IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**REPLY TO THE GOVERNMENT'S**
Appellee	)	**ANSWER TO THE SUPPLEMENT**
	)	**TO THE PETITION FOR GRANT**
v.	)	**OF REVIEW**
	)	
EDZEL D. MANGAHAS	)	**USCA Dkt. No. 17-0434/AF**
Lieutenant Colonel (O-5)	)	
United States Air Force,	)	**Crim. App. No. 2016-10**
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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REPLY TO THE GOVERNMENT'S ANSWER TO THE SUPPLEMENT

A. Introduction.

The complaining witness in this case, DS, put multiple Government officials on notice in 1997 (according to her) or 1998 (according to other witnesses and a signed, sworn statement to civilian and military law enforcement officials), that she had been raped in 1997. There was no investigation whatsoever, or documentation explaining why the Government chose not to investigate. Lt Col Mangahas was not even told that he had been accused. Seventeen years later, in 2014, DS reported the alleged rape again, this time to the Department of Veterans Affairs, and only then did the Government conduct any investigation at all.

The military judge found a due process violation and dismissed the charge and specification with prejudice. His findings and conclusions were supported by the record and correct; he did not abuse his discretion. This Court's review will show that Lt Col Mangahas met his burden to show an egregious delay between the allegation and preferral of the charge, and actual prejudice, and thus a Fifth Amendment due process violation. Therefore, the military judge properly dismissed the charge and specification with prejudice. The Air Force CCA erroneously granted the Government's appeal and vacated the military judge's ruling. This Court should reverse.

Preliminarily, it is important to note the following:

1. This is not a "consent" case

In a case in which the accused admits that the sexual activity occurred but defends the claim of rape by asserting that the activity was consensual, the entire case focuses on the credibility of the accused and the complaining witness. True, there may be eyewitnesses to conduct that tends to make the issue of consent more or less likely (such as those who witnessed the complaining witness kissing or showing romantic interest in the accused prior to the alleged rape, or not); but the only decision for members to make in that situation is whether the admitted sexual conduct was consensual. That determination usually is based completely on a weighing of evidence pertaining to whether the accused's assertion of consent or the complaining witness' claim of non-consent is more believable, which normally is the members' evaluation of the likelihood of their respective accounts and their character for truthfulness.

In contrast, the theory of defense in this case is that the sexual activity did not occur at all. Therefore, the factfinder would be tasked with evaluating a wide array of evidence to determine whether the sexual activity occurred in the first place. This includes eyewitness testimony of U.S. Coast Guard Academy cadets who could confirm or deny that Lt Col Mangahas went to DS' dorm room on the night in

question (or, in fact, ever); witnesses who could support or rebut an alibi defense; physical evidence such as clothing, bedding, or other items located in the dorm room at the time of the alleged offense, especially considering that DS claimed penetration (which would involve bodily fluid), ejaculation onto herself and her bedding, and presumably onto other items such as the floor; forensic evidence relevant to the physical evidence, such as DNA or that resulting from analysis of other items such as hair or fibers; photographs and diagrams of the dorm room; and of course, character evidence as to both Lt Col Mangahas and DS. In this case, almost all of this evidence is lost due to the passage of almost twenty years since DS put the Government – and specifically, the Coast Guard Investigative Service, whose mission is to collect and preserve evidence of alleged crime – on notice that she claimed to have been raped, because the Government failed to do any investigation whatsoever for seventeen years.

2. The Government agreed to the underlying facts

At the motions hearing, the Government stipulated to all of the facts set forth in the Defense Motion to Dismiss. R. 26-29. This is important because the military judge's findings and conclusions are based on the facts in the record – and the Government agreed to them at the trial level. The military judge did not abuse his discretion.

B. The Supplement Establishes Good Cause for Review under Rule 21.

This Court's Rules require that the Supplement make "a showing of good cause" for review. C.A.A.F. Rule 21(a). "Where applicable, the Supplement shall also indicate" one of the specified reasons for review. C.A.A.F. R. 21(b)(5). The Supplement in this case both establishes good cause and identifies a reason to grant review, specifically that the Air Force CCA decided a question of law in conflict with decisions of this Honorable Court and the Supreme Court. *See* Supplement at 9.

The good cause for review is that the Government, through its complete inaction on a claim of rape from 1997 to 2014, violated Lt Col Mangahas' Fifth Amendment due process right to a speedy trial. As further discussed below, the Air Force CCA's opinion finding no actual prejudice is in conflict with controlling case law, including *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995), because applying those cases and others, a due process violation occurred in the instant case, contrary to the Air Force CCA's opinion.

The Government argues that a court-martial will "adequately and appropriately" protect Lt Col Mangahas' due process rights. Gov't Answer at 17. We respectfully disagree. The controlling case law and other applicable authorities hold that when a pre-preferral delay is egregious and causes actual prejudice to an accused, dismissal with prejudice is appropriate. *See, e.g., Reed*, *supra*; R.C.M. 707(d)(1).

This Court will review de novo whether such a due process violation occurred. The delay of almost two decades between the time the Government actually was on notice of a claim of rape and any investigation whatsoever, resulting in the loss of a crucial witness and other vital evidence Lt Col Mangahas needs to defend himself, is exactly the kind of delay that meets these criteria and warrants dismissal with prejudice.

The military judge's decision was well within the "range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). The Air Force CCA erred in holding otherwise and vacating the military judge's order of dismissal. This Court should grant review and reverse.

C. The Air Force CCA Erred in Finding There Was No "Actual Prejudice" in this Case.

The Government and Lt Col Mangahas agree that the question of prejudice revolves around whether he can mount an effective defense at this late date. *See* Gov't Answer at 21; Supplement at 17-18. However, we strongly disagree as to whether the delay will prevent Lt Col Mangahas from mounting an effective defense, and the record supports our conclusion.

The Government relies on the fact that Lt Col Mangahas presented evidence at the Article 32, UCMJ preliminary hearing to argue that he is fully able to defend himself. Gov't Answer at 15, 30-31. The Government bases this argument on the

testimony of the SJA and one witness who contradicted DS' account plus a large volume of character evidence in Lt Col Mangahas' favor. However, the Government overlooks the fact that as mentioned above, character evidence, while important, only has a part to play in the defense of this case, since the factfinder will have to determine whether the sexual activity occurred at all (not merely whether admitted sexual activity was consensual). Therefore, while character evidence can be an important evidentiary tool in any case, it is essential to provide members in this case with more – physical and forensic evidence, and testimony of witnesses with knowledge of relevant facts, as well as witnesses as to DS' character – to mount an effective defense. This Lt Col Mangahas cannot do because the Government failed to investigate and preserve evidence when the evidence existed. At this late date, most of that evidence is lost.

To illustrate: certainly Lt Col Mangahas will present character evidence that he is nonviolent, peaceful and law-abiding. Further, he may elect to testify and also present evidence regarding his good character for truthfulness. Then, defense counsel can argue that he is not the type of person to commit the charged offense, and that his testimony denying any sexual activity with DS – and that he did not rape her – is worthy of belief. However, in order to effectively argue that the Government failed to prove that DS' claims are valid, it is essential to point to evidence unrelated to Lt

Col Mangahas or his friends and colleagues – in other words, he should not be forced to rely solely on evidence of his good character to dispute the Government's evidence. He is entitled to confront and cross-examine his accuser, and had the Government conducted an investigation at the time of the initial report, neutral, physical, and forensic evidence would exist that he could have used to defend himself. For example, perhaps he could have showed that he could not have committed the offense because he was somewhere else (alibi), or someone else's DNA was found on the floor of DS' dorm room (source of injury), or the laundry facilities were out of order on that weekend so she could not have laundered her items as she claimed (impeachment). Or witnesses could have said they were in their rooms with the doors open or in the hallway on the evening in question and did not see Lt Col Mangahas run by. The late date prevents Lt Col Mangahas from even identifying witnesses who could have seen or heard something relevant to this accusation – because the Government failed to find and preserve this relevant evidence.

The Government notes that at the preliminary hearing, civilian counsel was asked, "How many witnesses have you been unable to find?" The answer included, "Hard to say." Gov't Answer at 30 n.12. Rather than supporting the Government's argument, this exchange proves the point – because there was no investigation at the time of the initial complaint, there is no way to know twenty years later who may or

may not be a witness, especially when, at the time of the motions hearing, the Government had not provided investigative assistance to the Defense. As it stands now, there are two witnesses who would testify in contradiction to DS, but those witnesses also would testify that their memories have faded due to the passage of time.

While it is true that there are many witnesses willing to testify to Lt Col Mangahas' good character, Lt Col Mangahas' defense could and should include witnesses to testify to DS' bad character. Because the USCGA cadets have scattered to the four winds, it is nearly impossible at this time to identify and locate witnesses who may have had a negative opinion of her character and who would still remember that opinion twenty years later in order to testify at trial. CGIS could and should have interviewed those people and preserved their viewpoints. Lt Col Mangahas cannot mount an effective defense with his good character evidence alone.

It is important to emphasize that while any accused may have evidentiary problems when a complaining witness waits to report an alleged offense, the issue in this case is that within months of the relevant events, DS told the Government verbally and in writing that a potential crime occurred, and the Government did nothing about it – not even notify the person accused. The due process clause guarantees a person accused of committing a crime that the Government will act diligently once aware that a crime is alleged. The Government did not do that in this case. Most of the evidence,

including information favorable to the Defense, is not available any more. The Government agents' complete failure to execute their duties constitutes a due process violation in this case.

The Supplement sets out three separate categories of evidence that constitute actual prejudice in this case: the death of PM before she was asked about this allegation, the loss of other evidence, and the harm to public perception of the military justice system. The Government's Answer fails to adequately address all three of these.

1. PM

The Government's two-pronged argument regarding PM misses the mark.

a. *"No correlation between PM's death and the period between 1997 and 2016"*

This claim argues that PM's death would have occurred regardless of what the Government or other parties did and therefore her unavailability for trial is not prejudice. Gov't Answer at 24-26. While certainly, Lt Col Mangahas is prejudiced by the fact that PM is not able to testify at the trial, he complains not of her "death" alone, but of the fact that she died without the Government asking her a single question relevant to this case before she died. Not only should they have talked to her in 1997 and 1998, but the same agency – CGIS – actually did talk to her in 2014 three months after their 90-minute interview of DS. It is not her death alone that constitutes

the actual prejudice, but the fact that she would have significantly impeached DS but her views and reaction to DS' claims are unrecorded for use in any form at trial.

b. *"Claim of 'actual prejudice' is based on pure speculation"*

The Government and the Air Force CCA assert that there is no prejudice because there is no evidence as to what PM would have said had the Government properly interviewed her – they allege that the Defense position is based on pure speculation. Gov't Answer at 26-28; *United States v. Mangahas*, Misc. Dkt. No. 2016-10 (A.F. Ct. Crim. App. Apr. 4, 2017), slip opinion at 8. With all due respect, we could not disagree more.

First of all, the contention that PM would impeach DS is based not on speculation, but on the sworn testimony of the SJA, whom the trial counsel cross-examined, at the preliminary hearing. He provided facts and opinions based on first-hand knowledge of PM's factual history and character that more than justify the inference that PM would not have advised DS as DS claims. This is far from speculation. Further, the trial counsel would have another opportunity to cross-examine the SJA at trial about the adequacy of the facts or the foundation for his opinions. Trial counsel also could propose during argument at trial the Government's theory of what PM said or what she meant by what she said. However, there simply is no evidence in the record to support any other conclusion than that PM would have

supported and encouraged DS both to participate in counseling and to cooperate with the prosecution of a rape case. There is more than enough evidence for this Court to conclude (as the military judge properly did) that PM would impeach DS.

The Government also ignores the fact that the reason PM's views were not preserved to avoid claims of "speculation" later is due solely to Government failures. It was CGIS who failed to interview her in 1997 and 1998. It was CGIS who failed to ask her any questions about DS in 2014 after they were on notice that DS claimed PM interacted with her negatively with regard to DS' claim of rape. And it was the Government who, despite multiple Defense requests, failed to provide notice even of the fact that they had interviewed PM, much less her contact information, in time for the Defense to question PM themselves. The military judge correctly took all of these factors into consideration in his findings and conclusions. The Government's complete and total mishandling of PM as a witness deprived Lt Col Mangahas of his due process rights. The military judge did not abuse his discretion.

2. Loss of other evidence

It is undisputed that two of the witnesses at the preliminary hearing, the SJA and CDR SP, testified that they could not remember certain relevant facts because too much time had passed since the events in question. The Government claims that the military judge failed to identify with sufficient specificity what facts the witnesses

could not remember, and that the Supreme Court has stated that this "speculation" regarding what memories have diminished is insufficient to demonstrate that Lt Col Mangahas cannot get a fair trial. Gov't Answer at 29 (citing *United States v. Marion*, 404 U.S. 307, 308 (sic – this is the syllabus) (1971)). However, it is important to note that in *Marion*, the pre-charging delay was a mere thirty-eight months – not over seventeen years – and the Court found that:

> No actual prejudice to the conduct of the defense is alleged or proved. ... Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.

Marion, 404 U.S. at 325-26 (emphasis added). In contrast, witnesses in the instant case have testified to their diminished memories – demonstrating actual prejudice and not speculation about the possibility of faded memories. *Marion* supports the Defense position on prejudice, not the Government's.

The Supplement contains several examples of other evidence lost due to the failure to timely investigate this claim, for example, potential eyewitness testimony to the events of the night in question and other fact witnesses, potential alibi

witnesses, and character witnesses. The Government's Answer does not address any of this lost evidence.

With regard to physical, scientific, or medical evidence, the Government simplistically argues, "the fact that none of this type of evidence exists today was not impacted at all in the delay from 1997 until the present. Once more, there is no nexus between the delay and any actual prejudice" to Lt Col Mangahas. Gov't Answer at 34. This argument is hollow and erroneous, and actually makes the Defense point – it was not that such evidence "did not exist" in 1997; but because of the Government's complete failure to conduct an investigation once a cadet claimed to have been recently raped in the dorm at USCGA, those who had a duty to do so did not seek and preserve the available evidence. Again, it is not the lack of evidence alone that constitutes prejudice, it is the Government's failure to find and preserve the evidence when it should have done so that causes prejudice to Lt Col Mangahas when he must defend himself against this allegation twenty years later. This constitutes a due process violation and the military judge properly dismissed the charge and specification.

3. Public perception

Although cited at oral argument at the Air Force CCA, the lower court's opinion omits any reference to this Court's decision pertinent to this issue, *United*

States v. Haney, 64 M.J. 101 (C.A.A.F. 2006). Likewise, although discussed in the Supplement, the Government wholly fails to address the argument that proceeding to trial under the circumstances of this case would cause members of the public to doubt the fairness and integrity of the military justice system. This factor militates in favor of the military judge's ruling.

D. Other Arguments to Which the Government Did Not Respond.

Significantly, the Government did not respond to the arguments in the Supplement regarding the logical connection between advice regarding proceeding with additional counseling and proceeding with a prosecution; the fact that trial counsel stated an intention to impeach the SJA at trial, thus weakening his ability to aid the Defense and making PM a more vital witness; and the impact of an additional impeaching witness pursuant to *United States v. Brickey*, 16 M.J. 258, 265-66 (C.M.A. 1983) ("The fact that court-martial members believe a witness despite circumstances A and B, which tend to impair his credibility, does not mean they will continue to believe him if impeaching circumstance C is added."). All of these issues support the contention that the egregious delay in this case resulted in actual prejudice to Lt Col Mangahas' ability to mount an effective defense.

E. Conclusion.

The Government's continued and repeated failure to take appropriate action in this case for almost two decades after DS claimed that she was raped, causing Lt Col Mangahas actual prejudice in that he cannot now mount an effective defense, deprived him of his due process right to a speedy trial. The military judge's findings of fact are supported by the record and his conclusions of law are based on a thorough evaluation and correct interpretation of the law. The Air Force CCA erred in holding that the military judge abused his discretion when he granted the Defense Motion to Dismiss based on violation of Lt Col Mangahas' right to a speedy trial.

PRAYER

The Air Force CCA's opinion conflicts with applicable decisions of this Court and the United States Supreme Court. Good cause exists for this Honorable Court to grant review. Lt Col Mangahas respectfully requests that this Court grant review, reverse the lower court, and affirm the military judge's ruling dismissing the Charge and Specification with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Reply to the Government's Answer to the Supplement complies with the type-volume limitation of Rule 21(b) because the document contains a total of 3760 words.

2. This document complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing Reply to the Government's Answer to the Supplement to the Petition for Grant of Review was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on July 24, 2017.

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