted and published a memorial video that contained a slideshow along with theatrical music. (R. at 1302; Pros. Ex. 32). The video contained numerous photographs taken at CDT [redacted] funeral, including photos of former President William Clinton giving a speech. (Pros. Ex. 32, timestamp 0:28, 1:28). The audio accompanying the slideshow is a dramatic musical piece that was clearly included to evoke emotion. (Pros. Ex. 32).

The video/slideshow was not proper evidence in aggravation under R.C.M. 1001(b)(4). As such, defense counsel should have objected. However, they failed to do so. The video/slideshow is incredibly emotional and somber; it would have

been a perfect tribute had it been played in any forum other than appellant's trial. However, appellant suffered prejudice because the video substantially increased the likelihood that the panel would issue a sentence based on sentiment rather than reasoned judgment.

II. APPELLANT IS ENTITLED TO RELIEF DUE TO UNREASONABLE POST-TRIAL DELAY BY THE GOVERNMENT.

Additional Facts

Appellant's court-martial adjourned on 20 July 2020. (R. at 1412). On 19 November 2020, appellant made a demand for speedy post-trial processing. (Speedy Post-Trial Processing Request). The case was docketed with this court on 30 December 2020. (Referral and Designation of Counsel). Accordingly, 163 days elapsed between adjournment and docketing with this court. On 29 June 2021, the confinement facility negligently placed faulty handcuffs on appellant. (Def. App. Ex. A). The handcuffs became stuck on appellant's wrists and the confinement facility had to use a saw to remove them. (Def. App. Ex. A). During that process, the handcuffs tightened and embedded into appellant's skin. (Def. App. Ex. A). As a result, appellant has endured significant pain and experiences difficulty in performing tasks that require use of her hands. (Def. App. Ex. A).

Law

A convicted service member has a due process right to timely post-trial review of court-martial convictions. *Moreno*, 63 M.J. at 135. In the past, appellate courts applied a presumption of unreasonable post-trial delay "where the action by the convening authority is not taken within 120 days of the completion of trial [phase I]," 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 [phase 2]." *Moreno*, 63 M.J. at 142.

"The Military Justice Act of 2016, however, made a stringent application of *Moreno*'s phase I and II presumptions impossible in part because convening authorities are no longer required to take action." *United States v. Brown*, __ M.J. __, 2021 CCA LEXIS 111, at *4-5 (Army. Ct. Crim. App. 8 Mar. 2021). To adjust for the new post-trial processing procedures, this court now applies a presumption of unreasonable delay "in cases when more than 150 days elapse between final adjournment and docketing with this court." *Id*. at *5.

When there is a presumption of unreasonable delay, appellate courts test for a due process violation by using the four factor analysis set forth *Barker v. Wingo*, 407 U.S. 514 (1972). *Id*. The 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." *Id*. at 135.

Even if this Court does not find a due process violation, "[t]he Courts of Criminal Appeals have authority under Article 66(c) . . . to tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Intervention is necessary where "the convening authority fails to grant relief in his action or the staff judge advocate fails to document an acceptable explanation for the untimely post-trial processing." *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001).

Argument

All of the four *Barker* factors weighs in appellant's favor.

1. Length of the Delay.

One-hundred and sixty-three days elapsed from final adjournment to docketing with this court — which exceeds the standard set forth in *Brown* by nearly two weeks. *Brown*, __ M.J. __, 2021 CCA LEXIS 111 at *5. Accordingly, the length of the delay favors relief for appellant.

2. Reasons for the Delay.

When delay occurs in the post-trial process, convening authorities are expected to "document reasons for the delay and to exercise…institutional

vigilance[.]" *Moreno*, 67 M.J. at 143. The Court of Appeals for the Armed Forces noted:

Some cases will present specific circumstances warranting additional time, thus making those periods reasonable upon assessment of the *Barker* factors. But these must be justifiable, case-specific delays supported by the circumstances of that case and not delays based upon administrative matters, manpower constraints or the press of other cases. *Id*. Here, neither the convening authority nor the Office of the Staff Judge Advocate (OSJA) provided any explanation for the delay. This factor also weighs in favor of appellant.

3. Appellant's Assertion of her Right to Timely Review and Appeal.

Appellant asserted her right to timely review in appeal. As such, this factor weighs in favor of appellant.

4. Prejudice.

Appellant has been prejudiced by the delay because assuming appellant's appeal is meritorious, she will have suffered from oppressive incarceration. Moreover, appellant has suffered from particularly harsh confinement conditions. As explained in her affidavit, the confinement facility negligently locked handcuffs tightly on her wrists, which had to be removed with a saw. (Def. App. Ex. A). Appellant has endured significant pain because of the confinement facility's

actions. (Def. App. Ex. A). In the alternative, should this Court find appellant's due process rights were not violated, appellant requests that this Court exercise its power under Article 66 and *United States v. Tardiff* to provide sentence relief.

III. APPELLANT IS ENTITLED TO RELIEF DUE TO UNLAWFUL POST-TRIAL CONFINEMENT CONDITIONS.

As stated above, appellant continues to suffer pain and hardship due to the confinement facility's gross negligence in placing faulty handcuffs on her. (Def. App. Ex. A). Additionally, prison officials compounded the problem by using excessive force when attempting to remove the handcuffs, causing further pain to appellant. (Def. App. Ex. A). Accordingly, appellant has suffered from unlawful post-trial confinement conditions and is entitled to relief pursuant to the Eighth Amendment to the United States Constitution and Article 55, UCMJ. In the alternative, appellant requests this court to exercise its Article 66, UCMJ authority because appellant's sentence is inappropriate in light of the confinement's facility's actions.

IV. IN LIGHT OF *RAMOS V. LOUISIANA*, APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE NON-UNANIMOUS VERDICT IN HER CASE.

Additional Facts

Appellant's panel consisted of eight members. (R. at 288). At the close of evidence but before findings, the military judge instructed the panel:

> The concurrence of at least three-fourths of the members present when the vote is taken are required for any finding of guilty. Since we have eight members, that means that six members must concur in any finding of guilty. Therefore, if you have at least six votes of guilty of any offense, then that will result in a finding of guilty for that offense.

(R. at 1237).

When the president of the panel announced the findings, he did not indicate the vote tally for any of the specification of which the panel found appellant guilty. (R. at 1251). Similarly, the findings worksheet contains no information on the vote tally for any specification. (App. Ex. XLIX). Defense counsel preserved the issue by filing a motion requesting an instruction for a unanimous verdict. (App. Ex. V). The military judge denied the motion. (App. Ex. XLI).

Law

The Fifth Amendment provides that no person may be "deprived of life, liberty, or property, without due process of law[.]" U.S. Const., amend. V, cl. 3. The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const., amend. VI.

The United States Supreme Court recently issued its decision in *Ramos v. Louisiana*, ___ U.S. ___, No. 18–5924 (20 April 2020).[1] In interpreting the Sixth Amendment's right to trial by an impartial jury, the Court held:

Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict. *Id.* slip op. at 4 (citations omitted).

The Court further pointed out that it "repeatedly and over many years, recognized that the Sixth Amendment requires unanimity." *Id.* slip op. at *6 (citations omitted). Finally, the Court held that "[t]here can be no question . . . the Sixth Amendment's unanimity requirement applies to state and federal courts equally." *Id.* slip op. at *7.

"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.*

[1] Available at: https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf

Williams, 1 M.J. 267, 270 (C.M.A. 1976) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953))). The C.A.A.F. has previously held "there is no Sixth Amendment right to trial by jury in courts-martial. *Easton*, 71 M.J. at 175 (citing *Ex parte Quirin*, 317 U.S. 1, 39 (1942)).

Argument

This court should apply the Supreme Court's holding in *Ramos* and set aside the findings and sentence in appellant's case. The record does not reveal—and there is no mechanism to determine—whether the panel in appellant's case was unanimous or not. Accordingly, this court should set aside the findings and sentence, as there is no way to be sure whether appellant's court martial complied with *Ramos*.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 26 July 2021.

[redacted]

JOSEPH A. SEATON, JR.
CPT, JA
Appellate Defense Counsel
Defense Appellate Division