17 July 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant,* v. Lieutenant Colonel (O-5) EDZAL D. MANGAHAS, USAF, *Appellee.*	) UNITED STATES' ANSWER) TO SUPPLEMENT TO) PETITION FOR GRANT OF) REVIEW)) USCA Dkt. No. 17-0434/AF)) Misc. Dkt. No. 2016-10

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

ISSUE PRESENTED

[WHETHER] THE LOWER COURT ERRED IN FINDING NO DUE PROCESS VIOLATION WHEN THE GOVERNMENT WAS INACTIVE FOR OVER 17 YEARS BEFORE INVESTIGATING A CLAIM OF RAPE, VIOLATING LT COL MANGAHAS' FIFTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review the decision of the Air Force Court pursuant to Article 67(a)(3), UCMJ, "upon petition of the accused and on good cause shown."

STATEMENT OF THE CASE

On 28 October 2015, a single charge and specification were preferred against Appellant which read as follows:

Charge I: Violation of the UCMJ, Article 120

> Specification: In that LIEUTENANT COLONEL EDZAL D. MANGAHAS, United States Air Force, 388th Operations Group, Hill Air Force Base, Utah, did, at or near the United States Coast Guard Academy, Connecticut, between on or about 1 February 1997 and on or about 28 February 1997, rape [DB], then known as [DS].[1]

(R. at 11.1.)

A preliminary hearing pursuant to Article 32 was conducted on 19 April 2016. On 27 April 2016, the Preliminary Hearing Officer (PHO), a sitting military judge and Air Force judge advocate, issued his report and determined probable cause did not exist for the charge. (App. Ex. X at 15.) On 2 June 2016, the convening authority referred the case to a General Court-Martial. (R. at 11.1.) Appellant was properly arraigned on 14 June 2016. (Id. at 12.)

On 10 July 2016, Appellant, through his civilian trial defense counsel,[2] filed a Motion to Dismiss the charge and specification based on an alleged violation of

[1] The victim's last name has changed since 1997. For purposes of this brief, her name will be listed as "DS" from this point forward.

[2] Appellant's civilian trial defense counsel is also his current civilian appellate defense counsel.

his right to a speedy trial. (App. Ex. X.) On the same day, Appellant also filed a Motion to Dismiss based on a violation of the statute of limitations. (App. Ex. VI.) The government filed its responses to both motions on 17 July 2016. (App. Exs. VII, XI.)

On 29 July 2016, the parties held an Article 39(a) session to address the motions. (R. at 14.) On 2 August 2016, the military judge denied Appellant's Motion to Dismiss based on the statute of limitations, ruling that the charge of rape had no statute of limitations. (App. Ex. XIV.) However, on the same day, the military judge granted Appellant's Motion to Dismiss based on speedy trial, ruling that "the accused's Fifth Amendment Due Process right to a speedy trial has been violated. The accused's constitutional right to a speedy trial having been violated, R.C.M. 707(d)(1) mandates dismissal with prejudice." (App. Ex. XV; *see also* App. Appendix B.)

On 5 August 2016, the government provided its Notice of Appeal pursuant to Article 62, UCMJ and R.C.M. 908(b). The case was docketed with AFCCA on 25 August 2016. On 4 April 2017, AFCCA vacated the military judge's order, stating, "We conclude the military judge abused his discretion in finding actual prejudice and thus grant the Government's appeal." (*See* App. Appendix A.)

STATEMENT OF FACTS

In 1997, both Appellant and DS were cadets at the United States Coast Guard Academy (CGA), Connecticut. DS was a junior while Appellant was a senior. Currently a civilian, DS served on active duty in the Coast Guard until 2004 when she joined the Coast Guard Reserves. (App. Ex. I, Atch 1.) She served in the reserves in Louisiana until she moved to Alaska in 2007. (Id.)

In October 2014, DS provided a statement to the Coast Guard Investigative Service (CGIS) regarding an allegation of rape stemming from an incident that occurred between her and Appellant at the CGA in 1997. (*See* Id.; App. Ex. X, Atch 3.) According to DS, she made the same rape allegation to personnel at the CGA in 1997 and 1998, as well as to the Department of Veterans Affairs in January 2014. (Id.)

a. DS's CGIS Statement, 5 October 2014

In the CGIS interview, DS stated that on a Saturday night in February 1997, she was asleep in her room when she awoke to Appellant touching her through her clothing. (Id.) She talked to Appellant, but did not call for help because there were freshman rooms on both sides of her room. DS stated that she felt pain between her legs and penetration, so she started crying and asked Appellant to stop. When he did not stop, she stated that she did not want to have an abortion.

Appellant then asked her about birth control. When she replied that she was not on birth control, Appellant stopped and left her room. (Id.)

DS told CGIS that the next morning, she told SP, a fellow cadet with whom she attended church, about the assault.[3] However, she did not report the incident. As DS explained it, "I'm like 'I don't know what to do' and, you know, like . . . it's at that point, if you told, it would get turned around, that somehow you, you know, had done something. You 'asked for it,' you know, that you were somehow were just as guilty, if not more guilty, you know, of the guy doing something. And so I'm like, I don't feel safe around, and I've watched . . . I've watched so many females report, and they get processed out and nothing happens to the guy. The guy continues on . . . And I was like, you know, "I want to stay in the Coast Guard. I don't want . . . I want to be an officer . . . I don't know what to do." (App. Ex. X., Atch 3.)

DS also stated that she attended cadet counseling with PM once, stating:

> . . . I went to Cadet Counseling and met with her once . . . I can't remember her last name; I think it was [PM]. And she was like, "Well, if you continue, this could look bad, because they could say that you have a mental health issue, and you may not be, you know, be able to be commissioned." So she recommended that I don't continue counseling. And so I didn't go any further with that..

[3] At the time, SP's initials were SH. Cadet SH is now CDR SP.

(Id.)

DS stated that later, in April-May 1997, SP told her that Appellant was facing a court-martial for raping a freshman cadet. As a result, DS decided to come forward with her allegation. (Id.) She stated that she reported the alleged assault to LT GS, a legal officer on staff at the Academy, and that LT GS took her statement and said he would "add this to the file."

DS further told CGIS that in April-May 1997, Appellant came by her room and told her that he was wrong for what had happened and asked for her forgiveness. Appellant was in the middle of proceedings regarding the alleged assault against a freshman cadet. DS said she understood that he would be discharged and not allowed to be commissioned. (Id.) Specifically, she said, "And . . . the statement that was told to me . . . from, you know, through friends, is that, he was told, that they were told he never be allowed to become an officer in any of the military services. That there was going to be something in his DD-214. And I was like, I was like okay, he, you know . . . "Good, it's closed." (Id. at App. Ex. X, Atch 3.)

DS told CGIS that in November-December 1997, she received a phone call from Appellant to congratulate her on the results of the Marine Corps Marathon. During this call, she became aware that Appellant was in Air Force officer training. DS stated that upon learning that Appellant was potentially going to be allowed to

commission in the Air Force, she returned to the USCGA legal office to check on the status of her allegation against Appellant.

There, she met with LT GS and CAPT TM. Her statement to CGIS is transcribed as follows relating to that meeting:

> DS: Umm . . . and so I went back to the same guy . . . I had gone back to the same Lieutenant, Lieutenant [GS]. And so I got called back to Legal, and that time it was him, as well as an O-6, Captain . . . I want to say it was Markum, I'm not 100 percent sure on that . . . name, who was sitting across the desk from me. And they . . . let me know, that, they couldn't find my statement. And that they had, you know, were looking into what . . .you know the conditions of why he was allowed to go to . . . you know, OCI . . . and . . .
>
> CGIS: So this, this was after you got that phone call?
>
> DS: This is after I got that phone call.
>
> CGIS: Okay . . . Okay, I'm sorry.
>
> DS: Yeah, so, yeah . . .so I went back on that, in November. So after I got that phone call . . . umm . . . is when that happened. And . . . I met with them a few times, and . . . you know I had written out my statement, and they said "Well, we'll keep this statement, you know, but really need to think about, if you want to go forward with this . . . because . . . this isn't going to be easy. You know . . .if you go forward now, this is going to hurt you, you know, being a cadet, on your studies. How much time this is going to take. You probably won't graduate on time . . .
>
> CGIS: This is after you got the phone call, from him?
>
> DS: Yes.

CGIS: And you returned to, back to Legal . . .

DS: I went back to Legal. And they said, "You won't graduate on time. So you probably won't be commissionable. You know, this is going to take up so much time."

CGIS: Tell me how you felt . . .when they . . .

DS: "I was just like . . . you know . . . it was . . . it was just like, "Okay, I'm not going to be doing a Legal action? Is basically how I felt. And so I was kinda like, okay, "I don't go forward now, I'll wait until I am commissioned. Well, you know, what . . . what happens then?" And they were like, "Well this will hold you up going to your ship. And that's gonna, you know, affect you. You know, cause, we're not . . . you're not going to go to your ship and say what happened. So . . . you'd, you know, you're not going to, you know, get that done on time, you know, be able to get qualified on time . . . and that's going to, you know, affect you and how your ship is going to feel about you. Because your ship is expecting, you know, an Ensign . . . and you're, you're not going to be there." And so I was like, "Okay . . . and . . . I was like, well, what if I go forward later?" "Well you only have 3 years to go forward. And you, you know, you need to work on graduating. You need to worry about going to your ship and qualifying. "and so . . . I was, like, what is my timeframe? And they were like, "You have 3 years." And so, that put it to, into February of 2000 . . . you're still on your ship."

I – Uh-huh.

DS: And . . .and, again I think it was Captain Markum, and he did, he did share with me, "Well, if you do feel that you need to go forward . . . I'm going to PACAREA, and you can come to PACAREA, and you can report it to me." And I was like, "Okay . . . "

> CGIS: So when you left that office . . . what were you thinking? Or feeling?
>
> DS: "That I need to worry about . . . graduating. I need to worry about getting to my ship and qualifying . . . and . . . that . . . the don't . . . they're not after . . . they don't care about, you know, going . . . you know, trying to do something, you know . . . trying to get . . . you . . .

(Id.)

On the weekend of the Martin Luther King, Jr. holiday in January 1998, DS overheard a friend being raped at her friend's house. (Id.) As a result, she provided a statement to CGIS detailing her description of those events and later testified as a witness in either a court-martial or disciplinary hearing against Cadet SM. (Id.)

b. DS's Statement as a Cadet regarding her allegation against Appellant

While still a cadet at the CGA, DS provided a written statement regarding Appellant's actions in 1997. (App. Ex. X, Atch 4.) The header of that statement refers to DS with the rank "1/c." This rank refers to her class at the CGA. In the statement, DS refers to herself as a "4/c" during the fall of 1994." (Id.) Since her rank was "4/c" during the school year of Fall 1994-Spring 1995, her rank of "1/c" in the instant statement implies this statement was taken sometime during the Fall 1997-Spring 1998 school year.

The statement provides details of Appellant's rape of DS. DS also wrote that she told SP about the incident, as well as the following additional details:

> At that time I told her that I did not want to take any action because of the treatment other females had received after having come forward about being raped. In addition, at that time I did not even admit to myself that the penetration itself was rape. I kept trying to say that it was anything else because he had withdrawn before ejaculation. I also had to deny that I allowed myself to become a victim of rape for my own sanity.
>
> I also talked to one of the cadet counselors, [PM], about the incident. I had used [Appellant's] name, at least his first name. I said that I did not want to come forward with an investigation due to the treatment of the Corps and the Administration to the females who do come forward with having been raped.

(Id.)

c. DS's Statement as a witness against Cadet SM

As a witness against Cadet SM, DS provided a four-page single spaced statement on 21 January 1998 detailing what she heard and witnessed relating to that case. (App. Ex. X, Atch 8.) On the third page in the middle of a paragraph, DS wrote, "I was in a state halfway between being fully awake and dreaming. I remember my dream of [Cadet SM] and [the victim] and then the dream turning into me and the guy who raped me last year." (Id.)

d. CAPT TM Testimony, Article 32 Hearing

At Appellant's Article 32 hearing, then-CAPT, now Mr., TM testified that then-LT GS did not graduate from law school until May 1997, went to various trainings throughout the end of 1997, and was not fully functioning member of his office until the beginning of 1998. (App. Ex. XIII.)[4]

Regarding PM, CAPT TM stated that she had "very little tolerance for sexual misconduct" and was part of a group on campus that was at the forefront of ridding sexual assault on college campuses. He believed she would have supported counseling for DS and would have expected PM to come to his office to discuss pursuing the perpetrator. He could not, however, recall if PM had come to his office for this particular case. (Id.)

CAPT TM also testified about his personal efforts to curb issues related to curfew and sexual activity in the dorms. (Id.) He stated it was "highly unlikely" that he would tell someone to not go forward with a case. In fact, he candidly admitted that he was looking for a sexual assault case to go forward since he was completing for flag and "wanted to be the first legal office to court-martial a cadet for sexual assault." (Id.)

[4] CAPT TM's full testimony, as well as the entire Article 32 proceeding, is included as an audio file on Appellate Exhibit XIII.

Regarding this case in particular, CAPT TM testified that he found out about DS and the allegation through her statement in the Cadet SM case that was given in early 1998. He was sure he had never heard of the case in 1997. (Id.) He stated that once he saw DS's statement and that she mentioned being a victim the prior year, he was confused as to why he had never heard of the case before and that either he or the commandant of cadets had DS come to his office soon after. (Id.)

CAPT TM stated that meeting took place sometime between March and May of 1998. He was sure of the dates because at the end of the conversation, he and DS spoke about their next assignments, both of which would be in the Bay area. (Id.) He said that since cadets get their assignments on billet night, which is held in early March, and DS graduated on 20 May 1998, the meeting had to have been between those times.

CAPT TM was adamant that DS did not want to go forward with the accusations at that meeting. Specifically, when asked by Appellant's civilian trial defense counsel if DS wanted to pursue the claim, CAPT TM affirmatively stated, "No, she did not." (Id.) He continued, "I told her that if she changed her mind and decided to pursue this investigation, or these allegations, that I was going to make a copy of the [Cadet SM] file, including her statement, and I would have it in my office in Alameda and I would have it for five years." CAPT TM denied attempting to talk DS out of reporting.

When asked if he thought DS should have gone forward with the case, CAPT TM stated, "There were issues, challenges, with pursuing the investigations." (Id.) He stated that Appellant had left CGA in August 1997 and that, "As I understood the rules for jurisdiction over a person . . . once he got his discharge papers, the military lost jurisdiction, so that would have been a challenge, but . . . you know, at least I thought there was, ways that we might be able to go after the perpetrator if she wanted to pursue it. But she didn't. So I told her OK, if you change your mind within five years, we'll see what we can do." (Id.)

When asked if he had pursued going to the civilian authorities to pursue Appellant since he was no longer in the Coast Guard and outside military jurisdiction, CAPT TM explained that there was a question of whether the dorms on the academy were strictly federal jurisdiction, which would have negated state civilian jurisdiction, or was concurrent jurisdiction. Because of DS's unwillingness to go forward, however, CAPT TM never pursued the issue. When asked by Appellant's trial defense counsel, "If she had wanted you to explore that option, would you have done some research," CAPT TM immediately responded, "Absolutely. I wouldn't have kept her file for five years unless I thought there was something there." (Id.)

CAPT TM stated that he only met with DS once but that he ended up keeping her file for "quite a bit longer" than five years. However, he stated that she never again contacted him. When Appellant's trial defense counsel again asked, "If she had wanted help proceeding, you would have provided it," CAPT TM again responded, "Absolutely," adding, "She never communicated to me that she wanted to go forward." (Id.)

CAPT TM next explained that he never reported this allegation to CGIS because he learned of the allegation from CGIS' own report and DS's statement to CGIS. When asked why he did not go to CGIS to have them do more investigating, he responded as follows:

> Well, I don't remember, but it would have been pointless since he was a civilian and we didn't have jurisdiction over him and she wasn't . . . I mean, [DS] was not chompin' at the bit to pursue it, so that's why I told her if you change your mind give me a call, I'll keep a copy of the file so we have a place to start from. And, that's how it ended. I mean, if you don't have a willing victim that's willing to pursue it, you know, you can't really ride into windmills by yourself.

(Id.)

Regarding his "chomping at the bit" statement, Appellant's civilian trial defense counsel followed up by asking, "You just mentioned she wasn't 'chomping at the bit,' did that mean, does that mean that she wanted to go forward sort of unenthusiastically, or . . . or did she not want to go forward at all? CAPT

TM responded immediately, "My recollection was that she wasn't interested in going forward at all." (Id.)

e. Declaration of CDR SP, Article 32 Report

CDR SP, then Ms. SH, provided a declaration which became PHO Ex. 15 in the Article 32 report. (*See* App. Ex. VIII at 14.) In that declaration, CDR SP acknowledged attending church occasionally at CGA, but stated that she did not remember ever attending church with DS or DS ever telling her about an alleged rape. (Id. at 18.)

f. Appellant's Unsworn Statement, Article 32 Hearing

At his Article 32 hearing, Appellant made an unsworn statement where he denied ever having sex with DS, ever going to DS's dorm room to apologize for anything, and ever contacting DS in any way after he left CGA in the summer of 1997. (App. Ex. XIII.)

g. Appellant Evidence and Witnesses, Article 32 Hearing

At his Article 32 hearing, Appellant called multiple witnesses and entered 22 declarations that spoke to one or more of the following: (1) good military character of Appellant; (2) character for peacefulness of Appellant; (3) character for truthfulness of Appellant; (4) general character of DS; (5) character for truthfulness of DS; or (6) impeachment of DS's recitation of the facts. (*See* App. Ex VIII at 14-15, 21-22.) Three such witnesses, each either former or current Air Force

commanders, testified to their relationship with Appellant and his character for truthfulness. (App. Ex. XIII.)

h. PM and Availability of Appellant's Counsel

On 29 December 2015, counsel for the United States were "prepared to proceed with the Article 32 Hearing." (App. Ex. IV.) However, Appellant's civilian trial defense counsel, one with whom he had established an attorney-client relationship with on 19 November 2015, was not available until over three months later on 19 April 2016. The Article 32 hearing took place on that very day.

Appellant did not submit his first discovery request until 3 February 2016, nearly three months after Appellant's civilian defense counsel was retained and nearly six weeks after the United States was prepared to proceed with the Article 32. (App. Ex. I, Atch 8.) On 17 March 2016, the defense was provided a list of witness contact information; the list did not include PM's information. PM sadly passed away on 23 March 2016. (App. Ex. X, Atch 10.)

Additional facts relating to this case are set forth in the argument below.

SUMMARY OF ARGUMENT

The United States respectfully requests this Court deny Appellant's Petition for Grant of Review, as he has failed to meet his burden of establishing good case for review as required by Rule 21 of this Honorable Court's Rules of Practice and

Procedure. Appellant has failed to establish any of the bases in Rule 21(b)(5) for granting his petition.

AFCCA was correct when it granted the United States' appeal under Article 62, UCMJ, and concluded that "the military judge abused his discretion in finding actual prejudice." AFCCA was also correct in finding certain findings of fact by the military judge to be clearly erroneous.

Appellant's argument to prolong this interlocutory appeal before this Court is unpersuasive, as it merely repeats and relies upon the flawed analysis of the military judge in his erroneous ruling. Accordingly, this Court should deny Appellant's petition for grant of review and affirm AFCCA's decision to reverse the military judge's ruling and return this case to trial where it belongs. Simply put, Appellant's due process rights will be adequately and appropriately protected during the normal course of the appellate process provided in Articles 66 and 67, UCMJ, and there is no reason presently before the Court to interrupt the forthcoming trial.

ARGUMENT

AFCCA CORRECTLY CONCLUDED THE MILITARY JUDGE ABUSED HIS DISCRETION IN DISMISSING THE CHARGE AND SPECIFICATION WITH PREJUDICE BASED ON A DUE PROCESS VIOLATION OF THE FIFTH AMENDMENT.

Standard of Review

On an interlocutory appeal under Article 62, UCMJ, this Court may act only with respect to matters of law. Article 62, UCMJ. A military judge's ruling on a motion to dismiss is reviewed for an abuse of discretion. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside 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).

Law

In its opinion of this case, AFCCA stated:

> An accused's primary protection against unreasonable delay by the government in bringing charges is the statute of limitations. United States v. Marion, 404 U.S. 307, 322 (1971). Still, the Due Process Clause of the Fifth Amendment may also provide protection against onerous pre-preferral delay. Id. But to prevail on a Fifth Amendment due process claim predicated on pre-preferral delay, an accused must show: (1) "egregious or intentional tactical delay" on the part of the government; and (2) that he suffered actual prejudice as a result of the delay. United States v. Reed, 41 M.J. 449, 452 (C.A.A.F. 1995).

(*See* App. Appendix A at 5.)

Regarding "actual prejudice," AFCCA stated:

> In meeting the burden to prove actual prejudice, speculation is not sufficient. Reed, 41 M.J. at 452. The

> "possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence lost" is not sufficient to demonstrate that an accused cannot receive a fair trial. Marion, 404 U.S. at 326. Furthermore, "conclusory allegations of prejudice, otherwise unsupported in the record, do not constitute valid grounds for dismissal." Reed, 41 M.J. at 452 (quoting United States v. Comosona, 614 F.2d 695, 697 (10th Cir. 1980)). Prejudice may be demonstrated by showing: "(1) the actual loss of a witness, as well as 'the substance of their testimony and the efforts made to locate them,' or (2) the loss of physical evidence." Id. (quoting United States v. Tousant, 619 F.2d 810 (9th Cir. 1980)) (internal citations omitted). Finally, the prejudice must be a substantial prejudice to an [Appellant's] rights to a fair trial to the point where it "would impair the ability to mount an effective defense." Reed, 41 M.J. at 452 (quoting Lovasco, 431 U.S. at 795 n.17).

(Id.)

Analysis

a. Appellant's Argument on "Egregious Delay"

At trial, the military judge ruled that the first prong of Reed was met in this case by finding an "egregious delay" on the part of the government.[5] (*See* App. Appendix B.) As part of its Article 62 appeal, the government argued that the military judge abused his discretion by finding an "egregious delay" on the part of the government.[6] AFCCA's opinion did not address whether an "egregious delay"

[5] As AFCCA correctly noted in its opinion, "both parties concede that there was no intentional delay." (*See* App. Appendix A.)

[6] The government also questioned the correct test for the first prong of Reed based on prior case law from this Court, various federal circuits and states, and the

was actually present in this case.[7] Instead, AFCCA looked to the second prong of Reed and granted the appeal "by finding a lack of actual prejudice."

Thus, the second prong of the Reed test is what ultimately proved fatal to Appellant's case at AFCCA and is the prong directly at issue before this Court. Yet, Appellant spends more time in his brief attempting to convince this Court that the military judge was correct in finding "egregious delay" than in analyzing the actual issue in this case – whether AFCCA erred in finding there was no "actual prejudice" in this case.[8]

While the government continues to believe the military judge erred in finding an "egregious delay" in this case, AFCCA did not grant the Article 62 appeal on that issue, which focused on prong one of the Reed test. Instead, the issue before this Court, as stated by Appellant, is whether AFCCA erred in finding

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Supreme Court. The argument centered on whether Reed provided definitive guidance as to what type of conduct by the government an accused is burdened with proving to be successful. (*See* Gov. Article 62 Br. at 30-57.)

[7] While AFCCA did opine as to the broader government argument (noted in footnote 5) as to what test should be used to determine whether prong one was met, AFCCA did not state whether it agreed with the military judge's conclusion that an "egregious delay" occurred in this case. While Appellant states in this brief that "The Air Force CCA did not take issue with [the military judge's] finding" regarding "egregious delay," they also did not ratify it. (*See* App. Br. at 15.)

[8] Appellant's "The delay was egregious" section begins on page 15 and ends on page 20, accounting for nearly six pages. His "[Appellant] suffered actual prejudice" section, the section which deals with the actual issue before this Court, begins on page 20 and ends on page 24, accounting for just over four pages of his 25-page brief.

that Appellant suffered no actual prejudice in this case, the second prong of the Reed test. Thus, this brief will not address Appellant's over six-page argument regarding whether the delay in this case was "egregious."[9]

b. AFCCA correctly found that the military judge abused his discretion in finding actual prejudice; here, Appellant has suffered no actual prejudice

In his brief to this Court, Appellant retreads the same unsuccessful arguments he made before AFCCA and the same flawed analysis made by the military judge at trial in an attempt to show he was actually prejudiced in this case. However, as shown below, AFCCA correctly found that Appellant suffered no actual prejudice in this case and correctly found the military judge abused his discretion by finding actual prejudice.

As noted by the Supreme Court, actual prejudice is a question of whether the accused is able "to mount an effective defense" as a result of the delay. Lovasco, 431 U.S. at 795 n. 17; *see* United States v. Vogan, 35 M.J. 32, 34 (C.M.A. 1992). Notably, in Lovasco, the Supreme Court ruled no due process violations in that

[9] Should this Court find analysis of the first prong of Reed relevant to Appellant's issue regarding AFCCA's finding of "no actual prejudice" in his case, the government stands on its 16-page analysis disputing the military judge's "egregious delay" finding within its original Article 62 brief before AFCCA. (*See* Gov. Article 62 Br. at 57-72.)

case even if the appellant's "defense might have been somewhat prejudiced by the lapse of time." Id. at 796.

Here, Appellant failed to prove he was unable to "mount an effective defense" as required by this Court and the Supreme Court. The evidence shows, in fact, he was able to mount a highly "effective defense" to the charges, particularly at his Article 32 hearing. Yet, only a few months later, Appellant came to his trial claiming he was "prejudiced by the egregious delay." (App. Ex. X at 6.) In his motion at trial, Appellant only cited three grounds for prejudice: (1) the death of PM, (2) the fading memories of witnesses, and (3) Appellant's family and professional situations since being relieved of command in December 2014. (App. Ex. X at 6.)

In a ruling that failed to mention, let alone analyze, the breadth of evidence presented by Appellant in his defense at the Article 32, the military judge found Appellant was actually prejudiced, citing (1) the death of PM and (2) the "diminished" memory of CAPT TM as his only reasons for finding "actual prejudice." (*See* App. Appendix B.)

In its opinion, AFCCA analyzed what the substance of PM's trial testimony would have been as well as Appellant's ability to mount an effective defense without that trial testimony. AFCCA found PM's testimony speculative at best and

that Appellant was not denied the ability to mount an effective defense. (*See* App. Appendix A at 12.)

Now, Appellant claims that AFCCA erred since PM's death "constitutes actual prejudice" and because AFCCA "failed to acknowledge the loss of other evidence." (App. Br. at 20, 23.) He also claims he suffered actual prejudice "due to the impact on the public's perception of the fairness and integrity of the military justice system." (Id.) However, a full review of this case, including evidence the military judge failed to address in his ruling, shows the delay did not cause substantial prejudice to Appellant's rights to a fair trial. *See* Marion, 404 U.S. at 324.

i. PM

The death of a witness alone is not enough to show actual prejudice. As this Court stated in Reed, "Speculation by the defendant is not sufficient . . . [t]he defense may establish prejudice by showing: (1) the actual loss of a witness, as well as 'the substance of their testimony and the efforts made to locate them,' United States v. Tousant, 619 F.2d 810, 814 P19 (9th Cir. 1980); or (2) the loss of physical evidence, *see, e.g.*, United States v. Dennis, 625 F.2d 782, 794 P18 (8th Cir. 1980); Tousant, 619 F.2d at 814 P19; United States v. Comosona, 614 F.2d 695, 697 P7 (10th Cir. 1980) ("Conclusory allegations of prejudice, otherwise

unsupported in the record, do not constitute valid grounds for dismissal")." Reed, 41 M.J. at 452.

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

From a beginning standpoint, the delay from 1997 to 2016 is irrelevant for the purposes of PM's death. Had she died sometime during those years, perhaps the military judge's line of reasoning would be more sound. However, she died in 2016, after the investigation became active in 2014.

Thus, her death is akin to if the instant rape occurred in 2014 and was immediately reported, but then PM died before the Article 32 in 2016, or, in the alternative, if DS's report had been investigated in 1997 but then, prior to an Article 32 in either 1998 or 1999, PM suddenly died. The simple fact is she will not be able to testify at trial because she died, but her inability to testify at trial, namely her death, had no correlation or nexus to the delay from 1997 to 2016. Based on her obituary, PM was only 60 years old when she passed away and did not appear to have suffered from any terminal disease or other condition that made it apparent that her death was anything other than a sudden unforeseeable and unfortunate passing.

Notably, the military judge during the motion seemed to attempt to explain the death of two witnesses in Lovasco away by saying that when those witnesses died, the authorities were still investigating, looking for other witnesses, and

"actually moving the case forward." (R. at 82.) Yet, when PM died, the same exact circumstances were present.

However, the military judge in his ruling unreasonably raised the government's culpability by stating, "That PM passed due to an egregious delay on behalf of the government now deprives the accused of a fundamentally fair trial." (Id.) Of course, the military judge failed to state how PM's death was "due to" anything on the part of the government, let alone a supposed "egregious delay."

Yet, to the extent that all parties' inability to gather information from PM due to her passing can be blamed on anyone, that blame can just as easily be placed at the feet of Appellant and his counsel as it can on the government. On 29 December 2015, counsel for the United States were "prepared to proceed with the Article 32 Hearing." (App. Ex. IV.) However, Appellant's civilian trial defense counsel was not available until over three months later on 19 April 2016. The Article 32 hearing took place on that very day. Had Appellant's counsel not needed a defense delay of three months, a delay which was based on availability, PM would have been able to appear and this issue would have been averted.

That said, the United States places no fault on either Appellant or his counsel insomuch as there likewise was no fault by the United States in PM passing away before the Article 32 or Appellant's trial. The timeline is pointed out

simply to show the pure happenstance of PM's passing and how it is purely unrelated to any delay from 1998 until 2016.

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

Both Appellant and the military judge believe the death of PM creates "actual prejudice" to Appellant's case, but for different reasons. Appellant states that PM would have "critically impeached DS." (App. Ex. X at 6; *see also* App. Br. at 20.) However, as AFCCA correctly pointed out in its opinion, such a statement is pure speculation. No one, including the United States, can say with any certainty how PM would have testified about any conversation between her and DS, assuming, of course, she would have remembered the conversation at all. This is the sort of speculation that Lovasco and all the cases since expressly prohibit.

The military judge found her death created "actual prejudice" because "the defense was denied [PM's contact information], especially after asking for the contact information for PM multiple times before her death." (App. Ex. XV at 17.) In the same paragraph, the military judge noted that PM's death meant that no parties could "ask PM whether D.S. sought counseling from her at the USCGA . . . whether D.S. claimed she was raped or simply assaulted . . .whether PM discouraged D.S. from proceeding forward with her case . . . and how impacted DS was by the alleged incident." This statement clearly reinforces that Appellant's

argument above, that PM would have "critically impeached DS" is based purely on impermissible speculation.

Yet, the military judge's finding is speculative as well, but in a different fashion. While the military judge was correct that Appellant did not receive PM's contact information before she died, he, just like all other parties, has no idea what information would have been discovered if she had been contacted prior to her death. For all anyone knew, PM could have said, "Yes, usually I push cadets to press with sexual assault allegations, as CAPT TM believes I would, but in this case, with DS's particular situation, I advised her to not pursue it."

The simple fact remains neither the military judge nor Appellant can say without vast speculation what substance and impact PM's testimony would have had. As AFCCA correctly opined, "[i]t is inherently an exercise in speculation to determine whether PM would have recalled, credited, or rebutted the details of the counseling session as provided by DS." (*See* App. Appendix A at 8.) That is not "actual prejudice" and thus must fail.

Moreover, even if PM would have remembered the conversation and denied discouraging the victim, the exact scenario suggested by both the military judge and Appellant, such testimony would not necessarily conflict with that of DS. First, contrary to Appellant's claim otherwise, DS never alleged that PM "discouraged" her or even used the word "discourage" in her statement. What DS

recounted of her meeting was PM involved PM explaining to DS the practical effects of seeking counseling for rape (not pursuing a rape charge), i.e., her potential discharge from the academy. The same is true for DS's conversations with CAPT TM which consisted of him explaining to her the anticipated delays to her next assignment if she pursued a rape allegation. The conversations DS recalled could have happened just as she recalled them, yet not with any intent by CAPT TM or PM to "discourage" her but instead to prepare her for the harsh realities of the situation.[10]

Accordingly, it is possible that if PM recalled her conversation with the victim, that she would acknowledge making the statements the victim recalled, but with the intent to prepare her rather than to "discourage" her. This illustrates that the assumed prejudice erroneously suggested by both Appellant and the military judge that PM's testimony would have undermined the victim's credibility and been helpful to the defense is purely speculative and insufficient to support finding a Fifth Amendment violation.[11]

[10] Notably, these events took place years before the advent of Special Victims' Counsel, Article 6(b) rights, and expedited transfers.

[11] Separately in his ruling, the judge also states, "The substance of her testimony, as one of the two main witness with whom DS talked back in 1998, is critical to determine the action." Yet, as discussed above, any determination of the "substance" of her testimony is purely speculative.

Finally, as noted below and by AFCCA in its opinion, PM's death did not foreclose the ability of the defense counsel to articulate a motive to lie or potential inconsistent statements from DS.

ii. The "diminished" memory of witnesses

As Appellant now complains about "faded" memories of witnesses, the military judge claimed in his ruling that "CAPT TM's memory about the specific facts of this case has, by his own admission, diminished." However, the military judge wholly failed to explain what "specific facts" have diminished from CAPT TM's memory. (App. Ex. XV at 17.) In his findings of fact, the military judge only stated, "CAPT TM cannot remember everything about this case." (Id. at 2.)

This blanket "memories will dim" analysis, without more specifics of what has diminished, is the exact type of speculation that the Supreme Court in Marion found is "not in itself enough to demonstrate that the defendant cannot receive a fair trial." Marion, 404 U.S. at 308.

Furthermore, while he may not "remember everything about this case," CAPT TM's testimony at the Article 32 hearing showed that he remembered a remarkably great deal about this case, even if it was some 19 years ago. The military judge's characterization of CAPT TM's memory and his testimony at the Article 32 hearing as "diminished" is a remarkable reach, but consistent with the military judge's attack against CAPT TM throughout his ruling. If anything,

however, any lost memories from CAPT TM or any other government witness would benefit Appellant as he would be able to easily highlight such vagueness and attack their reliability.

In similar fashion, Appellant in his motion at trial stated, "Even witnesses who are available will suffer from fading memories of events that happened so long ago."[12] (App. Ex. X at 6.) Such claims are clearly insufficient to support a claim of "actual prejudice."

iii. Appellant has more than sufficient ability to "mount an effective defense"

a. Article 32 Evidence

Contrary to Appellant's claims and the military judge's erroneous findings, Appellant has more than sufficient ability to "mount an effective defense." As previously discussed, this ability was first shown at the Article 32 when he called multiple witnesses and entered 22 declarations that spoke to one or more of the following: (1) good military character of Appellant; (2) character for peacefulness of Appellant; (3) character for truthfulness of Appellant; (4) general character of DS; (5) character for truthfulness of DS; or (6) impeachment of DS's recitation of

[12] Further evidence of Appellant's inability to provide concrete, "actual" prejudice regarding witnesses is shown by his civilian trial defense counsel's response to the military judge's question, "How many witnesses have you been unable to find?" (R at 92.) Beginning her response with, "Hard question," Appellant's counsel was unable to provide names of witnesses, let alone any substance to any anticipated testimony.

the facts. (*See* App. Ex VIII at 14-15, 21-22.) Three such witnesses, each either former or current Air Force commanders, testified to their relationship with Appellant and his character for truthfulness. Such a plethora of evidence certainly goes against Appellant complaint that he is unable to identify "other fact witnesses . . . and character witnesses who are not unknown and unavailable." (App. Br. at 23.)

b. Other witness accounts

In his ruling, the military judge stated, "The substance of [PM's] testimony, as one of the two main witnesses with whom D.S. talked back in 1998, is critical to determine the action." While the judge limits his statement here to the year 1998, he still failed to mention two other "main witnesses" with whom DS talked to during this timeframe about her allegations. One of these witnesses is then-LT GS. No evidence was provided by Appellant that he is currently unavailable to testify; in fact, DS even provided a location for him when she said in her statement that "He's actually a . . . Captain at the Academy still . . . ." (App. Ex. X at 19.) In terms of potential witnesses Appellant could use to potentially attack DS's credibility and version of events, LT GS, being the first legal officer DS claimed to have reported this allegation, would seem to be a highly important witness. Yet, in the face of this, and even though DS mentioned him multiple times in her written

statement and CAPT TM testified about him extensively at the Article 32, LT GS's name appears nowhere in the military judge's ruling.

CDR SP, the former Ms. SH, provided a declaration that was presented ***by Appellant*** during the Article 32 hearing. It stated that while she attended church occasionally at CGA, she did not remember ever attending church with DS or DS ever telling her about an alleged rape. (*See* App. Ex. VIII at 14, 18.) This declaration is particularly significant as it shows the notion of "fading memories" is something that affects the prosecution of this case and is something from which Appellant actually stands to benefit. Much like LT GS, however, neither CDR SP's current or former name is mentioned at all in the military judge's ruling.

The military judge's omission of these two key witnesses, each of whom provide Appellant with the ability to attack DS's credibility and version of events during that timeframe, considerably lessens the "critical" impact the military judge placed on the potential yet speculative testimony of PM. Such a blow to his ultimate conclusion is also notable, especially considering his complete omission of both of them from his ruling.

Finally, AFCCA's opinion specifically noted that Appellant had "at least two witnesses," specifically naming both CAPT TM and CDR SP, "who can impeach DS's credibility." (*See* App. Appendix A at 12.)

c. Other avenues to attack DS

Besides the witnesses and evidence noted above, Appellant has multiple other theories to attack DS and her allegation. In fact, the military judge himself outlined an entire defense theory of motivation of DS to come forward in 2014 with the rape allegation in his ruling. There, he stated theories of whether "D.S. has an MRE 608(c) motive to fabricate to obtain a better disability rating with the VA when she went there in 2014 to report this incident to them, and whether DS may have asserted to the VA that she was told by [CAPT] TM and PM not to go forward in an effort to explain, for the purposes of increased VA benefits, why her rape accusation was never adjudicated." (App. Ex. XV at 16.) AFCCA also specifically noted this "ability to raise the VA disability benefits as a motive to fabricate." (*See* App. Appendix A at 12.)

The military judge also specifically noted another piece of evidence in the "motive to fabricate" theory when he found, as an "essential finding of fact," that DS's report was made to the VA in January 2014 "after D.S. had been passed over for promotion." (Id. at 4.) In fact, Appellant's evidence of DS's motive to fabricate and of bias is substantially greater than it ever could have been in 1998. Whether the career implications of her being passed over multiple times throughout her years and receiving a subpar officer evaluation, to her potentially reporting this incident to the VA for a better disability rating, such theories did not

exist at all in 1998. In fact, based on the Article 32 evidence, it appears the further investigation beginning in 2014 unearthed witnesses who contradict DS and call into question both her credibility and character, all of which are an advantage to Appellant.

On a final note, both Appellant and the military judge mentioned on multiple occasions the fact that there was no DNA recovered in 1997, no tests were done during that time, and no surveillance camera footage was acquired.[13] In his ruling, the military judge stated, "The parties agreed that no physical, scientific, or medical evidence existed in 1998 to support D.S.'s allegations, and that remains true today." (App. Ex. XV at 18.) Yet, this would have been true whether the case went forward now or back in 1998. Thus, 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 Appellant.

Again, Appellant was able at his Article 32 hearing to present a robust defense**.** Appellant has clearly not been prejudiced, actually or otherwise, by the delay and is still clearly able to "mount an effective defense" on his behalf. AFCCA certainly did not err in finding as much.

[13] Appellant mentions it again to this Court in his brief ("forensic evidence from the ejaculation she describes in the written statements"). (App. Br. at 23.)

c. ***AFCCA correctly found that the military judge's finding of fact that DS claimed in 2014 that PM told her not to pursue the rape allegation was clearly erroneous.***

Finally, AFCCA's conclusion that the military judge's finding of fact that DS claimed in her 2014 interview with CGIS that PM told her not to pursue the rape allegation was unsupported by the record and clearly erroneous is correct. DS's interview plainly shows DS stated, "So she recommended that I don't continue counseling. And so I didn't go any further with that." Appellant even concedes such a point, stating, "while accurate that the 2014 videotaped statement mentions counseling rather than an investigation . . . ." (App. Br. at 12.)

CONCLUSION

This Court has stated that "[u]nder some circumstances extensive delay in preferring charges might justify a due-process claim by an accused; but clearly such situations are very unusual." United States v. McGraner, 13 M.J. 408, 413 (C.M.A. 1982). This is not that "very unusual" case. Appellant faced the burden to prove all facets of this issue to be successful on his motion. Appellant failed to meet that burden at trial, and the military judge committed factual and legal error when he granted Appellant's motion to dismiss. AFCCA properly corrected the military judge's abuse of discretion by granting the government's Article 62 appeal and finding a lack of actual prejudice. AFCCA did not err in making that

determination. Appellant has failed to show good cause for this Court to grant review, and this Court should deny his petition.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's petition.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate defense counsel, and to the Appellate Defense Division on 17 July 2017.

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