IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Staff Sergeant (E-6) **DANIEL J. VALDEZ** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20220274 USCA Dkt. No. 26-0122/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Granted Issues

I. WHAT IS THE PROPER STANDARD OF REVIEW FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES WHEN REVIEWING THE DECISION OF A COURT OF CRIMINAL APPEALS IN GRANTING OR DENYING RELIEF FOR EXCESSIVE POST-TRIAL DELAY USING ITS POWER UNDER ARTICLE 66(d)(2), UCMJ?

II. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR 952 DAYS OF POST-TRIAL DELAY WHERE THE GOVERNMENT AGREED APPELLANT'S SENTENCE SHOULD BE SET ASIDE.[1]

[1] As the issues are closely related, Appellant will answer them in a consolidated manner.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

On May 19, 2022, a special court-martial consisting of both enlisted and officer members convicted Appellant, Staff Sergeant Daniel J. Valdez, contrary to his pleas, of one specification of absence without leave, one specification of disrespect toward a superior commissioned officer, one specification of disrespect toward a superior noncommissioned officer, and one specification of battery upon a spouse, in violation of Articles 86, 89, 91, and 128, Uniform Code of Military Justice 10 U.S.C. §§ 886, 889, 891, and 928 (2018) [UCMJ].[2] (JA 9). On May 20, 2022, the military judge sentenced Appellant to be reduced to the grade of E–5 and to perform hard labor without confinement for thirty days. (JA 10). On June 6, 2022, the convening authority approved the sentence but took no action on the

[2] Appellant was acquitted of two specifications of failing to report to his assigned place of duty, one specification of disrespect towards a superior commissioned officer, and one specification of disobeying a superior commissioned officer, in violation of Articles 86, 89, and 90, UCMJ.

findings. (JA 12). Six months later, the military judge entered judgment on December 22, 2022. (JA 11).

On December 27, 2024—736 days after the entry of judgment and affirmative appeal by SSG Valdez pursuant to Article 66(b)(1)—the Army Court of Criminal Appeals (Army Court) docketed Appellant's case. (JA 27, 28). Appellant submitted his brief to the Army Court on March 27, 2025. (JA 71). On April 25, 2025, the government filed its response in which it agreed with Appellant that relief was warranted based on the "extraordinary post-trial delay," and recommended the Army Court set aside Appellant's sentence. (JA 127).

On December 9, 2025, the Army Court summarily affirmed the findings and sentence. *United States v. Valdez*, ARMY 20220274 (A. Ct. Crim. App., Dec. 9, 2025) (JA 2).[3] This Court granted Appellant's petition for grant of review on March 25, 2026, and ordered briefing on the above issues pursuant to Rule 25. (JA 1).

Summary of Argument

The threshold question—left unacknowledged and unanswered by the Army Court—is whether Appellant demonstrated excessive post-trial delay. Appellant did so and the Government agreed. The demonstration of excessive delay is a legal

[3] The Army Court released a corrected decision on December 10, 2025.

determination this Court reviews de novo. This Court should find reversible error in the Army Court's failure to answer the predicate question.

As excessive delay has been demonstrated—a legal question this Court can answer without remand—this Court reviews the Army Court's decision whether to grant or deny relief under an abuse of discretion standard. If a service court fails to place its analysis on the record, it is afforded minimal deference. Here, the Army Court failed to acknowledge the excessive delay, let alone analyze whether relief was warranted. The Army Court abused its discretion when it summarily affirmed Appellant's case.

No matter if this Court finds error in the Army Court's failure to answer the threshold question or error in its omission of analysis, it should grant the relief requested by both parties at the lower court and set aside Appellant's sentence.

Statement of Facts

A. The Government Took 952 Days to Process Appellant's Case.

On May 20, 2022, Appellant was sentenced to a reduction of one grade and 30 days of hard labor without confinement. (JA 10). Appellant's court-martial adjourned the same day. (JA 10). On June 6, 2022, the convening authority took no action on the findings and approved Appellant's sentence. (JA 12).

199 days after the convening authority's action, on December 12, 2022, the military judge entered judgment. (JA 11). 267 days later, on September 15, 2023, the chief of military justice pre-certified the record of trial. (JA 21).

Over a year after pre-certification, on October 18, 2024, the trial judge certified the record. (JA 22). A week later, on October 25, 2024, the court reporter finalized the complete record of trial. (JA 24).

After another month, on November 22, 2024, the deputy staff judge advocate [DSJA] signed a Letter of Lateness. (JA 19–20). In the letter, the DSJA provided multiple excuses as to why the government failed to process Appellant's case for over two years. None of the ten listed reasons for delay (ranging from personnel shortages to training missions) actually mentioned Appellant's specific case.

Based on Appellant's sentence, his case was not eligible for automatic review, and Appellant appealed his case pursuant to Article 66(b)(1), UCMJ. (JA 28). The Army Court finally docketed Appellant's case on December 27, 2024. (JA 27).

The total time between the adjournment of Appellant's court-martial and docketing at the Army Court was 952 days. The total time between entry of judgment and docketing of Appellant's case at the Army Court was 736 days.

B. The Government Agreed the Post-Trial Delay Was "Extraordinary" and Warranted Relief.

At the Army Court, Appellant argued the overall delay of 952 days was a violation of his Due Process right to speedy post-trial processing. (JA 86–95). Appellant also argued the delay post-entry of judgment was excessive and constituted a violation of Article 66(d)(2), UCMJ. (JA 95–97).

The Government concurred that the "extraordinary" post-trial delay in Appellant's case "warrants relief." (JA 127). The Government recommended the Army Court "disapprove appellant's sentence." (JA 127). The Government believed disapproving Appellant's sentence "appropriately addresses the Fort Irwin Office of the Staff Judge Advocate's negligent processing of this case, protects appellant's post-trial rights, and corrects potential public perception of the post-trial delay in this case." (JA 127).

Appellant agreed with the Government that relief was warranted, but maintained that the Army Court should set aside the findings as well as the sentence based on the egregious post-trial delay. (JA 134–36).

C. The Army Court Summarily Affirmed Appellant's Case.

On December 9, 2025, the Army Court issued a summary affirmance of Appellant's case. (JA 2). The Army Court did not address any issue. It did not state whether the delay was excessive; did not acknowledge the parties' agreement

that relief was warranted; and provided no analysis of why it denied Appellant relief.

Granted Issues

I. WHAT IS THE PROPER STANDARD OF REVIEW FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES WHEN REVIEWING THE DECISION OF A COURT OF CRIMINAL APPEALS IN GRANTING OR DENYING RELIEF FOR EXCESSIVE POST-TRIAL DELAY USING ITS POWER UNDER ARTICLE 66(d)(2), UCMJ?

II. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR 952 DAYS OF POST-TRIAL DELAY WHERE THE GOVERNMENT AGREED APPELLANT'S SENTENCE SHOULD BE SET ASIDE.

Standard of Review and Law

A. Excessive Delay Pursuant to Article 66(d)(2).

"A Court of Criminal Appeals 'may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record.'" *United States v. Valentin-Andino,* 85 M.J. 361, 364 (C.A.A.F. 2025) (quoting Article 66(d)(2), UCMJ). "*If* a CCA decides to grant sentencing relief," the relief must be "that which is suitable or right for a particular situation." *Id.* at 363, 365 (emphasis in original).

B. Historical Treatment of Post-Trial Delay Claims.

1. Whether Post-Trial Delay Was Excessive Has Traditionally Been Reviewed De Novo.

Under the previous version of Article 66(c), 10 U.S.C. 866(c) (2012), this Court analyzed post-trial delay through the lens of sentence appropriateness. Claims of excessive post-trial delay were reviewed de novo.

For instance, in *United States v. Tardiff,* this Court analyzed a CCA's ability to provide sentence relief under Article 66(c) for excessive post-trial delay. 57 M.J. 219 (C.A.A.F 2002). In so doing, this Court sought to answer both a question of statutory interpretation and a question of what relief is available for the "excessive post-trial delay." *Id.* at 222–23. Both were questions of law, which this Court then reviewed de novo. *Id.* at 223.

Importantly, *Tardiff* drew a distinction between a CCA's requirement to review for legal error under Article 59(a) and its ability to provide relief for excessive post-trial delay under Article 66(c). *Id.* at 222–24. "Based on the legislative and judicial history of Articles 59(a) and 66(c), we conclude that the power and duty of a Court of Criminal Appeals to review sentence appropriateness under Article 66(c) is separate and distinct from its power and duty to review a sentence for legality under Article 59(a)." *Id.* at 224.

Given this separation, the Court of Criminal Appeals erred when it failed to determine if relief was warranted based on the demonstrated post-trial delay,

"Thus, we hold that, in addition to its determination that no legal error occurred within the meaning of Article 59(a), the court below was required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id.*

Similarly, in *United States v. Moreno,* this Court reviewed the appellant's speedy post-trial processing claims de novo. 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)) (conclusions of law are reviewed under the de novo standard); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003) (speedy trial issues, as conclusions of law, are reviewed de novo). *See also United States v. Ariaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (post-trial delay is a question of law).

2. Once Delay Was Determined, the Service Court's Decision to Grant Relief Was Reviewed for an Abuse of Discretion.

In line with *Tardiff,* the question of whether excessive delay occurred was reviewed de novo under the former Article 66(c), but a service court's decision to award relief under the sentence appropriateness framework was reviewed for an abuse of discretion. *United States v. Gay,* 75 M.J. 264, 268 (C.A.A.F. 2016).

The prior framework allowed service courts to review delay under the umbrella of fairness and thus, the decision of whether the delay warranted relief required an abuse of discretion standard. "The language of Article 66(c) states that

a CCA 'may' approve only that part of a sentence that it finds 'should be approved.' The statute clearly establishes a discretionary standard for sentence appropriateness relief awarded by the Courts of Criminal Appeals." *Id.* (internal quotations omitted) (see *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (recognizing that "the sentence review function of the Courts of Criminal Appeals is highly discretionary"); *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) (*Toohey II*) (analyzing whether the CCA "abused its discretion by denying relief under Article 66(c), UCMJ, for unreasonable post-trial delay.").

C. Article 66(d)(2) Specifically Authorizes a Service Court to Review for Excessive Post-Trial Delay and Award Appropriate Relief.

The Military Justice Act of 2016 created Article 66(d)(2) and the new statute became effective in January 2019.[4] This statutory provision specifically addressed a CCA's ability to provide appropriate relief for excessive post-trial delay, separate and distinct from a CCA's duty to review for sentence appropriateness under Article 66(d)(1) (which largely mirrored the former Article 66(c)). The change was brought about because Congress was likely concerned with the extent to which *Moreno* had been cited (over 1,000 times as of February 2022) and because "post-

[4] National Defense Authorization Act for Fiscal Year 2017, 114 P.L. 328, 130 Stat. 2000 (2016). Implemented by Pub. L. 114–328 effective on Jan. 1, 2019, as designated by the President pursuant to Ex. Ord. No. 13825.

conviction delay remains a serious concern in the military justice system." *United State v. Anderson*, 82 M.J. 82, 90 (C.A.A.F. 2022) (Maggs, J., concurring).

The amendment also brought the service courts' abilities in line with suggestions from the Military Justice Review Group, which recommended the service courts should review cases specifically for "excessive post-trial delays."[5]

D. Interpretation of Article 66(d)(2).

1. Article 66(d)(2)'s Sole Predicate Condition.

Congress maintained a CCA's discretion to award appropriate relief under the revised Article 66(d)(2) through words such as "may" and "appropriate," both of which mirror the discretionary ability of a CCA to conduct sentence appropriateness reviews under the former Article 66(c).

But the new Article 66(d)(2) created a single predicate condition not previously required by Article 66(c): that the accused "demonstrate excessive delay." Once demonstrated, a CCA may provide appropriate relief.

While this Court has addressed the meaning of "appropriate" in regard to the relief a CCA may award for excessive post-trial delay (and whether it must be meaningful), it has not yet addressed what constitutes a "demonstration" of "excessive delay" under Article 66(d)(2). *Valentin-Andino,* 85 M.J. at 363–65.

[5] Military Justice Review Grp., *Report of the Military Justice Review Group* (2015). *See* p. 114.

Defining words within a new statute is a matter of statutory interpretation, an issue this Court reviews de novo. *United States v. Csiti*, 85 M.J. 414, 417 (C.A.A.F. 2025) (citing *United States v. Kohlbeck,* 78 M.J. 326, 330–31 (C.A.A.F. 2019)). "'When Congress acts to amend a statute, [courts must] presume it intends its amendment to have real and substantial effect.'" *Csiti,* 85 M.J. at 418 (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). "'Unless the text of a statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result.'" *Id.* (quoting *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013)).

2. "Unreasonable Delay" As Compared to "Excessive Delay."

Prior to the MJA 2016 amendments, this Court presumed any delay over 120 days from adjournment to action by the convening authority was "facially unreasonable." *Moreno*, 63 M.J. at 142. Though *Moreno* focused on the analysis of a Due Process violation, it set out a bright line rule of when a CCA's duty to review for post-trial delay was "triggered":

> Post-trial review begins by determining whether there is a facially unreasonable delay sufficient to trigger a due process analysis. Prior to *Moreno*, this assessment was made purely on a case-by-case basis. However, in *Moreno*, this Court established definitive time frames that would trigger due process review. Action of the convening authority must be taken within 120 days of the completion of the trial. Appellate review must be completed and a decision rendered within eighteen months of docketing before that court. The Government can rebut the presumption of unreasonable delay by showing the delay was not unreasonable.

Anderson, 82 M.J. at 86 (internal quotations and citations omitted).

As a delay of 120 days was "facially unreasonable," it acted as the triggering condition, and a CCA was required to review any post-trial delay that exceeded the bright line presumption. *Moreno,* 63 M.J. at 136. However, if the delay was found to be "excessive" (even if not a Due Process violation), the CCA still had the ability to award appropriate relief without a showing of prejudice. *See Tardiff,* 57 M.J. at 224.

Tardiff and *Moreno* therefore delineated the CCA's role into two parts: 1) a determination of whether delay was "facially unreasonable" which would trigger an analysis and 2) a decision—after the court's analysis—of whether to award relief if the delay was determined to be excessive.

Moreno was superseded by Article 66(d)(2), which abrogated "facially unreasonable." The demonstration of "excessive delay" is now the triggering condition for a service court's review of whether appropriate relief is warranted.

"Demonstrate" means "to show clearly; to prove or make clear by reasoning or evidence."[6] "Excessive" means "exceeding what is usual, proper, necessary, or normal."[7] Compare this to "unreasonable" (the former trigger condition under

[6] Merriam-Webster, https://www.merriam-webster.com/dictionary/demonstrate (last visited April 9, 2026).
[7] Merriam-Webster, https://www.merriam-webster.com/dictionary/excessive (last visited April 9, 2026).

Moreno) which means "exceeding the bounds of reason, appropriateness, or moderation; lacking justification."[8]

Argument

A. Whether Excessive Delay Has Been Demonstrated is Reviewed De Novo.

1. The Demonstration of Excessive Delay is a Legal Question.

The proper standard of review when this Court examines the Army Court's decision in Appellant's case is de novo, because the threshold determination of whether excessive post-trial delay occurred is a question of law, not a discretionary act. While this Court affords deference to a Court of Criminal Appeals' discretionary post-trial relief determinations under *Valentin-Andino*, that deference does not apply to the threshold question presented here.

Indeed, after this Court's decision in *Valentin-Andino,* Courts of Criminal Appeals appear to have uniformly adopted a de novo review of excessiveness. Similar to the reasoning in *Moreno* that "facially unreasonable" delay was the trigger condition, the CCAs have utilized excessiveness as a trigger for their examination of whether relief is warranted. *See e.g.*, *United States v. Beals,* 2026 CCA LEXIS 136, at *2 (A. Ct. Crim. App., Mar. 24, 2026) (summ. disp.); *United States v. Monroe,* 2025 CCA LEXIS 447, at *4 (A. Ct. Crim. App., Sep. 15, 2025)

[8] Merriam-Webster, https://www.merriam-webster.com/dictionary/unreasonable (last visited April 9, 2026).

(summ. disp.); *United States v. Lozano,* 2026 CCA LEXIS 47, at *3 (A. Ct. Crim. App., Jan. 8, 2026) (summ. disp.); *United States v. Adams,* 2025 CCA LEXIS 343, at *9 (A.F. Ct. Crim. App., Jul. 29, 2025) (mem. op.); *United States v. Thomas,* 2025 CCA LEXIS 477, at *9–10 (A.F. Ct. Crim. App., Sep. 29, 2025) (mem. op.); *United States v. Campbell,* 2026 CCA LEXIS 117, at *61 (A.F. Ct. Crim. App., Mar. 11, 2026) (mem. op.).

When presented with excessive delay, the CCA has two distinct judicial functions: (1) the legal duty to identify a violation, and (2) the discretionary power to fashion a remedy for it. The primary error in this case occurred at the first step, which demands de novo review. This Court should find error in the Army Court's omission of finding excessive delay, especially so after Appellant demonstrated excessive delay.

2. The Plain Meanings of "Demonstrate" and "Excessive Delay" Are Easily Definable.

The threshold question is whether Appellant "demonstrated" the delay in his case was "excessive." But in the context of post-trial delay under the new Article 66(d)(2), Congress did not define either what it means to "demonstrate," nor what constitutes "excessive" delay. Thus, this Court's statutory interpretation of the trigger words also merits a de novo review. *See Csiti,* 85 M.J. at 417

This Court need not utilize canons of construction to define either term. The plain, unambiguous language of the words suffice. *Valentin-Andino*, 85 M.J. at 364–65.

First, "demonstrate" simply means "to show clearly." This definition does not impose a formal burden on an appellant; rather, this Court should adopt the plain meaning – that Appellant need only show clearly there is excessive delay after the entry of judgment.

Here, not only did Appellant demonstrate error and assign the delay as error, but the Government concurred that excessive delay occurred. Thus, the Army Court erred when it failed to even acknowledge the demonstration of excessive delay.

Second, "excessive" and "unreasonable" both merely require the delay be outside normal bounds. It is a straightforward definition—exceeding that which is normal—for which this Court can utilize its precedent in coming to a simple rule comparable to that of *Moreno*.

While Congress did not maintain *Moreno*'s "facially unreasonable" description of delay, its inclusion of "excessive delay" is a similar concept. As the two words both require delay to be beyond normal processing times—and neither assign a requirement of malfeasance or prejudice—this Court should adopt its former reasoning in *Moreno* and create a presumptive, bright line rule of what

constitutes "excessiveness." Such a bright line rule would not just provide clarification for appellate practitioners but also would provide uniformity for what triggers review by a service court.

No matter the definition, whether excessive delay is present in Appellant's case is a question this Court reviews de novo. Under that standard, this Court should find excessive delay. While no bright line rule yet exists as to what is presumed to be excessive, the 736 days of delay in Appellant's case is neither usual, proper, necessary, or normal. Using the former 120-day test from *Moreno,* the processing of Appellant's case took over six times longer than what was formerly presumed to be facially unreasonable.[9] Further, the Government conceded excessive delay in this case. (JA 127). Therefore, Appellant "demonstrated excessive delay" and this Court should grant appropriate relief.

[9] The Judge Advocate General of the Army, in his Fiscal Year 2025 Report to Congress on the state of military justice noted, "In 196 of the 320 cases processed under MJA 16 procedures, the certification of the record of trial was completed within 120 days." Dep't of the Army, Off. of the Judge Advocate Gen., *U.S. Army Report on Military Justice for Fiscal Year 2025* (Dec. 31, 2025) [Report]. He went on to state that the Army Court received 228 of the 320 cases within 30 days of the later of certification or entry of judgment. (Report, p.1). The "normal" processing times of cases received by the Army Court still comply with *Moreno's* 120-day bright line rule and The Judge Advocate General of the Army considers compliance with *Moreno* to be the norm.

B. The Army Court's Decision Whether to Grant or Deny Relief Should Be Reviewed for an Abuse of Discretion.

Should this Court find the threshold question is answered affirmatively—that excessive delay was demonstrated—the Army Court's decision to grant or deny relief is reviewed for an abuse of discretion based on the permissive wording of Article 66(d)(2) ("may provide relief").[10] *See Valentin-Andino,* 85 M.J. at 367.[11]

The Army Court abused its discretion because it failed to even acknowledge the demonstrated excessive delay nor analyze whether relief was appropriate.

To be certain, the Army Court was not obligated "to explain its reasoning regarding relief it does provide to put a detailed analysis on the record." *Valentin-Andino*, 85 M.J. at 367. A Court of Criminal Appeal's "reasoned analysis will be given greater deference than otherwise." *United States v. Winckelman*, 73 M.J. 11, 16 (C.A.A.F. 2013). But if a Court of Criminal Appeals "does not put [its] findings and analysis on the record, less deference will be accorded [its] decision."

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[10] *United States v. Moss*, 73 M.J. 64, 68 (C.A.A.F. 2014) ("'May' is a permissive rather than a mandatory term.").

[11] Dividing this Court's review into two distinct parts is consistent with precedent. For instance, in *Harvey*, when examining a lower court's decision on factual sufficiency, this Court reviewed de novo whether the predicate condition was met. *United States v. Harvey*, 85 M.J. 127, 131 (C.A.A.F. 2024). Subsequently, the service court's decision to determine an appropriate outcome was reviewed for an abuse of discretion. *Id*.

United States v. Ramirez, 84 M.J. 173, 176 (C.A.A.F. 2024) (citing *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014)). As this Court has previously noted:

> When the standard of review is abuse of discretion, and we do not have the benefit of the [the court's] analysis of the facts before [it], we cannot grant the great deference we generally accord to a [court's] factual findings because we have no factual findings to review. Nor do we have the benefit of the [court's] legal reasoning in determining whether [it] abused [its] discretion….

United States v. Finch, 79 M.J. 389, 397 (C.A.A.F. 2020) (quoting *United States v. Benton*, 54 M.J. 717, 725 (A. Ct. Crim. App. 2001)).

Here, the Army Court abused its discretion when it summarily affirmed Appellant's case after Appellant demonstrated excessive delay. The Army Court did not address the delay or the Government's agreement that excessive delay occurred. This Court should provide no deference to the Army Court under the specific facts here because the Army Court failed to provide any analysis or even address the Government's agreement that excessive delay occurred. Instead, it summarily affirmed Appellant's case without explanation.

The Army Court had before it a case which totaled 952 days of delay, with 736 of those days occurring post-entry of judgement. The Office of the Staff Judge Advocate [OSJA] did not justify its dilatory processing. The Government concurred the delay was "extraordinary" and warranted relief. Therefore, the initial question of law was answered in the affirmative – Appellant demonstrated excessive delay. The condition precedent was met (i.e. excessive delay was

demonstrated) and the Army Court erred by neither acknowledging the demonstrated excessive delay (and concurrence of the parties), nor determining whether relief was warranted.

The Army Court has provided relief under Article 66(d)(2) for far *less* delay than that found in Appellant's case. *See e.g.*, *Beals,* 2026 CCA LEXIS 136, at *4 (providing 45 days of confinement relief as "appropriate" under Article 66(d)(2) for 510 days of delay post-entry of judgment); *Monroe,* 2025 CCA LEXIS 447, at *6 (providing three months of confinement relief as "appropriate" for 650 days of "excessive post-trial delay" post-entry of judgment); *Lozano*, 2026 CCA LEXIS 47, at *6 (providing 30 days of confinement relief as "appropriate relief" for 360 total days of delay). The Army Court's action in Appellant's case left both parties, as well as this Court, with no explanation why it did not grant relief.

Here, no deference should be afforded to the Army Court's decision as it provided neither its factual findings nor its conclusions of law. In this case, the facts are undisputed and this Court need not remand the case for further fact finding.[12] It was agreed that 736 days of delay occurred between the entry of

[12] This Court has previously answered legal questions of granted issues without remand to the service court for further fact finding when "[t]he operative facts in [the] case are not disputed." *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995); *see also United States v. Simon,* 64 M.J. 205, 208 (C.A.A.F. 2006) (finding 847 days of delay was excessive, but remanding to the service court to determine if the delay warranted sentence appropriateness relief under the former Article 66(c)).

judgment and docketing of Appellant's case the Army Court. Appellant demonstrated excessive delay (as the Office of the Staff Judge Advocate provided no substantive excuse for the three-year delay) and the Government agreed the delay warranted relief. The Army Court was not required to accept the concurrence of the parties, but it was not in a position to summarily affirm either. *See Young v. United States*, 315 U.S. 257, 258 (1942).

The text of Article 66(d)(2) states that an accused must simply "demonstrate excessive delay" in order to trigger a CCA's decision as to whether relief was warranted. There is now a distinction between a CCA's requirement to affirm findings it finds correct in law and fact (Article 66(d)(1)(A)) and its mandate to analyze whether relief is warranted if excessive delay is demonstrated (Article 66(d)(2)). Weight should be given to the separation of a CCA's former ability to review delay under sentence appropriateness (former Article 66(c)) versus its new duty to analyze whether appropriate relief is warranted.

As Appellant satisfied the predicate condition, the Army Court was required to analyze the delay and whether relief was warranted per the wording of the new statute. It was not obligated to place its analysis on the record, but not placing its analysis on the record is certainly distinct from conducting no analysis at all. The Army Court abused its discretion when it 1) failed to place its findings or conclusions on the record and 2) failed to explain why relief was not warranted

(even over its own precedent granting relief for cases whose completion took less than a year, compared to Appellant's post-trial delay of three years).

This Court is without the Army Court's reasoning and thus, should provide no deference to its decision. Therefore, this Court should adopt the parties' agreement that the "extraordinary" delay warrants setting aside Appellant's sentence.

C. This Court Should Abide by the Parties' Positions and Set Aside Appellant's Sentence.

Neither this Court, nor the Army Court, is bound to the parties' agreement as to appropriate relief. However, the concession of error by the Government carries heavy weight.

"The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function." *Young,* 315 U.S. at 258. The Supreme Court has given great weight to the "considered judgment" of prosecutors when the Government concedes error; however, it requires the reviewing court to conduct further judicial analysis. *Id.*

Yet where conceded error aligns with undisputed facts, the reviewing court may come to a swift conclusion and grant the requested relief. *See e.g.*, *Marino v. Ragen,* 332 U.S. 561, 562–63 (1947) (Rutledge, J., concurring).

Here, the Government conceded error and that the post-trial delay in Appellant's case was extraordinary. It requested the Army Court set aside Appellant's sentence as "appropriate relief" that would address the "negligent processing" of Appellant's case. The Army Court did not acknowledge this concession of error, nor that both parties concurred on appropriate relief. This was error.

Appellant's case took nearly three years to be docketed. The delay was "extraordinary." This Court should abide by the parties' agreement to set aside Appellant's sentence because it is "appropriate" in these circumstances.

Conclusion

This Court should review the Army Court's decision de novo and grant the parties' requested relief to set aside Appellant's sentence.

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Certificate of Compliance with Rules 24(c) and 37

1. This Brief on Behalf of Appellant complies with the type-volume limitation of Rule 24(c) because it contains 5,406 words.

2. This Brief on Behalf of Appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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APPENDIX A – UNPUBLISHED CASES

United States v. Adams

United States Air Force Court of Criminal Appeals

July 29, 2025, Decided

No. ACM 22018

Reporter
2025 CCA LEXIS 343 *; 2025 LX 276252; 2025 WL 2145027

UNITED STATES, Appellee v. Grayson N. ADAMS, Airman (E-2), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 30.4.

Subsequent History: Petition for review filed by *United States v. Adams, 2025 CAAF LEXIS 782 (Sept. 22, 2025)*

Motion granted by *United States v. Adams, 2025 CAAF LEXIS 801 (Sept. 24, 2025)*

Review denied by *United States v. Adams, 2025 CAAF LEXIS 989 (Dec. 2, 2025)*

Prior History: Appeal from the United States Air Force Trial Judiciary[1] **[*1]** . Military Judge: Shad R. Kidd. Sentence: Sentence adjudged 25 October 2021 by SpCM convened at Barksdale Air Force Base, Louisiana. Sentence entered by military judge on 24 November 2021: Confinement for 60 days, forfeiture of $1000.00 pay per month for three months, and reduction to E-1.

Counsel: For Appellant: Captain Michael J. Bruzik, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Lieutenant Colonel Catherine K.M. Wray, USAF; Major Vanessa Bairos, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, MASON, and KEARLEY, Appellate Military Judges. Judge KEARLEY delivered the opinion of the court, in which Chief Judge JOHNSON and Judge MASON joined.

Opinion by: KEARLEY

Opinion

KEARLEY, Judge:

A special court-martial composed of a military judge alone convicted Appellant, in accordance with his pleas, of two specifications of dereliction of duty in violation of *Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892*, and two specifications of unlawful use of a controlled substance, and one specification of unlawful possession of a controlled substance in violation of *Article 112a, UCMJ, 10 U.S.C. § 912a*.[2] The military judge sentenced Appellant to confinement for 60 days, **[*2]** forfeiture of $1,000.00 pay per month for three months, and reduction to the grade of E-1. The convening authority took no action on the findings or sentence.

Appellant raises four issues on appeal, which we have reworded: (1) whether Appellant's sentence is inappropriately severe; (2) whether this case should be remanded for correction of the record of trial when a court reporter who was not present at the original proceeding transcribed and certified the verbatim transcript; (3) whether Appellant is due relief because of the Government's post-trial delay; and (4) whether the entry of judgment erroneously subjects Appellant to a restriction on firearm ownership in violation of his *Second Amendment*[3] right to bear arms.

We have carefully considered issue (2) and conclude it

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[1] Appellant appeals his conviction under *Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A)*, Manual for Courts-Martial, United States (2024 ed.).

[2] Unless otherwise noted, all references in this opinion to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] *U.S. CONST. amend. II.*

warrants neither discussion nor relief. *See* United States v. Guinn, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)). We have also carefully considered issue (4) and conclude it warrants neither discussion nor relief. *See* United States v. Johnson, M.J. . No. 24-0004, 86 M.J. 8, 2025 CAAF LEXIS 499, at *8-14 (C.A.A.F. 24 Jun. 2025); Matias, 25 M.J. at 361. As to the remaining assignments of error, we find no error that materially prejudiced Appellant's rights, and we affirm the findings and sentence.

I. Background

At the time of his offenses, Appellant was a security forces member, living **[*3]** on base in the dormitory at Barksdale Air Force Base, Louisiana. In the early morning hours of 8 November 2020, the base security forces received word that someone may have been shot in the dorms. A second dispatch elaborated that the gunshot was an attempted suicide. Two security forces members, Technical Sergeant (TSgt) MH and TSgt EH, responded. While they did not hear any gunshots, they heard shouting from Appellant's dorm room and proceeded in that direction. They directed Appellant to come out with his hands up. Appellant complied with their orders and allowed them to apprehend him. The two security forces members noticed shattered glass on Appellant's floor and blood on his hands. After clearing the room, TSgt MH asked Appellant if they could search the dorm room. Appellant consented to the search.

Upon searching Appellant's room, the security forces members did not find evidence of a gun being fired, but they found a loaded AK-47 rifle with multiple clips of ammunition and a handgun with multiple magazines of ammunition. Appellant had not registered these privately-owned firearms with the security forces armory on base. He also failed to store them in the armory despite knowing **[*4]** that storage of guns or ammunition within the dorms was prohibited by installation regulations.

During the search of Appellant's room, security forces personnel found two pills of methamphetamine in a plastic bag, along with a plastic card and a plastic straw, a mirror, and a homemade smoking device. According to the security forces personnel, Appellant appeared to be under the effects of a substance due to dilated pupils, restlessness, and short-term memory loss.

During his guilty plea inquiry, Appellant admitted to wrongfully possessing and using methamphetamine and wrongfully using hydrocodone. He also admitted to willful dereliction of duty for failure to register and store his firearms properly.

II. Discussion

A. Sentence Severity

Appellant contends his sentence of confinement for 60 days, forfeiture of $1000.00 pay per month for three months, and reduction to E-1 is inappropriately severe because it did not fully account for the mitigating circumstances behind the underlying conduct. Appellant argues that the record of trial showed he was a "young Airman struggling with life away from his structured upbringing and dealing with medical issues." Appellant specifically takes issue with **[*5]** the "hefty forfeitures" that were adjudged against him and highlights how cooperative he was throughout his interactions with security forces on the night of his apprehension.

1. Additional Background

During sentencing, Appellant provided an unsworn statement where he described his sheltered upbringing and his desire to join the Air Force to pursue a career in law enforcement. Appellant shared that he was overtaken with temptations that he struggled to manage while being away from home for the first time. He also explained that he had been dealing with medical issues that required him to take prescription medications that interfered with his judgment. He emphasized that he had no intention to hurt anyone with the firearms in his room and he merely possessed an interest in "unique guns." Appellant also provided the court with a character letter, photos of him with his friends and family, and a written unsworn statement.

During the sentencing argument, trial counsel referred to the drugs and guns in Appellant's dorm room as a "recipe for disaster," and suggested the events represented a detriment to safety.

2. Law

We review issues of sentence appropriateness de novo.

United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted). **[*6]** Our authority "reflects the unique history and attributes of the military justice system" including "considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)* (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved based on the entire record. *Article 66(d), UCMJ, 10 U.S.C. § 866(d)*. By this standard, we may overturn a sentence that is inappropriately severe. *See United States v. Schauer, 83 M.J. 575, 580 (A.F. Ct. Crim. App. 2023)* (holding the appellant's record of service, to include four overseas deployments and his personal circumstances, and the record of trial, were not enough to conclude the adjudged sentence was inappropriately severe), *rev. denied*, *83 M.J. 461 (C.A.A.F. 2023)*. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam) (citations omitted). Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *See United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

3. Analysis

The maximum sentence Appellant could receive for his offenses, by virtue of the forum, included a bad-conduct discharge, confinement for one year, forfeiture **[*7]** of two-third's pay per month for 12 months, and reduction to the grade of E-1. However, Appellant entered into a plea agreement with the convening authority that capped his term of confinement for each specification to 150 days, with each term running concurrently. Appellant received concurrent sentences to confinement of between 10 and 60 days for each specification, in addition to forfeiture of $1,000.00 pay per month for three months, and reduction to the grade of E-1.

We do not find Appellant's sentence is inappropriately severe. In particular, the nature and seriousness of Appellant's crimes support the sentence imposed. Appellant kept three categories of unlawful items in his dorm room on base: guns, ammunition, and controlled substances. He blatantly ignored base policies to disclose privately owned weapons and store such weapons at the armory. He wrongfully and illegally possessed and used methamphetamines and wrongfully used hydrocodone.

The record of trial shows Appellant took responsibility for his crimes by pleading guilty to the offenses with which he was convicted, rather than contesting them at trial, and this was a factor the military judge could consider as a positive **[*8]** indicator of rehabilitation potential. However, giving individualized consideration to Appellant, the nature and seriousness of his offenses, Appellant's record of service, and all other matters contained in the record of trial, we conclude Appellant's sentence is not inappropriately severe.

B. Post-Trial Delay

Appellant seeks relief due to what he characterizes as the Government's "excessive delay" in processing his court-martial after the entry of judgment due to the Government's "untimely provision" of the record of trial (ROT) and verbatim transcript. Appellant asks us to provide relief by setting aside his forfeitures. We find no relief is warranted.

1. Additional Background

Appellant was sentenced on 25 October 2021. At that time, Appellant's sentence did not meet the jurisdictional requirements for direct appeal to this court. On 23 December 2022, Congress amended *Articles 66* and *69, UCMJ*, *10 U.S.C. §§ 866*, *869*. *See* The *National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582-84 (23 Dec. 2022)*. As amended, *Article 66(b)(1)(A), UCMJ*, expanded Court of Criminal Appeals (CCA) jurisdiction to any judgment of a special or general courtmartial, irrespective of sentence, that included a finding of guilty. *10 U.S.C. § 866(b)(1)(A)* (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)).

On 20 December 2023-361 days after the enactment of **[*9]** *Article 66(b)(1)(A), UCMJ* (2024 *MCM*)—the Government notified Appellant of his right to direct appeal before this court along with a copy of a summarized record of trial.

On 14 March 2024, Appellant filed his notice of appeal, and on 15 March 2024, this court docketed his case but ordered the Government to forward a copy of the record

of trial to the court as it had not been received yet. The record of trial, with a verbatim transcript, was provided to this court on 26 July 2024.

Subsequently, Appellant requested and received seven enlargements of time. Appellant ultimately submitted his brief on 16 April 2025. On 16 May 2025, the Government submitted its answer to Appellant's assignments of error. On 23 May 2025, Appellant filed his reply brief.

2. Law

We review de novo whether an appellant is entitled to relief for post-trial delay. *United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020)* (citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*).

In *Moreno*, the United States Court of Appeals for the Armed Forces (CAAF) identified thresholds for facially unreasonable delay during three particular segments of the post-trial and appellate process. *63 M.J. at 141-43* (citations and footnotes omitted). Specifically, our superior court established a presumption of facially unreasonable delay where: (1) the convening authority did not take action **[*10]** within 120 days of the completion of trial, (2) the record was not docketed with the CCA within 30 days of the convening authority's action, or (3) the CCA did not render a decision within 18 months of docketing. *Id. at 142*.

In *Livak*, this court recognized that "the specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules." *80 M.J. at 633*. Accordingly, this court established an aggregated sentence-to-docketing 150-day threshold for facially unreasonable delay in cases that were referred to trial on or after 1 January 2019. *Id.* (citation omitted). However, in light of subsequent statutory changes, this court recently found the 150-day threshold established in *Livak* does not apply to direct appeals, such as Appellant's, that are submitted under the amended *Article 66(b)(1)(A), UCMJ*, effective 23 December 2023. *See United States v. Boren, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at *47 (A.F. Ct. Crim. App. 19 Mar. 2025)* (unpub. op.). This court noted, "[t]hese statutory changes substantially altered the sequence of posttrial events in such [direct appeal] cases" as compared to the mandatory review cases the CAAF contemplated in *Moreno*. *Id. at *47-48*. Therefore, although we acknowledge appellants in such cases still enjoy constitutional due process rights **[*11]** to timely post-trial review, we decline to establish a new specific timeframe for a facially unreasonable delay from sentence-to-docketing in direct appeal cases. Even without a specific timeframe, we can determine if there is a case-specific facially unreasonable delay. *See United States v. Gray, 2025 CCA LEXIS 122, at *15-17 (A.F. Ct. Crim. App. 24 Mar. 2025)* (unpub. op.) (recognizing it is possible an appellant could demonstrate a case-specific facially unreasonable delay outside of *Livak* and *Moreno* that would trigger a *Barker*[4] due process analysis), *rev. denied*, *2025 CAAF LEXIS 498 (C.A.A.F. 24 Jun. 2025)*.

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: "(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 [to the appellant]." *Moreno, 63 M.J. at 135* (citations omitted). In *Barker*, the Supreme Court also identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) "particularized" anxiety and concern "that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability **[*12]** to present a defense at a rehearing. *Id. at 138-40* (citations and footnotes omitted). "Of those, the most serious is the last [type], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker, 407 U.S. at 532*.

Additionally, where an appellant has not shown prejudice from the delay, we cannot find a due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*.

Independent of any due process violation, this court may provide appropriate relief where there is "excessive delay in the processing of the court-martial after the judgment was entered into the record." *United States v. Valentin-Andino, 85 M.J. 361, 364 (C.A.A.F. 2025)*

[4] *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*.

(citing *Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2)*).

If a CCA decides relief is warranted for excessive post-trial delay under *Article 66(d)(2), UCMJ*, "that relief must be 'appropriate,' meaning it must be suitable considering the facts and circumstances surrounding that case." *Id. at 367*. "This does not require a [CCA] to provide relief that is objectively meaningful, and it does not obligate a [CCA] to explain its reasoning regarding the relief it does provide." *Id.*

3. Analysis

Appellant argues he was subject to excessive delay in two instances. First, Appellant argues that **[*13]** the 361-day delay between the statutory change that allowed Appellant to appeal and the Government providing notice to Appellant of his right to appeal was too great. Second, Appellant argues that the delay of 133 days between this court docketing the case and our receipt of the record of trial with a verbatim transcript was excessive.[5]

The most significant issue is the first instance of delay because it took the Government almost a full year to notify Appellant of his right to appeal as a result of the new statutory change explained *supra*. In explaining this delay, the Government claims that after the enactment date of the statute allowing for direct appeals, the "Government lacked any guidance to determine which courts-martial qualified from the expanded appellant rights." The Government also argues that the FY23 NDAA failed to include a specific timeframe notification requirement for cases where there was a final judgment under *Article 57(c)(2), UCMJ*, *10 U.S.C. § 857(c)(2)*. The Government further stated the delay reflected "the time required to retroactively review courts-martial convictions and notify the applicable service members."

We begin our analysis by restating that we decline to establish a new specific timeframe for **[*14]** a presumptive facially unreasonable delay to cover the period from sentence-to-docketing in direct appeal cases. *See Boren, unpub. op. at *47* (explaining that the new procedures applicable to direct appeals gives appellants significant control over what post-conviction review process they elect to seek as part of their right to appellate review). However, we considered Appellant's due process rights to speedy appellate review without presuming a facially unreasonable delay to determine whether Appellant demonstrated a case-specific facially unreasonable delay that would trigger a *Barker* due process analysis. *See Gray, unpub. op. at *15-17* (finding no prejudice to appellant and that the delay was not egregious enough to violate due process or warrant sentence relief in a direct appeal case).

a. Delay From Statutory Change to Notice of Appeal

We find that the lengthy delay between the statutory change (23 December 2022) and the Government's notice to Appellant of his right to appeal (20 December 2023) is excessive, and that Appellant has demonstrated a facially unreasonable delay apart from *Livak* and *Moreno* that triggers a *Barker* due process analysis. After considering the first three *Barker* factors, we conclude: (1) the length of the delay is excessive, **[*15]** as it took nearly a year for the Government to review prior cases which may be affected by the statutory change and notify Appellant of his new right to appeal;[6] (2) the Government's reasons for some delay were understandable but do not justify a year-long delay, as anticipating this new legislation and issuing timely guidance was within the Government's control; and (3) Appellant asserted his right to appeal within a reasonable time after being notified. *Moreno, 63 M.J. at 135*.

As to the fourth *Barker* factor, we do not find Appellant suffered any prejudice. Appellant was not subject to oppressive incarceration because he was confined for 60 days and had completed his confinement prior to the legislative change allowing direct appeals. Appellant has not alleged particularized anxiety or impairment related to the delay in notification of his new right to a direct appeal. In addition, any delay in this case did not harm Appellant's ability to present an appeal, especially given the seven requests for extension of time in filing his own appellate brief. Finally, absent a finding of prejudice to Appellant under the fourth *Barker* factor, Appellant is not entitled to relief for a due process violation because we **[*16]** find that the delay was not so egregious as to

[5] Appellant also argues that the ROT received was "still incomplete" because Appellant claims the transcript is "uncertified." However, as stated above, we find this contention is without merit.

[6] While this delay is excessive, we have no indication of gross indifference or institutional neglect on the part of the Government in processing Appellant's case.

"adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey, 63 M.J. at 362*.

b. Delay in Receiving Verbatim Transcript

Next, turning to Appellant's second instance of delay, we do not find the 133 days between docketing with this court and our receipt of a record of trial with a verbatim transcript to be an unreasonable delay. Appellant filed his notice of appeal on 14 March 2024, and this court docketed his case the next day. In this court's docketing order, the court ordered the Government to "forward a copy of the record of trial to the court forthwith." This court received a record of trial on 26 July 2024, with a verbatim transcript. It would take some time to create a verbatim transcript and conduct the necessary routing and certifications. Therefore, under the circumstances, a *Barker* due process analysis does not apply, and just over four months is not a facially unreasonable delay.

c. Relief in Absence of Due Process Violation

Recognizing our authority under *Article 66(d)(2), UCMJ*, we have considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation as to Appellant's **[*17]** notice of his right to appeal. We have carefully considered Appellant's argument that he has suffered harm by the delay "impeding his ability to exercise his right to appellate review" and we find that, under the circumstances, he is not entitled to relief.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(d), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(d)*. Accordingly, the findings and sentence are **AFFIRMED**.

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United States v. Beals

United States Army Court of Criminal Appeals

March 24, 2026, Decided

ARMY 20240042

Reporter
2026 CCA LEXIS 136 *; 2026 LX 151190; 2026 WL 825343

UNITED STATES, Appellee v. Private First Class KAMARI D. BEALS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, National Training Center and Fort Irwin. Robert E. Murdough, Military Judge. Colonel Justin M. Marchesi, Staff Judge Advocate.

Counsel: For Appellant: Major Beau O. Watkins; JA; Major Andrew M. Hopkins, JA.

For Appellee: Major Stephen L. Harmel, JA.

Judges: Before COOPER, MORRIS, and SCHLACK, Appellate Military Judges. Senior Judge COOPER and Senior Judge MORRIS concur.

Opinion by: SCHLACK

Opinion

SUMMARY DISPOSITION

SCHLACK, Judge:

Appellant entered a plea of guilty pursuant to a pretrial agreement, and the military judge accepted the plea as knowing, voluntary, and provident before entering findings of guilty. The central issue before this court is not the validity of the conviction, which we affirm, but the post-trial delay in this case.[*] Appellant asserts this delay violated his constitutional right to due process. We disagree. Appellant alternatively argues the delay in the post-trial processing of this case constitutes excessive delay under the Uniform Code of Military Justice (UCMJ), entitling him to relief. *See* *Article 66(d)(2), UCMJ, 10 U.S.C. § 866*. We agree.

[*] Appellant did not raise post-trial delay as an assignment of error but did identify the issue per *United States v. Grostefon, 12 M.J. 431, 436-37 (C.M.A. 1982)*.

BACKGROUND

Appellant pleaded guilty to fleeing apprehension, willfully disobeying his superior commissioned officer, assault in which substantial bodily harm was inflicted, assault by strangulation, and obstructing justice in **[*2]** violation of Article 87a, 90, 128 and 131b, UCMJ, *10 U.S.C. § 887a*, 890, 928, and 931b. A military judge sitting as a general court-martial accepted the pleas and sentenced appellant to a dishonorable discharge, confinement for 37 months, and reduction to the grade of E-1. The court-martial adjourned on the same day.

The military judge entered judgment 20 days later. It then took the government another 510 days to finish transcribing the 168-page record of trial and mail it to this court. The government did include a letter of lateness with the record, citing personnel challenges as the sole cause for the delay.

LAW AND DISCUSSION

We review claims of unreasonable post-trial delay de novo. *See* *United States v. Anderson, 82 M.J. 82, 85 (CAAF 2022)* (citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*. Whether a post-trial processing timeline is reasonable or dilatory is determined on a case-by-case basis. *E.g.,* *United States v. Abdullah, 85 M.J. 501, 2024 CCA LEXIS 479, at *27 (Army Ct. Crim. App. 5 Nov. 2024)*, pet. granted, *2025 CAAF LEXIS 426 (C.A.A.F. May 30 2025)*; *United States v. Toohey (Toohey I), 60 M.J. 100, 102-03 (C.A.A.F. 2004)*.

There are two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the Due Process Clause of the Fifth Amendment; and (2) the statutory basis under Article 66 when there is no showing of "actual prejudice." *Abdullah, 2024 CCA LEXIS 479, at *9* (citing *Anderson, 82 M.J. at 85*).

Whether there is a due process violation resulting from post-trial delay is analyzed under the four factors from *Barker v. Wingo, 407 U.S. 514, 530 (1972)*: "(1) length of the delay; (2) reasons for the delay; (3) appellant's assertion of his right **[*3]** to a timely appeal; and (4) prejudice to appellant." *Toohey I, 60 M.J. at 102*. When there is no finding of prejudice under the fourth *Barker* factor, a due process violation still occurs if "in balancing the three other factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system." *Anderson, 82 M.J. at 87* (quoting *United States v. Toohey (Toohey II), 63 M.J. 353, 362 (C.A.A.F 2006)*.

Although the length of the delay is excessive and the reasons for the delay are unpersuasive, we find no due process violation here. Appellant did not assert his right to a timely appeal and concedes no "specific prejudice" from the delay. In this case we do not find the delay so egregious as to negatively impact public perception of the military justice system. However, more than 17 months expired between the issuance of the entry of judgment and our receipt of the record. This court has consistently found similar delays to be excessive and has granted relief under Article 66(d)(2). *E.g., United States v. Monroe, No. ARMY 20220122, 2025 CCA LEXIS 447, at *6 (Army Ct. Crim, App. 15 Sep. 2025)* (summ. disp.); *United States v. Lozano, No. ARMY 20240096, 2026 CCA LEXIS 47, at *6 (Army Ct. Crim. App. 8 Jan. 2026)* (summ.disp.).

This guilty plea consisted of a 168 page transcript and few exhibits. Nothing in the Chief of Justice's memorandum justifies the length of the delay in this case; instead, it reveals an inefficient administration of military justice. **[*4]** While not required to provide relief for the excessive delay, we choose to do so here. After our complete review, we determine 45 days of confinement relief is appropriate_

CONCLUSION

The findings of guilty are AFFIRMED. Only so much of the sentence extending to a dishonorable discharge, 35 months and 15 days of confinement, and reduction to the grade of E-1 is AFFIRMED.

Senior Judge COOPER and Senior Judge MORRIS concur.

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United States v. Campbell

United States Air Force Court of Criminal Appeals

March 11, 2026, Decided

No. ACM 40652

Reporter
2026 CCA LEXIS 117 *; 2026 LX 124651; 2026 WL 688223

UNITED STATES, Appellee v. Kyshown D. CAMPBELL, Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: Appeal from the United States Air Force Trial Judiciary[1] **[*1]** . Military Judge: Lance R. Smith. Sentence: Sentence adjudged on 3 November 2023 by GCM convened at Luke Air Force Base, Arizona. Sentence entered by military judge on 16 January 2024: 60 days confinement, forfeiture of $836.00 pay per month for 6 months, and a reprimand.

Counsel: For Appellant: Captain Michael J. Bruzik, USAF.

For Appellee: Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Captain Heather R. Bezold, USAF; Mary Ellen Payne, Esquire.

Judges: Before GRUEN, KEARLEY, and MORGAN, Appellate Military Judges. Judge KEARLEY delivered the opinion of the court, in which Senior. Judge GRUEN and Judge MORGAN joined.

Opinion by: KEARLEY

Opinion

KEARLEY, Judge:

A general court-martial composed of a military judge alone convicted Appellant, contrary to his pleas, of one specification of domestic violence, in violation of *Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b*.[2],[3] The military judge sentenced Appellant to confinement for 60 days, forfeiture of $836.00 pay per month for six months, and a reprimand. The convening authority took no action on the findings or sentence, but provided language for the reprimand.[4]

Appellant raises four issues on appeal, **[*2]** which we have reworded: (1) whether the military judge erred in admitting evidence of certain video clips without a proper foundation; (2) whether the military judge abused his discretion by admitting evidence of uncharged misconduct to show Appellant's motive for the convicted offense; (3) whether the military judge's finding of guilty for domestic violence was factually and legally sufficient; and (4) whether the Government violated Appellant's right under Article 13, UCMJ, U.S.C. § 813, to be free from conditions of pretrial confinement more rigorous than necessary to ensure his presence at trial. While not raised by Appellant, we have also considered: (5) whether Appellant is entitled to relief due to post-trial delay.

We find no error that materially prejudiced Appellant's rights, and we affirm the findings of guilty and sentence.

I. Background

Appellant and his wife, RC, who was also an Airman,

[1] Appellant appeals his conviction under *Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A)*. See Manual for Courts-Martial, United States (2024 ed.).

[2] Unless otherwise noted, all references in this opinion to the UCMJ, Rules for Courts- Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] Appellant was found not guilty of one specification of sexual abuse (indecent language) upon a child, and two specifications of sexual abuse (indecent exposure) upon a child, in violation of Article 120b, UCMJ, *10 U.S.C. § 920(b)*; and one specification of indecent recording, in violation of *Article 120c, UCMJ, 10 U.S.C. § 920c*.

[4] The convening authority denied Appellant's request "for deferment of all adjudged forfeitures until the military judge signs the entry of judgment."

were assigned to Luke Air Force Base (AFB), Arizona. They were married for five years. They did not have children together, but RC's nine-year-old son from a previous relationship, PC, lived with them.

On or about 30 June 2021, Appellant was preparing for a deployment. RC was helping him pack his bags while Appellant went **[*3]** to do some out-processing on base. Appellant called RC and asked if she had seen his deployment folder. In her efforts to help Appellant find his folder, RC went into Appellant's backpack and noticed a small wireless headphone case. Since they did not have wireless headphones at the time, she was confused, so she opened it. Inside she found an SD card[5] and a small tool, commonly referred to as an ejector pin, to open a phone and replace the SD card.

RC used the ejector pin to pop out the SD card on her own cellular phone and replace it with the one she found in Appellant's bag. She noticed a substantial amount of memory was being used and located a folder labeled "My Bitches." She determined the folder included sexual videos and photos and she recognized a few of the names of the women in the folder.

RC decided to hide the SD card. She taped it under the television ledge in the living room. RC then called her friend, GG, and told her about finding Appellant's SD card. RC then called Appellant, indicated she found the SD card, and hung up the phone. RC anticipated Appellant would be angry, so she took measures to prevent Appellant from entering the house. She removed the battery pack from **[*4]** their front door keypad and tried to deactivate the electric garage door. She also made sure the back door was locked.

Appellant called RC several times, but she did not answer. While still on the phone with GG, RC finally answered one of Appellant's calls and told him she "found something" and hung up the phone. Within 15 minutes, Appellant was at the house standing outside the front door. RC continued to talk with GG on speaker phone about what she had found, saying things like "[she] remember[ed] specifically one female that [she] had seen," and "[she] couldn't believe [this female] had come into [RC's] home." RC was "very emotional." When RC realized Appellant was no longer at the front door, she turned around and saw the backdoor open.

Appellant, now inside the house, told RC to hang up the phone and give him the SD card. He tried to grab her phone. They went into their home office where Appellant grabbed RC's government common access card (CAC) and told her to give him the SD card or he would destroy her CAC. When she did not give him the SD card, Appellant cut her CAC with scissors.

Appellant chased RC around the house trying to grab her phone. RC told him the SD card was not **[*5]** in her phone. Appellant punched RC in her left rib cage two times, causing her to release the phone. Appellant threw the phone onto the floor and shattered it by stomping on it. As a result, RC's call with GG was disconnected. It was these two strikes to RC's ribcage that formed the basis for the Specification of Charge III, domestic violence, in violation of Article 128b, UCMJ.

Appellant then walked towards the kitchen while RC got up and proceeded towards her shattered phone. RC heard her son, PC, screaming and yelling at Appellant, telling him to please stop, "Dad you don't have to do this," and "Dad I don't want my family to be like this."

GG tried to call RC back. After getting no answer, GG called Appellant, who answered on speaker phone. GG asked to talk with RC and warned Appellant that she would call the police if he refused. Appellant replied, "Call the cops, Bitch," and hung up the phone. Then Appellant told RC to "clean up and get [herself] together," told PC to stop crying, and then told RC not to "take his career" because it is how he provided for his daughter.

Meanwhile GG called the local Air Force Office of Special Investigations (OSI) detachment, which is where she worked, and asked the **[*6]** duty sergeant to call the local police and request a welfare check on RC and Appellant. GG also asked a mutual friend, BM, to go to RC's house to check on the situation since GG was out of town. Soon after, the police, BM, and Master Sergeant (MSgt) SS from Appellant's squadron all arrived at the scene. RC asked BM to take PC for the night. As BM drove PC away, PC became emotional and expressed concern for his mother.

RC and Appellant told the police their argument was verbal, not physical. RC told them that Appellant did not hit her. However, she also told them she wanted Appellant to leave for the night so she could have time to process what happened. They both told the police they are in the military and Appellant was planning on deploying within a few days. Appellant gathered a few

[5] A secure digital (SD) card is a small physical device used to store digital files.

items for the night and left the house as police waited.

MSgt SS remained at the house with RC, who was still emotional. RC insisted nothing was wrong with her physically. RC put her wedding ring, the SD card, and the ejector pin in a pouch and gave the pouch to MSgt SS because she did not want these items in the house.

After MSgt SS left, RC claimed that she went to her neighbor's house and explained what **[*7]** happened, including the punches to her ribs. Her neighbors gave her a specific cream to help with her pain and gave her gauze wrap. They encouraged her to tell somebody. One of the neighbors also helped RC secure her back door with a chain lock.

As RC reflected on the incident, she decided she did not want to harm Appellant's career and felt it would be best if he left on his scheduled deployment. She did not report the incident further because she "didn't want anybody [she] was close with or military to know what she went through." Appellant left for his deployment a few days later. RC received the pouch back from MSgt SS and put the SD card in her safe.

Appellant filed for divorce during his deployment. He claimed RC shared some of the sexually explicit videos from the SD card with women shown in the recordings. According to Appellant, these women informed him that RC had sent them the videos. Appellant also claimed RC sent the videos to Appellant's sisters and grandmother.

The mother of Appellant's daughter later told RC that she saw a video of Appellant involved in "sexual situations . . . with [a child present and that child's mother]." Another woman, Appellant's ex-girlfriend, also **[*8]** notified RC that she had found some of the same videos on an SD card in 2015 and noticed a child present.

RC's military leadership team received notice that some videos showed sexual acts with children present and subsequently told RC that she needed to report the matter and give the SD card to OSI.

Upon inspection, OSI determined the SD card contained approximately 1500 videos and images of consensual sex that Appellant had recorded or received from other women. Two videos showed an unidentified toddler in the vicinity of the camera. Three other videos showed Appellant's daughter nearby.[6]

II. DISCUSSION

A. Authentication of Video Evidence

1. Additional Background

At trial, in an effort to prove the charged offenses of sexual abuse of a child and indecent recording, in violation of Articles 120b and 120c, UCMJ, the Government sought to introduce as prosecution exhibits, five video files. These video files showed Appellant engaged in sexual acts with another woman, other than RC, while a child was present. RC found these videos on Appellant's SD card on the day of the charged domestic violence offense; however, she did not initially realize there was a child at some point in each video. RC testified to various facts **[*9]** about the video. She described that some of the videos were recorded at her home. RC recognized the name of one woman in two of the videos, and she personally knew the other woman in the three remaining videos. She also recognized the children in the videos. In addition to identifying Appellant, the women, and the children, RC could also identify the children's ages, and the location and time frame of the videos.

The Defense objected to the admission of the videos based on Mil. R. Evid. 1002, the best evidence rule, claiming that the proponent of the evidence must produce the original or the duplicate. The Defense went on to argue that the Government could not admit the video evidence through RC because she was not in any of the videos and is unable to properly authenticate or lay the foundation for the videos because she cannot state the videos were a fair and accurate representation of what actually occurred at the time of the recordings.

After hearing from trial counsel and trial defense counsel, the military judge initially sustained the objection as to authenticity and foundation. Trial counsel then asked RC a series of questions about each video in an attempt to authenticate the videos and lay

[6] These five videos formed the basis for the offenses of which the military judge acquitted Appellant -- sexual abuse (indecent language and indecent exposure) upon a child and indecent recording.

the **[*10]** foundation necessary for their admission. Trial defense counsel and trial counsel conducted a voir dire of RC.

Ultimately, the military judge overruled the objection with respect to all five videos and announced his ruling in open court, on the record. The military judge explained that RC noted the exhibits were a fair and accurate representation of what she had previously seen on the SD card, and she had viewed enough of the recordings on the SD card to identify Appellant and other people in the recordings, their voices, and the locations where the recordings were made. The military judge explained that "although not perfect, the court finds [RC] has laid a legally sufficient foundation for the admission of [the five videos]." The military judge indicated RC, for the most part, maintained control of the SD card until it was turned over to the OSI. He pointed out that both RC and an OSI agent (Special Agent JF) testified that the exhibits were a fair and accurate representation of the version of the videos found in Appellant's SD card. The military judge stated that RC basically did the same thing as an OSI agent did in *United States v. Poole, No. ACM 39308, 2019 CCA LEXIS 235, at *22 (A.F. Ct. Crim. App. 15 May 2019) (unpub. op.)*, where the appellant challenged the foundation presented through **[*11]** a government witness (OSI agent) for extracted recordings from his phone.

Specifically, the military judge stated:

> In its holding, the [United States] Air Force Court of Criminal Appeals stated, as noted above, the 14 videos contained on Prosecution Exhibit 4 constituted the primary evidence against [the appellant]. Special Agent [JH] testified that he reviewed the data extracted from the appellant's cell phone, reviewed each of the videos in Prosecution Exhibit 4, and described them as a fair and accurate depiction of the videos found on [Appellant's] cell phone. He testified that he was able to identify the naked female appearing in the videos . . . the location depicted in the videos . . . and the person recording the videos . . . . That testimony satisfied the requirements of [Mil. R. Evid.] 901.

The military judge pointed out how RC found the recordings on the SD card and eventually turned them over to law enforcement. The military judge found the "videos are directly related to the Article 120b and Article 120c charges" in the case. He said the high probative value of the videos is not substantially outweighed by the danger of unfair prejudice. He further pointed out that the videos are "evidence of the alleged offenses" **[*12]** and therefore, there is no concern about the evidence confusing the issues or misleading the factfinder. Accordingly, the five videos were admitted as Prosecution Exhibits 5-9.[7]

During trial, Appellant discussed the text he received from RC indicating she had found the SD card and he described that he was "shocked, a little embarrassed." He explained, "I got caught cheating. There was an SD card out for her to see. It contained files of other women inside the video." Trial counsel utilized the videos during trial by displaying the images during a portion of his cross-examination of Appellant. During closing arguments, trial counsel referred to the contents of the SD card primarily when arguing the charged specification of sexual abuse of a child in violation of Article 120b, UCMJ, and the alleged indecent recording specification in violation of Article 120c, UCMJ. Appellant was acquitted of both these offenses.

2. Law

"The proponent of the evidence has the burden of demonstrating that the evidence is admissible." *United States v. Finch, 79 M.J. 389, 394 (C.A.A.F. 2020)* (citations omitted).

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Norwood, 81 M.J. 12, 17 (C.A.A.F. 2021)* (citations omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, **[*13]** [his] decision is influenced by an erroneous view of the law, or [his] 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)* (citations omitted).

Mil. R. Evid. 901(b) provides a non-exhaustive list of

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[7] Later, trial defense counsel objected to the Government playing the videos in open court, claiming that it was cumulative. Trial counsel argued that he would be using the videos to ask questions of Appellant during his cross-examination. The military judge overruled the objection and trial counsel used the videos to question Appellant. Measures were taken to ensure that the screen used by trial counsel was not facing the gallery.

examples of evidence that satisfies the authentication requirement including, *inter alia*, testimony of a witness with knowledge that an item is what it is claimed to be (Mil. R. Evid. 901(b)(1)); the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" (Mil. R. Evid. 901(b)(4)); and "an opinion identifying a person's voice" (Mil. R. Evid. 901(b)(5)).

The requirement of authentication is satisfied by "evidence sufficient to support a finding that the item is what the proponent claims it is." Mil. R. Evid. 901(a). The proponent "need only show by direct or circumstantial evidence of 'a reasonable probability' that the evidence is authentic." *United States v. Harris, 55 M.J. 433, 440 (C.A.A.F. 2001)* (citation omitted). Once the proponent has shown a reasonable probability that the evidence is authentic, the evidence should be admitted "in spite of any issues the opponent has raised about flaws in the authentication." *United States v. Lubich, 72 M.J. 170, 174 (C.A.A.F. 2013)* (noting that any flaws go to the weight of the evidence, not its admissibility). **[*14]** "There is no single way to authenticate evidence." *United States v. Holmquist, 36 F.3d 154, 167 (1st Cir. 1994)*. "Thus, a document's 'appearance, contents, substance, internal patterns, or distinctive characteristics, taken in conjunction with circumstances,' can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that is authentic." *Id.* (citations omitted).

3. Analysis

Appellant contends the military judge abused his discretion by admitting the five videos described *supra*. Appellant emphasizes RC testified that the SD card was not in her personal possession and that she did not record any of the video clips, nor was she present when any of the video clips were recorded. Appellant further emphasizes that when she first viewed the SD card, she skimmed through the files because she claimed there were "tons" of files. Appellant argues that "heightened scrutiny for authentication of digitally[-]stored images is warranted by recent developments in technology that allow such images to be easily created and altered."

We do not find the military judge abused his discretion. We agree with the military judge that RC laid a sufficient foundation and authenticated the videos found in Prosecution Exhibits **[*15]** 5-9. She viewed enough of the recordings on the SD card to identify specifics about the people and location in the videos. She was able to use clues such as a clock, holiday decorations, age of children, and even a pacifier belonging to one of the children to determine the approximate timeframe of the recordings. She testified that the exhibits were a fair and accurate representation of what she saw on the SD card. Additionally, Special Agent JF supported RC's testimony that the exhibits were a fair and accurate representation of the version of the videos found in Appellant's SD card. We conclude the military judge's determination that RC's testimony satisfied the requirements of Mil. R. Evid. 901 was not clearly unreasonable or erroneous. However, assuming *arguendo* the military judge erred in admitting the videos, any error was not prejudicial. Appellant was acquitted of the offenses Prosecution Exhibit 5-9 were offered to support.[8]

B. Mil. R. Evid. 404(b)

Appellant claims the military judge erred when he permitted the Government to prove the domestic abuse offenses with "impermissible propensity evidence." Specifically, Appellant argues the military judge erred in admitting into evidence uncharged acts of alleged **[*16]** violence under the theory of showing motive. Appellant claims the military judge abused his discretion by failing to apply the standard for establishing motive. He further avers that evidence of Appellant's prior acts of alleged violence towards RC when confronted with accusations of infidelity were "not relevant to motive" and instead inadmissible propensity evidence. We disagree and find no error, and even if there was error, we find no error that prejudiced Appellant. Therefore, no relief is warranted.

1. Additional Background

a. Government's Notice

Before trial, the Government provided the Defense with

[8] Appellant claims he was prejudiced by admission of the videos stating the "inadmissible videos likely tipped the scales in the Government's favor" claiming the military judge took the exhibits to be material to Appellant's alleged motive. However, as discussed *infra*, the military judge focused on the act of RC confronting Appellant about his infidelity as relative to the motive, not the substance of the videos.

notice that it may offer evidence of Appellant's uncharged acts, pursuant to Mil. R. Evid. 404(b), related to the domestic violence offense. The Government's notice focused on three incidents where Appellant and RC had physical altercations after RC discovered evidence of Appellant's infidelity during their marriage.[9] The Government intended to offer this evidence to show Appellant's intent, motive, plan, and common scheme to abuse RC.

The Government's notice stated:

> [(a)] In approximately March 2018, while driving, [Appellant] grabbed [RC]'s head with his hand and slammed her head into the vehicle **[*17]** window when she tried to grab his phone. [Appellant] struck her mouth with his hand. When [RC] got out of the vehicle, [Appellant] moved her back into the vehicle, punched the rearview window, and told her, "You are just f[**]king making it worse, stop."
>
> [(b)] On or about 20 August 2018, [Appellant] grabbed [RC]'s neck with his hand and she could not breathe. He let go and punched [a picture] frame, shattering it.
>
> [(c)] On or about 30 June 2021, when [Appellant] found out [RC] had his SD card, he smashed her phone and destroyed her military [CAC].

b. Motion in Limine

The Defense filed a motion *in limine* requesting the military judge exclude the noticed evidence. The Government responded to the motion and requested an Article 39(a), UCMJ, *10 U.S.C. § 839(a)*, hearing on the matter. Over the course of the motion hearing the military judge received evidence and heard arguments on the noticed evidence.

During the motion hearing, the Defense called one witness, RC, who at this time was Appellant's ex-wife. RC testified that in March 2018, she was driving in the car with Appellant and her son, when a Bluetooth notice showed up on the car's front screen with a "flirty" text message from a female name RC recognized. RC tried to retrieve **[*18]** Appellant's phone; however, Appellant, while driving, pushed her back from his phone and hit her head against the wind-shield. RC opened the door to get out, and Appellant swerved the car to a gravel area on the side of the road. RC exited the vehicle and tried to get her son out of the back seat. At this point, Appellant got out of the car and forced her back inside. RC kept crying and sat on the floor of the car's passenger seat. Appellant told her she was "making it worse" and punched the rearview mirror, shattering it completely and cracking the windshield. Once they got home, RC took a shower and laid down on her bed. Appellant stopped by the room, rubbed her head, and left the room. RC did not report the incident, nor seek medical treatment. RC eventually reported the incident to OSI during her 2021 interview regarding the videos on Appellant's SD card.

RC also testified about an "Anniversary Incident," which took place in August 2018. As it was their anniversary, RC bought Appellant a picture frame that she had arranged with a collage of photos from their first year together. As RC was grilling steaks for dinner, Appellant went outside to mow the lawn. RC took Appellant's phone **[*19]** to retrieve a particular photo of them and noticed he had an album on his phone that she was unfamiliar with titled, "What's App." When she clicked on it, there was a female she recognized as the one that had texted Appellant during the March 2018 incident. She went on to find naked pictures of this particular female in the "What's App" folder. Appellant came inside and noticed his phone was not where he left it and began looking for RC, who was hiding in the closet at this point.

RC told Appellant she was leaving and Appellant grabbed her and pinned her against the wall. RC testified that she could not breathe for a few seconds and she was holding his hand to indicate, "[L]et go of me." She stated that her son started yelling so Appellant let go of RC and went over to the frame he had just put on the wall and punched it causing it to shatter. He also began breaking other items in the house.

RC grabbed her son and they left the house. RC went on to explain that her son would talk about this incident after the fact, but she and Appellant would "act like nothing had happened and what [they] were doing was normal behavior." RC admitted that she never reported

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[9] In addition to giving notice regarding the incidents between Appellant and RC, the Government's notice also addressed uncharged physical assaults by Appellant against two other women; however, the military judge granted the Defense's motion *in limine* in part because he excluded any evidence of the other two women unless the Defense "open[ed] the door to such evidence."

the incident to law enforcement, **[*20]** nor did she make any statements to friends or family. She recalled texting Appellant after this incident and asking for a divorce.

In addition to RC's testimony, the military judge also watched recordings of RC's law enforcement interview where she described the prior alleged acts.

c. Military Judge's Ruling

After hearing oral arguments on the Mil. R. Evid. 404(b) motion, the military judge allowed testimony regarding the car and anniversary incidents to come in as "motive evidence." Specifically, the military judge found the incidents were admissible under Mil. R. Evid. 404(b) to "show [Appellant's] motive - that is when confronted by his wife with evidence of infidelity, [Appellant] reacts or responds with physical violence."[10]

The military judge provided an 18-page written ruling, in which he addressed the *Barnett* and *Reynolds* factors[11] as they related to the uncharged misconduct involving Appellant and RC and determined they weighed in favor of the Government.[12] *See United States v. Barnett, 63 M.J. 388, 395-96 (C.A.A.F. 2006)*; *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)*. In his *Barnett* factors analysis, the military judge addressed the probative value of the Mil. R. Evid. 404(b) evidence, providing his rationale for why the value of admitting this evidence was "high." He stated that the March and August 2018 incidents show a very specific result from Appellant (physical **[*21]** violence) to a very specific trigger (confronted with evidence of infidelity) and both the trigger and the response are present at the time of the charged offenses.

The military judge addressed why he found the uncharged conduct permissible under the Government's theory of motive. He explained that "'motive' is something, especially a willful desire, that leads one to act." The military judge relied on *United States v. Watkins* to address how evidence of motive "is relevant within the meaning of [Mil. R. Evid.] 401 to show the doing of an act by a person as an outlet for that emotion." *21 M.J. 224, 227 (C.M.A. 1986)* (citing 1A Wigmore, *Evidence* § 117 (Tillers rev. 1983)); *see also id.* (citing 2 Wigmore, *Evidence* §§ 396, 397 (Chadbourn rev. 1979)) (recognizing that prior conduct "reasonably reflects" hostility towards women, particularly when coupled with intoxication, and therefore may be admissible to establish motive in the charged offense where intoxication prior to the offense was also at issue)) (additional citations omitted).[13]

Similarly, in the case in hand, the military judge recognized Appellant's prior conduct must be the type that reasonably could be viewed as the expression **[*22]** and effect of the existing internal emotion and this same motive must be shown to have existed in Appellant at the time of the subsequently charged acts. *Id.* He stated that the common thread among the physical assaults is that they came in response to RC confronting the Appellant in some way about his infidelity. The military judge went on to say

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[10] The military judge did not agree with the Government's theories of admissibility involving a "plan" or "intent" to control or dominate RC.

[11] In *United States v. Reynolds*, our superior court held that when looking to evidence of uncharged misconduct, we must test its admissibility under at least three standards: (1) whether "the evidence reasonably support a finding [by the factfinder] that appellant committed prior crimes, wrongs, or acts;" (2) what "fact . . . of consequence is made more or less probable by the existence of this evidence;" and (3) whether "the probative value [is] substantially outweighed by the danger of unfair prejudice." *29 M.J. 105, 109 (C.M.A. 1989)* (omission in original) (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.* In *United States v. Barnett*, the court reaffirmed the three-part test and refined its application by requiring careful articulation of the second and third prong of *Reynolds*. As to the second prong, it looked to "whether the factual dissimilarities between offenses charged at trial and the prior uncharged misconduct were so great such that [a] military judge abused his discretion," and as to the third prong, "assuming the prior uncharged misconduct is logically relevant . . . whether any unfair prejudice created by the evidence outweighed its probative value." *63 M.J. 388, 394-95 (C.A.A.F. 2006)*.

[12] Appellant claims the military judge abused his discretion by failing to establish the second and third prongs of the *Reynolds* test. While the military judge's ruling did not specifically state the second and third prongs of the *Reynolds* test were met in regards to RC by referring to "Reynolds" when addressing them in his opinion, the military judge did conduct an analysis of the content of those prongs, and applied *Barnett*.

[13] The court in *Watkins* further cited 1A Wigmore, Evidence § 117, and 2 Wigmore, Evidence § 395, to support that "prior acts must be the type which reasonably could be viewed as 'the expression and effect of the existing internal emotion'" that existed at the time of the subsequently charged acts.

that he would allow the evidence for the "limited purpose to show that when confronted with a very specific trigger from his wife (i.e., evidence of infidelity), the [Appellant] reacts in a very specific way - with physical violence." He further stated the evidence is probative to a material issue in this case, that it is more likely Appellant committed domestic violence against RC on 30 June 2021.

> As shown by the evidence on that date, and immediately prior to the charged domestic violence, RC confronted [Appellant] with the SD card that showed his infidelity. RC's confrontation, as it had on two prior occasions, resulted in Appellant physically assaulting her and violently damaging nearby property.

The military judge went on to state:

> To be clear, I am not allowing this evidence simply to show [Appellant] is a bad person who cheats on his wife, **[*23]** or that he is generally a mean and violent man. Instead, I will allow the evidence for the limited purpose to show that when confronted with a very specific trigger from his wife (i.e., evidence of infidelity), Appellant reacts in a very specific way - with physical violence.

Regarding Appellant's uncharged acts of smashing the phone and shredding the military CAC, the military judge determined those acts were *res gestae* of the charged offense. However, the military judge found to the extent the phone smashing and shredding of the CAC falls under Mil. R. Evid. 404(b), such evidence also passes the *Reynolds* test.

2. Law

We review a military judge's Mil. R. Evid. 404(b) ruling for an abuse of discretion. *United States v. Wilson, 84 M.J. 383, 390 (C.A.A.F. 2024)*. When we apply the abuse of discretion standard, mere disagreement with the conclusion of the military judge is not enough to overturn his decision. *United States v. Dooley, 61 M.J. 258, 262 (C.A.A.F. 2005)*. Instead, we determine whether the military judge was clearly wrong in his determination of the facts or that his decision was influenced by an erroneous view of the law. *Id.* "[T]he abuse of discretion standard of review recognizes that a judge has a wide range of choices and will not be reversed so long as the decision remains within that range." *Wilson, 84 M.J. at 390-91* (alteration in original) (citation omitted). **[*24]** "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney, 54 M.J.120, 130 (C.A.A.F. 2000)* (citations omitted).

Mil. R. Evid. 404(b)(1) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character in order to show criminal propensity, *i.e.*, that the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for other purposes, including, *inter alia*, proving motive, opportunity, intent, plan, the absence of mistake, or lack of accident. Mil. R. Evid. 404(b)(2).

We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b):

> 1. Does the evidence reasonably support a finding by the [factfinder] that [an] appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

Hyppolite, 79 M.J. at 162 (omissions in original) (quoting *Reynolds, 29 M.J. at 109*) (additional citations omitted).

If the admitted evidence fails to meet any of the factors laid out in *Reynolds*, the **[*25]** military judge will have erred. *Wilson, 84 M.J. at 390* (citing *Reynolds, 29 M.J. at 109*). The appellate court must then assess the prejudice, if any, resulting from that error. *Id.* (citation omitted).

An appellate court will not reverse an appellant's conviction for harmless error. By this standard, "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *Article 59(a), UCMJ, 10 U.S.C. § 859(a)*.

Whether an error is harmless is a question of law we review de novo. *United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017)* (citation omitted). "For nonconstitutional errors, the Government must demonstrate that the error

did not have a substantial influence on the findings." *Id.* (quoting *United States v. McCollum, 58 M.J. 323, 342 (C.A.A.F. 2003)*). "We evaluate the harmlessness of an evidentiary ruling by weighing: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *Id. at 89* (quoting *United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)*).

Mil. R. Evid. 404(b) "is a rule 'of inclusion rather than exclusion'" that "permits admission of relevant evidence of other crimes or acts unless the evidence 'tends to prove only criminal disposition.'" *United States v. Browning, 54 M.J. 1, 6 (C.A.A.F. 2000)* (quoting *United States v. Simon, 767 F.2d 524, 526 (8th Cir. 1985)*). Prior acts showing motive "must be the type which reasonably could **[*26]** be viewed as 'the expression and effect of the existing internal emotion'" and "this same motive must be shown to have existed in appellant at the time of the subsequently charged acts." *Watkins, 21 M.J. at 227* (citation omitted).

"Motive" is defined as "something, especially willful desire, that leads one to act." *Motive*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Motive evidence" is circumstantial proof that "shows the doing of an act by a particular person by evidencing an emotional need in that person which could have incited or stimulated that person to do that act in satisfaction of that emotion." *United States v. Whitner, 51 M.J. 457, 461 (C.A.A.F. 1999)* (citations omitted).

"Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)* (citation omitted). In particular, we further presume military judges are "capable of filtering out inadmissible evidence." *United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000)*.

"Evidence of uncharged misconduct is impermissible for the purpose of showing a predisposition toward crime or criminal character." *Id.* (footnote omitted). "However, uncharged misconduct can be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* (footnote and internal **[*27]** quotation marks omitted). "Evidence may be admissible for some purposes but not others." *United States v. Hyppolite, 79 M.J. 161, 164 (C.A.A.F. 2019)* (citation omitted). Mil. R. Evid. 404(b) "is viewed as an inclusionary rule under which evidence of logically relevant prior acts is admissible except when tending to prove only criminal disposition." *United States v. Franklin, 35 M.J. 311, 316 (C.M.A. 1992)* (internal quotation marks and citation omitted). Regarding the third *Reynolds* factor, the danger of unfair prejudice is precipitously less in a military judge alone trial when a military judge "emphasized that he would consider the uncharged acts only for the limited purpose of establishing a common scheme or plan and not as improper propensity evidence or for any purpose prohibited by [Mil. R. Evid.] 404(b)." *United States v. Greene-Watson, 85 M.J. 340, 348 (C.A.A.F. 2025)*; *see also id. at 349* (Sparks, J., concurring in part and in the judgment) ("The risk of relevant evidence causing unfair prejudice in a bench trial is nonexistent because the risk addressed in [*United States v. Staton, 69 M.J. 228 (C.A.A.F. 2010)*, *i.e.*, that a lay trier of fact will treat evidence of uncharged acts as propensity evidence,] is eliminated by the absence of a members panel.").

3. Analysis

Appellant contends the military judge abused his discretion by allowing RC to testify to the three episodes of uncharged misconduct - the driving incident, the anniversary incident, and the phone smashing **[*28]** and CAC card incident. In doing so, Appellant claims the military judge "allow[ed] the Government to present evidence of Appellant's alleged propensity to respond to RC with violence when confronted with accusations of infidelity." For the reasons stated below, we do not find that the military judge abused his discretion in admitting the challenged evidence. The military judge provided a detailed written analysis in this case. As such, "the military judge's ruling is entitled to full deference by this court under the abuse of discretion standard." *Id.* (citation omitted). The military judge conducted a *Reynolds* factor analysis. The military judge was not clearly wrong in his determination of the facts, and his decision was not influenced by an erroneous view of the law, particularly in the context of this judge-alone trial.

a. Relevance to Motive

The military judge properly determined that the evidence reasonably supported a finding that the uncharged acts

took place, satisfying the first *Reynolds* factor.[14] In regard to the second *Reynolds* factor, whether the evidence of the uncharged acts makes a fact of consequence more or less probable, Appellant argues that the military judge failed to apply the standard for **[*29]** establishing the uncharged acts as relevant to "motive." The military judge first articulated a detailed review of applicable precedent regarding evidence of motive under Mil. R. Evid. 404(b). He reasoned that the uncharged acts were admissible under Mil. R. Evid. 404(b) because they demonstrated Appellant had a motive to commit the charged misconduct. He then applied the definition of "motive" as referenced in Black's Law Dictionary to be "something, especially willful desire that leads one to act," citing *Motive*, BLACK'S LAW DICTIONARY (7th ed. 1999). The military judge accurately explained that "the common thread in all physical assaults alleged by RC is that they came in response to her confronting [Appellant] in some way about his infidelity." In March 2018, RC saw that Appellant was receiving text messages from a female and when she confronted Appellant, he reacted with physical violence by "pushing her head into the window, forcing her back in the car and smashing the rearview mirror of the car." In August 2018, when RC confronted Appellant about evidence of infidelity she had discovered on his phone, Appellant again reacted with physical violence by "choking RC and then punching and shattering a nearby picture frame." **[*30]** The military judge pointed out that similar to the uncharged offenses, on the night of the charged offense of 30 June 2021, RC confronted Appellant about evidence of infidelity she had discovered on the SD card, and Appellant reacted with physical violence by punching RC in the ribcage with his fist and smashing her phone.

We find that the military judge did not have an erroneous view of the law by applying *Watkins* to determine that Appellant's uncharged acts of violence after similarly being confronted about infidelity could reasonably be viewed as "the expression and effect" of the existing internal emotion that existed in Appellant at the time of the subsequently charged act, and therefore are relevant to Appellant's motive, within the meaning of Mil. R. Evid. 401. *Watkins, 21 M.J. at 227*. While the military judge did not name the specific emotion in his ruling, in applying *Watkins*, we can infer the military judge determined Appellant's past confrontations of infidelity created hostile emotions which were expressed as physical violence towards RC. Physical violence can reasonably be viewed as the "expression and effect" of an emotional response due to being confronted with infidelity. The military judge captured this idea **[*31]** when he said, "[W]hen confronted with a very specific trigger from his wife (i.e., evidence of infidelity), the [Appellant] reacts in a very specific way - with physical violence." *See Watkins, 21 M.J. at 227 (h*olding that an appellant's prior violent acts are reasonably the "expression and effect" of an appellant's existing internal emotion). Additionally, the military judge's ruling clearly indicated he was not admitting the evidence for purposes of propensity as he would not use the evidence to consider Appellant "a bad person who cheats on his wife, or that he is generally a mean and violent man." He further determined that the probative value of the evidence was very high and not substantially outweighed by the danger of unfair prejudice as part of his Mil. R. Evid. 404(b) and Mil. R. Evid. 403 analyses.

Upon reviewing the military judge's analysis, there is no clear evidence that the military judge failed to follow the law. *See Erickson, 65 M.J. at 225* (noting military judges are presumed to know the law and to follow it, absent clear evidence to the contrary). Therefore, we find the military judge's decision to admit evidence of uncharged acts testimony pursuant to Mil. R. Evid. 404(b) was not "arbitrary, fanciful, clearly unreasonable or 'clearly erroneous.'" *Collier, 67 M.J. at 353* (citation omitted). **[*32]** As such, the military judge did not abuse his discretion in allowing the evidence to be admitted. Furthermore, we give substantial deference to the military judge's Mil. R. Evid. 403 balancing test. Additionally, because this was a judge alone trial, where the military judge made a point to distinguish propensity evidence from motive evidence, there was even less danger of the evidence being used for any improper purpose. In coming to this conclusion, we are mindful of our superior court's admonition in *Wilson*, et al., to be on guard against "the wolf of propensity that comes dressed in the sheep's clothing of motive," and under somewhat different circumstances we would not be persuaded there was no error. *See Wilson, 84 M.J. at 392-93* (citing *United States v. McCallum, 584 F.3d 471, 477 (2d Cir. 2009)*) (describing evidence improperly admitted under Federal Rule of Evidence 404(b) as "propensity evidence in sheep's clothing"). However, here, the military judge's analysis laid out in his 18-page ruling, combined with his stated limited use of this

[14] We note "[t]he standard to meet this prong is low." *Wilson, 84 M.J. at 390* (quoting *United States v. Thompson, 63 M.J. 228, 230 (C.A.A.F. 2006)*).

evidence, led us to determine the military judge's distinction between propensity and motive evidence fell within the broad discretion vested in military judges. Furthermore, as we explain more fully below, any error was harmless.

b. Lack of Prejudice

Assuming *arguendo* the military **[*33]** judge abused his discretion by admitting evidence of the prior violent acts involving RC, reversal is warranted only if the error materially prejudiced the Appellant's substantial rights under Article 59 (a), UCMJ, a determination we make using the factors articulated in *Kerr*.

Appellant argues the evidence prejudiced his trial, pointing out that the trial counsel referred to the uncharged acts during his closing argument by stating, "Similar to the two instances in 2018, here we have [Appellant] being confronted with some form of proof or suspicion of infidelity . . . ." Appellant points out that the Government also argued, "But the facts are what they are. [Appellant] beat [RC] that day. Just like he has done in the past."

Applying the *Kerr* factors, we are not persuaded any error had a substantial influence on the findings. *See Bowen, 76 M.J. at 87* (quoting *Kerr, 51 M.J. at 405*). Conducting a de novo review of whether any error was harmless, and applying the four-prong test laid out in *Bowen*, we find any error in admitting the evidence of the prior uncharged acts of physical violence against RC was harmless. We evaluate prejudice from an erroneous ruling by weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the **[*34]** materiality of evidence in question, and (4) the quality of the evidence in question." *Bowen, 76 M.J at 89* (quoting *Kerr, 51 M.J. at 405*).

The Government had a strong case notwithstanding the testimony of the prior, uncharged, violent acts involving RC. Evidence of the charged conduct was established by other evidence at trial, particularly RC's testimony. In addition to reviewing the transcript, this court listened to the audio recordings of the trial, and finds RC to be a credible witness. She had a valid explanation as to why she initially denied the domestic violence. RC knew that if she reported the domestic violence it would have halted Appellant's deployment, and she felt it was best for him to leave on his deployment. She explained she did not end her marriage earlier because her son, PC, had a relationship with Appellant. While the Defense presented evidence from Appellant to contradict RC, as stated *infra*, RC's testimony was better supported by multiple witnesses involved in responding to the events of 30 June 2021. GG's testimony confirmed there was an altercation between Appellant and RC on 30 June 2021. She confirmed that Appellant did not allow GG to talk to RC. As a result, GG contacted her local OSI detachment **[*35]** and requested a health and wellness check. Furthermore, in regard to the CAC, Appellant testified under oath that he did not destroy or cut RC's CAC. However, multiple witnesses corroborated RC's testimony that her CAC was destroyed. GG testified that she helped RC plan to access the base the next day because her CAC was inoperable, and a non-commissioned officer authenticated documents showing RC obtained a new CAC the day after the offense. The fact RC needed a new CAC corroborated her testimony and timeline of events and supported her claim that Appellant was upset that RC had found the SD card and Appellant destroyed her CAC because she would not turn over the SD card.

As to materiality, RC's testimony regarding Appellant's prior physical altercations was material to the Government's overall case to show motive. As the military judge described in his ruling,

> This evidence is probative to a material issue . . . specifically, it makes it more likely [Appellant] committed domestic violence against RC on 30 June 2021. As shown by the evidence, on that date, and immediately prior to the charged domestic violence, RC confronted [Appellant] with the SD card that showed his infidelity. RC's **[*36]** confrontation, as it had on two prior occasions, resulted in [Appellant] physically assaulting her and violently damaging nearby property.

Even where evidence is material, the remaining *Kerr* factors demonstrate that the error did not materially prejudice Appellant. *See Kerr, 51 M.J. at 405* (determining admission of extrinsic evidence of misconduct was harmless error when Government's evidence was strong, defense case was not as strong, evidence was material, and evidence was of "questionable credibility").

Turning to the fourth factor, the quality of RC's testimony to Appellant's prior violent acts was not particularly high, having taken place nearly three years prior to the charged offense, and not corroborated by any other

witnesses. Therefore, three out of four factors of the *Kerr* test weigh in favor of finding no prejudice.

Even though trial counsel referred to the evidence in their closing argument, in the context of the trial as a whole, the *Kerr* factors demonstrate that the evidence played, at most, a minimal role in the Government's case. As such, the evidence would not have a meaningful influence on the verdict, given the strength of the other admitted evidence and limited quality of the challenged material. **[*37]** Therefore, in applying the *Kerr* factors, three of the four factors weigh in the Government's favor and the admission of RC's testimony about Appellant's prior violent acts when confronted by the military judge, if error, was harmless. *See United States v. Norman, 74 M.J. 144, 150 (C.A.A.F. 2015)* (holding error in admitting opinion testimony on an ultimate issue was not prejudicial when three out of four *Kerr* factors weighed in favor of the Government).

In light of the totality of the evidence in this case, we are not persuaded RC's testimony regarding the prior uncharged violent acts had a substantial effect on the findings.

C. Factual and Legal Sufficiency of Domestic Violence Conviction

Appellant contends his conviction for domestic violence was factually and legally insufficient. Specifically, he argues the Government's case was factually insufficient because it relied primarily on the testimony of RC, which Appellant describes as not credible because RC had initially "denied on body camera that any domestic violence took place." In terms of legal sufficiency, Appellant claims that no reasonable factfinder could have concluded that the offense occurred. Upon review of the record, we find Appellant's conviction for domestic violence factually and **[*38]** legally sufficient.

1. Additional Background

During trial, RC explained she did not initially tell the responding police officers that Appellant had committed domestic violence against her because she wanted to protect Appellant. She testified that she believed making such an allegation might ruin Appellant's career, prevent him from getting promoted, and interfere with his upcoming deployment which she considered the "best thing . . . to give [them] space but to also not hurt him."

The Government also offered supporting testimony from GG, who was on the phone with RC during the time of the violent act. GG explained how she arranged for police to conduct a health and welfare check at Appellant and RC's home based on her concerns about what she heard during that phone call. GG further testified, "I wanted law enforcement to figure . . . out [what happened] and respond in case she was hurt or something happened."

GG then told the military judge of her interactions with RC after the incident. GG spoke with RC about how to get on the base the day after the incident because RC's CAC was not serviceable. She explained that RC told her more about what happened between her and Appellant in "pieces." **[*39]** GG also attested to RC's character for truthfulness.

Appellant, for his part, also provided sworn testimony at trial, denying all of RC's allegations. When asked by his trial defense counsel whether "[he] ever commit[ted] assault consummated by a battery against [RC]" on 30 June 2021, Appellant answered, "No, sir."

Appellant provided his side of the account of the convicted offense. Appellant stated he was at a deployment-related appointment when he contacted RC to ask whether she had seen a document he had left at the house. According to Appellant, RC agreed to look for it, and he later received a text message from her stating, "[Y]ou piece of sh[*]t." He testified he then called RC, who told him she had found a SD card containing videos. He claimed he was "shocked" and "a little embarrassed" because he "got caught cheating" and "[t]here was an SD card out for her to see." "It contained files of other women . . . ."

Appellant described driving home and discovering that the front door was locked. When he attempted to unlock it using the combination, it did not work. He then went to the backyard, where he found the sliding glass doors locked as well. He explained he was able to open the **[*40]** sliding door by lifting one side and sliding it over. He denied breaking any lock to get in. Once inside the house, he began searching for his SD card while RC followed him from room to room while talking on the phone to GG. He told RC to get off the phone as he did not want "[his] business out there."

Appellant's version of how he got the phone differs from RC's testimony. Where RC claimed she released the

phone when he punched her in the ribs with his fist, Appellant claims he grabbed the phone from her "straight out of her hands" and held it above his head so she "couldn't grab it," implying they were both standing up. He claimed there was no injury to her from grabbing the phone. He testified he did not push RC, cause her to fall, or strike her in the ribs to obtain her phone.

Similar to RC's testimony, Appellant described how GG kept calling back and he eventually answered it. When GG threatened to call the police if she could not talk to RC, he claimed he told her, "[D]o what the f[**]k you got to do" and hung up. Appellant testified that he continued to look around the house for the SD card and within minutes, law enforcement knocked on the door claiming they received a call regarding **[*41]** a domestic violence dispute. Appellant testified that both he and RC told them that it was a verbal dispute and no property was damaged and no one was hit. Appellant claimed he and RC agreed that he would leave the residence for the night.

Trial defense counsel asked Appellant if RC's son PC was around during this dispute. Appellant testified that PC was home in his room but came out when he heard the argument and he saw Appellant holding RC's phone over his head. Appellant said he told PC to go back in his room and PC complied.

Appellant testified that within 24 hours of this incident, he was back at his house at RC's invitation. Appellant claimed that RC invited him to come over and spend time with PC before he left on his deployment.

Additionally, Appellant testified about the uncharged allegations of violence against RC which were part of the Mil. R. Evid. 404(b) evidence discussed *supra*. He agreed with his trial defense counsel on direct examination that he "never once laid hands on [RC]." He agreed with his trial defense counsel that PC was present during the alleged altercations and that he would not violently interact with a woman in front of a child. When his counsel asked him why he would not be **[*42]** violent in front of a child, Appellant explained:

> First of all it's not what I do. I know little man's watching me. I'm not saying kid's [sic] talk, but, you know, I wouldn't want to do that at all. Set myself up for failure.

Appellant further testified that filing for divorce during his deployment made RC "kind of upset" and that RC threatened to turn in the SD card to his squadron or OSI and told him "[his] career was ending."

Appellant denied destroying or cutting RC's CAC. At trial, the non-commissioned officer in charge of customer support at Luke AFB, testified that records showed RC replaced her CAC on 1 July 2021, the day after the charged offense, but indicated that her office did not have any record of why or how RC's card was damaged.

2. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021)* (citation omitted).

Factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows a specific deficiency in proof. *United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024)* (citing Article 66(d)(1)(B)(i), UCMJ, *10 U.S.C. § 866(d)(1)(B)(i)*, *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*)).

The current version **[*43]** of Article 66(d)(1), UCMJ, states:

> (B) FACTUAL SUFFICIENCY REVIEW. -
>
> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight

> of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

This factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13 (2021)*.

If both thresholds are met, this court may "weigh the evidence and determine controverted questions of fact." Article 66(d)(1)(B)(ii), UCMJ. We do so keeping in mind that a factfinder may choose to believe one part **[*44]** of a witness's testimony and disbelieve another. *United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979)*.

We must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." *Harvey, 85 M.J. at 130*. "[T]he requirement of 'appropriate deference' when a [Court of Criminal Appeals (CCA)] 'weigh[s] the evidence and determine[s] controverted questions of fact' . . . depend[s] on the nature of the evidence at issue." *Id.* (second and third alterations in original). It is within this court's discretion to determine what level of deference is appropriate. *Id.*

The CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." Article 66(d)(1)(B)(iii), UCMJ, *10 U.S.C. § 866(d)(1)(B)(iii)*. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." *Harvey, 85 M.J. at 131* (internal quotation marks omitted).

For this court "to be 'clearly convinced that the finding[s] of guilty [were] against the weight of the evidence,' two requirements must be met." *Id. at 132*. First, we must decide that evidence, as we weighed it, "does not prove that **[*45]** the appellant is guilty beyond a reasonable doubt." *Id.* Second, we "must be clearly convinced of the correctness of this decision." *Id.*

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (citation omitted). This "does not mean that the evidence must be free from any conflict . . . ." *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)* (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted). Thus, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *King, 78 M.J. at 221* (alteration in original) (citation omitted).

Article 128b, UCMJ, criminalizes violent offenses against a spouse, intimate partner, or immediate family member of that person, otherwise known as domestic violence. Article 128b(1)-(5), UCMJ, *10 U.S.C. § 928b(1)-(5)*.

As charged in this case, to find Appellant guilty of domestic violence, in violation of Article 128b, UCMJ, the Government was required to prove beyond a reasonable doubt: (1) that Appellant committed a violent offense, to wit: unlawfully struck RC's ribcage with **[*46]** his fists, and (2) that the violent offense was committed against RC, the spouse of Appellant. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM)*, App. 2, at A2-45-46.[15] As part of this offense, the underlying violent offense was assault consummated by a battery. To find Appellant guilty of assault consummated by a battery, in violation of Article 128, UCMJ, *10 U.S.C. § 928*, the Government was also required to prove beyond a reasonable doubt: (1) that Appellant did bodily harm to RC by unlawfully striking RC's ribcage with his fists, (2) that the bodily harm was done unlawfully, and (3) that the bodily harm was done with force or violence. *MCM*, pt. IV, ¶ 77.b.(2)(a)-(c).[16]

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[15] On 26 January 2022, the President signed an executive order which amended certain provisions of the Manual for Courts-Martial, to include a new paragraph 78a of the Uniform Code of Military Justice—Article 128b, UCMJ, *Domestic Violence*—outlining, *inter alia*, the elements of the offense and maximum punishments to be imposed. *See* Exec. Order No. 14,062, 3 C.F.R. 4763 (31 Jan. 2022).

[16] The military judge found Appellant guilty of the charged offense of domestic violence but excepted the words "fists" and substituted therefor the word "fist." Of the excepted word, the military judge found Appellant not guilty, of the substituted word, guilty. This does not change our analysis.

3. Analysis

We find Appellant has adequately asserted factual insufficiency as an assignment of error. *See* Article 66(d)(1)(B)(i), UCMJ. Appellant has shown a specific deficiency in proof given his claim that RC initially denied that domestic violence had occurred. Appellant has also highlighted a second specific deficiency in proof in Appellant's testimony denying that he assaulted RC. *See id.*

Therefore, we have "weigh[ed] the evidence and determine[d] controverted questions of fact." Article 66(d)(1)(B)(ii), UCMJ. We have also given "appropriate deference to the fact that the trial court saw and **[*47]** heard the witnesses and other evidence." *Harvey, 85 M.J. at 130*. By this standard, we are not "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ; *Harvey, 85 M.J. at 130*.

RC testified and described several reasonable explanations for denying the abuse when the police showed up to her house. She explained she was trying to protect herself from Appellant and believed reporting domestic violence would prevent Appellant from deploying as planned, an event she believed would guarantee six months apart from him. She also believed that if she had reported it, she would not have the strength to take the next steps to come forward or testify about the abuse and Appellant would have ended up being released anyway. RC claimed that if she reported it, she felt she would be back in the same situation, whereas the deployment gave them space.

Additionally, the Government provided other evidence that weighed in their favor. GG's testimony confirmed there was an altercation between Appellant and RC, which caused GG enough concern to request police support and contact a mutual friend to assist RC. GG's testimony tended to support RC's testimony that RC became upset with Appellant after finding the SD card with **[*48]** videos of him having sex with other women. GG's testimony also supported RC's allegation that Appellant would not let GG talk with RC after their phone call was disconnected. Furthermore, GG testified about helping RC think through options to get on base the next day without her CAC, which gave further support to RC's allegation that Appellant had destroyed the card on the night of the convicted offense. In light of this trial evidence, there was a reasonable basis to find RC credible given her testimony and corroborating evidence.

Turning to the conflicting testimony between RC and Appellant at trial, this case boiled down to a determination of witness credibility. The military judge, unlike this court, had the opportunity to observe both Appellant and RC testify and to receive the other trial evidence firsthand. We give the military judge appropriate deference to the fact that he saw and heard the witnesses and other evidence. *Harvey, 85 M.J. at 130*. While Appellant had witnesses testify on his behalf, not one witness corroborated his side of the testimony as it related to the domestic violence charge and specification. The Government called GG to testify about her concerns which rose to the level of involving **[*49]** the police. BM testified about taking PC from the house as the police arrived. MSgt SS testified about staying with RC for a while that evening. If it was merely a verbal altercation, it seems unlikely RC would want her son to leave the house, and that she would need a senior non-commissioned officer to stay with her for a while that evening. Her testimony is further corroborated by evidence that RC tried to get a new CAC the next day, which is unlikely if her prior CAC was not destroyed. This is not to say the military judge discounted Appellant's credibility in full. While the military judge found Appellant guilty of the violent act against RC, he likely gave some weight to Appellant's explanation for the alleged offenses of which he was acquitted.[17] We are convinced beyond a reasonable doubt of Appellant's guilt. The weight of the evidence supported the domestic violence conviction which we find factually sufficient. *See* Article 66(d)(1)(B)(iii), UCMJ.

Turning to the issue of legal sufficiency, after considering the evidence presented at trial in the light most favorable to the Government, including our resolution of credibility disputes, we conclude any rational trier of fact could have found the essential elements **[*50]** of the crime beyond a reasonable doubt. Accordingly, we find Appellant's conviction is legally sufficient and he is not entitled to relief.

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[17] Appellant testified he intended to record himself engaging in consensual sex with the ladies in the video, but he did not intend for the children to be around while he was having sex with the woman in each video and he had not intended to conduct indecent exposure, communicate indecent language, or indecently record them.

D. Article 13, UCMJ, Credit for Pretrial Confinement Conditions

Appellant claims he is entitled to relief for being confined under conditions more rigorous than necessary to ensure his presence at trial, in violation of *Article 13, UCMJ, 10 U.S.C. § 813*.

1. Additional Background

After the OSI had possession of the SD card and noticed several videos had children in them, they ran the names of the women in those specific videos through a database and made them "persons of interest" and alerted local authorities in Florida. In August 2022, while allegations by RC were pending, the State of Florida brought several charges against Appellant and issued an arrest warrant for crimes allegedly committed against RD, a named child victim in this case. Those crimes dealt with evidence that Appellant recorded himself having sex with RD's mother while RD was in the vicinity and thereby captured RD in the sexually explicit video recording. On 8 September 2022, the United States Air Force (hereinafter Air Force) requested exclusive jurisdiction from the State of Florida for all offenses forming the charges in Appellant's **[*51]** court-martial and asked that the State "rescind the current arrest warrant against [Appellant]."

On 16 September 2022, a Florida assistant state attorney notified the Air Force that after discussions with the base legal office, they would "honor [their] request to relinquish jurisdiction for all charges related to [RD] and [Appellant]" and that they were "also taking action to rescind the current arrest warrant . . . ."

In his motion for relief, Appellant claims he had trouble accessing the base due to the outstanding arrest warrant for approximately one year. Specifically, as a result of this warrant, Appellant stated he was stopped at the gate "everyday [sic] for the next year." He claimed he spoke with his leadership about the warrant each week and was told that the Air Force had taken jurisdiction over the charges and the Florida warrant would be dropped soon. Air Force officials attempted to resolve the problem by reaching out to authorities in Florida. However, Florida continued to retain an active warrant against Appellant for the allegations of crimes against RD.

While Appellant was on leave in Nevada on 29 June 2023, he was stopped for an alleged traffic violation and was arrested **[*52]** and placed in a Nevada jail based on the warrant issued by the State of Florida. Appellant remained in custody in Nevada until 18 July 2023, when he was extradited to Florida where he was also held in confinement by Florida authorities. He was released from confinement in Florida on 21 July 2023. He spent a total of 22 days in a civilian confinement facility under the custody of two states.[18]

Trial defense counsel moved for appropriate relief for an alleged violation of Article 13, UCMJ, asserting that Appellant's conditions of pretrial confinement at the civilian confinement facilities were "more rigorous than necessary to ensure his presence at trial." During sentencing, Appellant asked for 30 days of pretrial confinement credit to account for the time he spent in civilian confinement and restriction to base. According to Appellant, while confined in Nevada, he was "not permitted to go outside." He was "released from his cell only once every five days", "had a shower only every five days," and was kept in a cell with civilians where he had to wear a "jumpsuit" and "slept on the floor of the cell."

The military judge denied Appellant's motion, finding that confinement by civilian authorities "was solely **[*53]** related to the actions by the [S]tate of Florida" and that those actions "didn't have anything to do with the Air Force." Specifically, the military judge found in his written ruling:

> The United States was not involved in the issuance of the warrant, the failure to rescind such warrants, the enforcement of the warrants, nor the confinement in Las Vegas or Florida. Nonetheless, when [Appellant] kept getting stopped at the gate, Air Force officials attempted to resolve the problem by reaching out to authorities in Florida. Additionally[,] when [Appellant] was confined, the Government made efforts to resolve the situation.

The military judge also found in his verbal ruling:

> [T]he time spent in Nevada jail and Florida jail was completely unrelated to the offense which [Appellant] has been found guilty, which is domestic

[18] Appellant was also restricted to base for 30 days in August 2022. Appellant's first sergeant testified that he was restricted to base for a lack of good order and discipline in the unit, his safety, and the safety of others in the unit. This restriction was lifted.

> violence - or assault consummated by battery, violation of Article 128b, that took place in the state of Arizona. And so, given the confinement was not related to the offense of which [Appellant] accused was convicted, he is not entitled to pretrial confinement credit.

In a later written ruling, the military judge found Appellant would only be entitled to pretrial confinement credit under **[*54]** these circumstances if he had been convicted of the offenses which formed the basis of the charges in Florida.

2. Law

a. Standard of Review

Whether an appellant is entitled to relief for a violation of Article 13, UCMJ, is a mixed question of fact and law. *United States v. Crawford, 62 M.J. 411, 414 (C.A.A.F. 2006)* (citations omitted). "[T]he military judge's findings of fact will not be overturned unless they are clearly erroneous." *United States v. Fischer, 61 M.J. 415, 418 (C.A.A.F. 2005)* (citation omitted). "Whether the facts amount to a violation of Article 13, UCMJ, is a matter of law the court reviews de novo." *Crawford, 62 M.J. at 414* (citation omitted). The appellant bears the burden to demonstrate a violation of Article 13, UCMJ. *Id.* (citation omitted).

A military judge's findings of fact are "clearly erroneous when there is no evidence to support the finding or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Criswell, 78 M.J. 136, 141 (C.A.A.F. 2018)* (citations omitted).

b. Article 13, UCMJ

Article 13, UCMJ, provides, in the pertinent part: "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence **[*55]** [at trial] . . . ."

"Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005)*.

To qualify as "rigorous" within the meaning of Article 13, UCMJ, the conditions must be "sufficiently egregious [to] give rise to a permissive inference that an accused is being punished, or the conditions . . . [were] so excessive as to constitute punishment." *Id. at 227-28* (citations omitted) (holding solitary confinement in a six-by-six-foot windowless cell without any specific rationale was unduly rigorous). The United States Court of Appeals for the Armed Forces (CAAF) has previously explained that "genuine privations and hardship over an extended period of time" may rise to the level of a due process violation and warrant relief. *See United States v. Fricke, 53 M.J. 149, 155 (C.A.A.F. 2000)* (citations omitted) (holding that appellant's 326 days of pretrial confinement, where he was locked in his cell 23 hours a day and was required to sit or stand near a small wooden desk for 15-and-a-half hours to keep from falling asleep, raised a legal claim of unduly rigorous conditions in violation of Article 13, UCMJ).

Although R.C.M. 305(k) is the principal remedy for Article 13, UCMJ, violations, **[*56]** courts must consider other relief for violations of Article 13, UCMJ, where context warrants. *United States v. Zarbatany, 70 M.J. 169, 175 (C.A.A.F. 2011)*. The CAAF case law recognizes that certain circumstances may warrant other relief for Article 13, UCMJ, violations and that relief may range from disapproval of a bad-conduct discharge to complete dismissal of the charges, depending on the circumstances. *Id.; see also United States v. Fulton, 55 M.J. 88, 89-90 (C.A.A.F. 2001)* (noting that dismissal of charges for illegal pretrial punishment is an extraordinary remedy but is permissible if any lesser remedy is not appropriate to address the severity of the illegal punishment).

c. Civilian Authorities and Confinement

Where an appellant is confined by civilian authorities "for their own convenience" and not at the request of military authorities, he is not entitled to relief. *United States v. Harkins, ACM No. 29200, 1992 CMR LEXIS 806, at *3 (A.F.C.M.R. 19 Nov.1992)* (unpub. op.) (per curiam).

R.C.M. 305 is the rule that regulates pretrial confinement, and it "must be followed if a military member is confined by civilian authorities for a military offense and with the notice and approval of military authorities." *United States v. Lamb, 47 M.J. 384, 385 (C.A.A.F. 1998)*.

"A [servicemember] tried by court-martial must be given sentence credit for time spent in pretrial custody by local civilian authorities in connection with the offense or acts solely for which a sentence to confinement by **[*57]** a court-martial is ultimately imposed." *United States v. Turk, ARMY 20210104, 2022 CCA LEXIS 728, at *4 (A. Ct. Crim. App. 13 Dec. 2022) (unpub. op.)* (quoting *United States v. Dave, 31 M.J. 940, 942 (A.C.M.R. 1990)*).

d. Sentence Appropriateness

This court reviews issues of sentence appropriateness de novo. *See United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023)* (citing *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam). Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *See United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

3. Analysis

a. Article 13, UCMJ, Credit for Pretrial Confinement

Appellant claims he is entitled to relief after he was confined under conditions more rigorous than necessary to ensure his presence at trial under Article 13, UCMJ. Additionally, Appellant claims the military judge's determination that no credit could be awarded because of the distinction between the offenses listed on the Florida warrant (sexual abuse of a child) compared to the ones of which he was convicted (domestic violence) was erroneous. Appellant claims that the military judge "overlooked two crucial issues," arguing Article 13, UCMJ, embodies a "flexible approach to remedies, which may include more specific offenses, but also call for a more wholistic **[*58]** and equitable remedy depending on the circumstances," citing *Zarbatany, 70 M.J. at 175*.[19] Appellant also argues that our court has broad authority to review sentence appropriateness under its *Article 66, UCMJ, 10 U.S.C. § 866*, authority. In response, the Government claims that there is no Article 13, UCMJ, issue because the United States was not involved in the issuance of the warrant that led to Appellant's confinement in Nevada and Florida.

The military judge's findings of fact were not "clearly erroneous" when he stated Appellant was placed into civilian confinement in Nevada and Florida as a result of arrest warrants issued by the State of Florida, not through any coordination conducted by the United States Government. *Lamb, 47 M.J. at 385*. The military judge went on to state that Appellant's pretrial confinement is not attributable to the United States, but rather the State of Florida. The military judge's findings were not clearly erroneous. *See Fisher, 61 M.J. at 418* ("[T]he military judge's findings of fact will not be overturned unless they are clearly erroneous."). The Air Force did not request that state authorities issue a warrant for Appellant and confine him. Indeed, when the Air Force found out about Appellant's confinement, it took measures to resolve the situation. Furthermore, Appellant **[*59]** was not confined by any state for the offense for which he was ultimately convicted.

We do not find facts that amounted to a violation of Article 13, UCMJ, and the military judge did not err in his determination not to give Appellant credit under Article 13, UCMJ. Under the unique facts of this case, Appellant cannot seek redress in this court for the States' actions. We recognize the frustration this result may cause. Ultimately, this court is not a court of equity that can resolve the matter now on appeal because it would be *fair* to Appellant. *See United States v. Lopez, 86 M.J. 139, No. 24-0226, 2025 CAAF LEXIS 735, at *21 (C.A.A.F. 2 Sep. 2025)* (holding that Article 66(d)(2), UCMJ, does not turn service Courts of Criminal Appeals into courts of equity).

b. Appropriateness of Sentence

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[19] In *Zarbatany*, the CAAF found that when Article 13, UCMJ, relief is available, meaningful relief must be given. *70 M.J. at 175*. However, relief is not warranted or required where it would be disproportionate to the harm suffered or the nature of the offense. *Id. at 171*.

Appellant submitted an alternative argument that Appellant's sentence was inappropriately severe for "failing to account for the unlawful confinement." Upon our review of the "all matters contained in the record of trial," we find Appellant's sentence was appropriate for the charge and specification that he was convicted of.

During sentencing argument, the Government suggested, among other punishments, that Appellant receive a bad-conduct discharge, at least nine months in confinement, a reduction in grade to E-1, and total forfeitures. Trial defense counsel **[*60]** argued that "two months confinement and no punitive discharge is the appropriate sentence here" and specifically pointed out that Appellant spent "several weeks in civilian confinement" due to "essentially a clerical error."

Appellant was sentenced to be confined for 60 days.[20] He was not reduced in rank, nor did he receive a bad-conduct discharge. Based on our individual consideration of Appellant, his character, his service record, and the nature and seriousness of the offenses, we find the sentence, including the two months of confinement, is appropriate in this case.

E. Post-Trial Delay

Appellant did not raise excessive post-trial delay in his briefing. Nevertheless, we review this issue because this court's decision on his appeal was not rendered within 18 months of docketing.

1. Additional Background

The military judge sentenced Appellant on 3 November 2023 and signed the entry of judgment on 16 January 2024. On 15 July 2024, Appellant filed his notice of appeal, pursuant to Article 66(b)(1)(A), UCMJ, *see* n.1 *supra*, and this court docketed his case the same day.[21] Appellant later requested and received ten enlargements of time before he ultimately submitted his assignments of error brief on 17 July 2025. The **[*61]** Government submitted its answer on 18 August 2025. On 25 August 2025, Appellant filed a timely reply in response to the Government's answer.

2. Law

We review de novo whether an appellant is entitled to relief for post-trial delay. *United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020)* (citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*).

In *Moreno*, the CAAF identified thresholds for facially unreasonable delay during the post-trial and appellate process when: (1) the convening authority did not take action within 120 days of the completion of trial, (2) the record was not docketed with the CCA within 30 days of the convening authority's action, an (3) the CCA did not render a decision within 18 months of docketing. *63 M.J. at 142-43*.

When there is a facially unreasonable delay in an appellant's case, we determine whether to grant relief by examining four factors set forth in *Barker v. Wingo, 407 U.S. 514, 530 (1972)*: "(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) [whether there was any cognizable] prejudice [to the appellant]." *Moreno, 63 M.J. at 135* (citations omitted).

There are three types of cognizable prejudice in this context: (1) oppressive incarceration; (2) "particularized" anxiety or concern "that is distinguishable from the normal anxiety experienced by prisoners **[*62]** awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. *Id. at 138-40* (footnotes and citations omitted). The last is most serious because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker, 407 U.S. at 532*.

In cases where an appellant has not shown prejudice, we cannot find a due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*.

Even when there is no due process violation, this court may still provide appropriate relief to an appellant, pursuant to Article 66(d)(2), UCMJ, *10 U.S.C. § 866(d)(2)*, when there was "excessive delay in the

[20] Appellant was also sentenced to forfeiture of $836.00 of pay per month for six months and a reprimand.

[21] This court did not receive the record of trial at the time of docketing. It ordered the Government to forward a copy to the court forthwith. The Government provided the record of trial with a verbatim transcript to this court on 26 July 2024.

processing of the court-martial after the judgment was entered into the record." *United States v. Valentin-Andino, 85 M.J. 361, 364 (C.A.A.F. 2025)*.

Such relief "must be suitable considering the facts and circumstances surrounding that case." *Valentin-Andino, 85 M.J. at 367*. A CCA is not obligated to provide "objectively meaningful" relief or "explain its reasoning" for any relief it provides. *Id.*

3. Analysis

In Appellant's case, more than 18 months have elapsed since Appellant's case was docketed with this court. This is a facially unreasonable delay by almost two months over the **[*63]** 18-month threshold. *See Moreno, 63 M.J. at 135*.

Under these circumstances, we find no violation of Appellant's due process rights. *See Barker, 407 U.S. at 138-40*. Appellant is not in confinement and has not alleged any particular prejudice from the delay, and we perceive none. The delay in resolving his appeal is primarily attributable to his counsel's requests for enlargements of time and has not been so egregious as to adversely affect the perception of the military justice system. *See Toohey, 63 M.J. at 362*.

We have also considered whether relief for excessive post-trial delay is appropriate under Article 66(d)(2), UCMJ, even in the absence of a due process violation. *See Valentin-Andino, at 367*. We conclude such relief is not warranted.

III. CONCLUSION

The findings as entered are correct in law and fact. Article 66(d), UCMJ (2024 *MCM)*. In addition, the sentence as entered is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, *10 U.S.C. §§ 859(a)*, 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

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United States v. Lozano

United States Army Court of Criminal Appeals

January 8, 2026, Decided

ARMY 20240096

Reporter
2026 CCA LEXIS 47 *; 2026 LX 89808; 2026 WL 281012

UNITED STATES, Appellee v. Sergeant CRISTIAN U. LOZANO United States Army, Appellant

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Prior History: **[*1]** Seventh Army Training Command Thomas P. Hynes, Military Judge. Lieutenant Colonel Melvin L. Williams, Staff Judge Advocate.

Counsel: For Appellant: Colonel Frank E. Kostik, Jr., JA; Lieutenant Colonel Kyle C. Sprague, JA; Major Beau O. Watkins, JA; Captain Louis S. Steiner, JA (on brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA; Major Austin L. Fenwick, JA (on brief).

Judges: Before FLEMING, WILLIAMS, and COOPER Appellate Military Judges.

Opinion by: COOPER

Opinion

SUMMARY DISPOSITION

COOPER, Judge:

Appellant was convicted and sentenced on 4 March 2024. However, his record of trial did not arrive to this court until 27 February 2025-360 days later. Appellant raised one assignment of error alleging unreasonable post-trial delay and requests this court grant appropriate relief.

Having considered the entire record, we do not find a due process violation, but we agree the post-trial delay was excessive and grant appropriate relief under *Article 66, Uniform Code of Military Justice [UCMJ]*.[1]

BACKGROUND

On 4 March 2023, a military judge sitting as a special court-martial with the authority to adjudge a bad-conduct discharge (BCD), convicted appellant, pursuant to his pleas, of three specifications of larceny, in violation of **[*2]** *Article 121, UCMJ, 10 U.S.C. § 921 (2019)* and two specifications of obstructing justice in violation of *Article 131b, UCMJ, 10 U.S.C. § 931b*. In accordance with his plea agreement, the military judge sentenced appellant to a bad-conduct discharge and 8 months confinement.

Four days after the court-martial adjourned, the government received appellant's clemency matters under Rule for Courts-Martial [R.C.M.] 1106 where appellant requested waiver and deferral of automatic forfeitures. Seven days after that, on 15 March 2024, the Convening Authority (CA) approved appellant's request to defer and waive automatic forfeitures and took no action on the findings or sentence. On 9 April 2024, the military judge entered judgement and 25 days later, authenticated the record. The court reporter certified the record of trial (ROT) on 6 May 2024. The ROT was not received by this court until 27 February 2025-360 days after adjournment.

During post-trial processing, there was an opportunity to include a memorandum in the record of trial explaining any post-trial delay. The government neglected to do so. On appeal, after notice by appellant on post-trial delay, the government moved to attach a delay memorandum

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[1] We note two errors on the Statement of Trial Results. First, we correct Block 24 to include a missing term of the plea agreement - "a mandatory bad-conduct discharge." Second, Block 29 was incorrectly marked to indicate DNA processing was not required. In light of *United States v. Williams*, we lack the authority to correct this error. *85 M.J. 121, 126 (C.A.A.F. 2024)*.

to the record. In light of *U.S. v. Jessie, we* decline to allow this untimely supplementation of **[*3]** the record. 79 M.J. 437 (C.A.A.F. 2020).

LAW AND DISCUSSION

We review allegations of unreasonable post-trial delay *de novo*. United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006). Whether a post-trial processing timeline is reasonable or dilatory is determined on a case-by-case basis. United States v. Winfield, 83 M.J. 662, 667 (Army Ct. Crim. App. 27 April 2023) (quoting Toohey v. United States (Toohey I), 60 M.J. 100, 101-02 (C.A.A.F. 2004); *see also* United States v. Abdullah, 85 M.J. 501, 2024 CCA LEXIS 479, at *27 (Army Ct. Crim. App. 5 November 2024); United States v. Moreno, 63 M.J. 129, 143 (C.A.A.F. 2006).

The Court of Appeals for the Armed Forces has recognized two separate and independent avenues for service courts to provide relief for dilatory post-trial processing: (1) the Due Process Clause of the Fifth Amendment; and (2) Article 66, UCMJ. Abdullah, 85 M.J. 501, 2025 CCA LEXIS 479, at *27 (citing United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)); *see also* Toohey I, 60 M.J. at 101-02. Whether there is a due process violation resulting from post-trial delay is analyzed using the four factors from *Barker v. Wingo*: (1) length of delay; (2) reasons for the delay; (3) appellant's assertion of the right to timely review and appeal; and (4) prejudice. 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); Toohey I, 60 M.J. at 102. "[N]o single factor [is] required to find that post-trial delay constitutes a due process violation." United States v. Toohey (Toohey II), 63 M.J. 353, 359 (C.A.A.F. 2006) (quoting Moreno, 63 M.J. at 136) (citation omitted).

Where post-trial delay is not a due process violation, this court still has "authority under Article 66[(d)(2), UCMJ,] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . . if it deems relief appropriate under the circumstances" Tardif, 57 M.J. at 224 (citation omitted). In determining "excessive delay," this court considers "the totality of the circumstances surrounding **[*4]** the post-trial processing timeline for each case, balancing the interplay between factors such as chronology, complexity, and unavailability, as well as the unit's memorialized justifications for any delay" to make its determination. Winfield, 83 M.J. at 666.

Until its certification, this two-volume ROT with a 154-page transcript exhibits efficient post-trial processing. The sentence adjudication to certification took only 61 days. Once certified, however, post-trial processing halted. We have no explanation for the 270-day delay from certification on 6 May 2024 until the court received the record on 27 February 2025. A total of 360 days passed between the case adjournment and receipt of the record of trial by this court. The length of delay on this short record weighs heavily in favor of appellant.

This court emphasized in Winfield, that it would "scrutinize even more closely the unit-level explanations" of the delay to determine whether the delay was reasonable. 83 M.J. at 665. In addition, this court, sitting *en banc*, re-emphasized in *Abdullah*, the importance of an SJA's detailed explanation for post-trial delay and the expectation for OSJAs to "provide detailed explanations for any unwarranted delay." 85 M.J. 501, 2025 CCA LEXIS 479, at *29. Given clear notice from **[*5]** this court, the OSJA still inexplicably failed to provide any explanation. Thus, given no reason for the delay, the second factor weighs heavily in favor of appellant.

The third and fourth factor of the Barker test weigh in favor of the government, as appellant did not assert his right to a timely review and there is no prejudice alleged.[2] When there is no finding of prejudice under the fourth *Barker* factor, as is the case here, a due process violation only occurs when "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Anderson, 82 M.J. 82, at 87 (C.A.A.F. 2022) (quoting Toohey II, 63 M.S. at 362). We do not find the present case so egregious as to negatively impact the public's perception of the fairness and integrity of the *military* justice system. While the 270-day delay in mailing the record to this Court demonstrates inefficiency, we do not find under the facts and circumstances of this case that it would cause the public to doubt the fairness and integrity of the military justice

[2] In our analysis of prejudice under *Barker, we* considered three sub-factors: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." Moreno, 63 M.J. at 138-39 (quoting Rheuark v. Shaw, 628 F.2d 297, 303 n.8 (5th Cir. 1980)).

system.

In finding no due process violation, we next turn to our authority under *Article 66(d)(2), UCMJ*. Upon a demonstration of excessive **[*6]** delay in the processing of the court-martial, this court may grant appropriate relief, tailored to the circumstances of the case. *United States v. Hotaling, M.J. , 2020 CCA LEXIS 449, at *9 (Army Ct. Crim. App. 11 Dec. 2020)* (citing *United States v. Jones, 61 M.J. 80, 86 (C.A.A.F. 2005)* quoting *Tardif, 57 M.J. at 225*). In appellant's case, where there is simply no explanation for the 270-day delay in mailing a complete and certified record to this court, we find the post-trial delay excessive. After reviewing the entire record and considering the totality of the circumstances of this case, we find a 30-day reduction to the confinement sentence appropriate relief.

CONCLUSION

The findings of guilty are AFFIRMED. Only so much of the sentence extending to confinement for 7 months, and a bad-conduct discharge, is AFFIRMED.

Senior Judge FLEMING and Judge WILLIAMS concur.

FOR THE COURT:

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United States v. Monroe

United States Army Court of Criminal Appeals

September 15, 2025, Decided

ARMY 20220122

Reporter
2025 CCA LEXIS 447 *; 2025 LX 444235; 2025 WL 2651286

UNITED STATES, Appellee v. Private E1 TYLER J. MONROE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Monroe, 2025 CAAF LEXIS 943, 2025 WL 3635227 (Nov. 14, 2025)*

Motion granted by *United States v. Monroe, 2025 CAAF LEXIS 946, 2025 WL 3625635 (Nov. 17, 2025)*

Motion granted by *United States v. Monroe., 2025 CAAF LEXIS 1068, 2025 WL 4036544 (Dec. 31, 2025)*

Prior History: **[*1]** Headquarters, Fort Stewart. G. Bret Batdorff and Albert G. Courie III, Military Judges, Colonel Joseph M. Fairfield, Staff Judge Advocate.

Counsel: For Appellant: Captain Patrick R. McHenry, JA; Terri R. Zimmerman, Esquire; Jack B. Zimmerman, Esquire (on brief and reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Justin L. Talley, JA; Lieutenant Colonel Jonathan P. Robell, JA (on brief).

Judges: Before FLEMING, WILLIAMS, and SCHLACK, Appellate Military Judges. Judge WILLIAMS concurs. SCHLACK, Judge, concurring in part and dissenting in part.

Opinion by: FLEMING

Opinion

SUMMARY DISPOSITION

FLEMING, Senior Judge:

Appellant's tumultuous relationships with three different women resulted in a trial involving multiple offenses against each. Appellant pled guilty to some offenses and, ultimately, was found guilty of numerous others. Appellant's defense counsel raised multiple assignments of error on appeal, one of which, post-trial delay, warrants relief.[1]

BACKGROUND

In March 2022, a military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of one specification of wrongful use of a controlled substance and seven specifications of assault consummated by battery upon an intimate partner, **[*2]** in violation of *Article 112a* and *128, Uniform Code of Military Justice, 10 U.S.C. §§ 912a* and *928* [UCMJ].[2] The same military judge convicted appellant, contrary to his pleas, of two specifications of kidnapping,[3] two

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[1] We have given full and fair consideration to the other assignments of error asserted by appellant's defense counsel and the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. We determine appellant's other arguments, except as noted below, merit neither discussion nor relief. As to appellant's assertion the "Statement of Trial Results" (STR), incorporated into the Judgment of the Court, "erroneously over-reports the amount of [adjudged] confinement," the government concedes an error occurred. We agree and will correct later in this opinion.

[2] We note the military judge incorrectly announced findings of guilty following his acceptance of appellant's guilty plea. Instead of finding appellant guilty of Specification 1 of Additional Charge II, as appellant pled, the military judge announced findings as to Specification 1 of Additional Charge I. No one noticed the military judge's mistake and the contested portion of appellant's trial ensued. The military judge's error, however, did not prejudice a substantial right of the accused. Appellant was ultimately found guilty of Specification 1 of Additional Charge I and the military judge reentered findings regarding all specifications and charges at the conclusion of the contested trial.

[3] Appellant was charged with kidnapping his spouse during two time periods: (1) October to December 2018, and (2) January to June 2019. On 1 January 2019, the offense of

specifications of aggravated assault upon his spouse, eight specifications of assault consummated by battery upon his spouse and an intimate partner, two specifications of domestic violence, and one specification of obstructing justice, in violation of *Articles 125*, *128*, *128b*, *131b*, and *134, UCMJ*. The military judge sentenced appellant to a dishonorable discharge, confinement for 113 months and 20 days, and forfeitures of all pay and allowances.[4]

The initial post-trial processing of appellant's case proceeded swiftly. In late March 2022, pursuant to Rule for Courts-Martial [R.C.M.] 1106, appellant requested the convening authority to waive adjudged and automatic forfeitures. In the R.C.M. 1106 matters, submitted through the Staff Judge Advocate (SJA), Colonel JF, to the convening authority, appellant "invoke[d] his right to speedy post-trial processing" pursuant to *United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)*. The convening authority denied appellant's request regarding the waiver of adjudged and automatic forfeitures in early April 2022. In mid-April 2022, the military judge entered judgment on the case.

From this juncture, the processing of appellant's case hit not **[*3]** a mere standstill but instead a brick wall. Appellant's trial defense counsel, Major (MAJ) MB, submitted an affidavit to this court attaching three emails he sent to a MAJ C R-V. [5] In the first email, from late August 2022, MAJ MB stated he "wanted to check in and see how the post-trial processing" was going in the case. In the second email, from early October 2022, MAJ MB stated he was following up from the first email and appellant was then "reasserting his right to speedy post-trial processing." The third email, from mid-January 2023, was brief. The entirety of MAJ MB's third email follows: "Sir; I just wanted to follow up again on the status of US v. Monroe's post-trial processing. Thanks!" Major MB asserted in his affidavit that he "never got a response to any of [his] emails."

Appellant's record of trial (containing over 950 pages of verbatim transcript) was certified by the court reporter on 11 January 2024. The record was mailed on 19 January 2024 and received by this court on 25 January 2024—more than 690 days after appellant's guilty plea, more than 670 days after his *Moreno* demand to the convening authority, and more than 650 days after the entry of judgment (EOJ).

On 18 January **[*4]** 2024, the installation chief of justice (COJ), MAJ C R-V, signed a memorandum for record attempting to explain the post-trial delay in appellant's case.[6] Major C R-V's explanations fell into three broad categories regarding: (1) significant personnel shortages (in particular as to experienced, or even competent, court-reporters); (2) failed attempts at outsourcing transcription work to overcome court reporter shortages and deficiencies; and (3) the volume and backlog of cases (between the conclusion of appellant's case and completion of his verbatim transcript, the government "completed 43 courts-martial, including 13 other contested cases . . . [and had] 14 [other] cases in various dispositions, which required full post-trial processing.").

LAW AND DISCUSSION

We review allegations of unreasonable post-trial delay de novo. *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*. Whether a post-trial processing timeline is reasonable or dilatory is determined on a case-by-case basis. *E.g.*, *United States v. Abdullah, 85 M.J. 501, 2024 CCA LEXIS 479, at *27 (Army Ct. Crim. App. 5 Nov. 2024)*; *United States v. Toohey (Toohey I), 60 M.J. 100, 102 (C.A.A.F. 2004)*. "'[D]ilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice." *United States v. Ponder, ARMY 20180515, 2020 CCA LEXIS 38, at *4 (Army Ct. Crim. App 10 Feb. 2020)* (summ. disp.) (quoting *United States v. Bauerbach, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001)*). There are "two separate

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kidnapping was moved from *10 U.S.C. § 934* to *10 U.S.C. § 925*. As such, appellant was properly charged with kidnapping under both *UCMJ arts. 134* and *125*, respectively.

[4] The announcement of the sentence did not include the total amount of confinement adjudged. The initial calculation, reflected on the 3 March 2022 STR, amounted to 120 months, 15 days. This number was later reduced in a corrected STR, dated 16 March 2022, to 117 months and 15 days. This calculation was also incorrect as everyone failed to accurately account for the consecutive and concurrent confinement dictates announced by the military judge regarding appellant's various convictions.

[5] During the timeframe of the three emails, MAJ MB was Captain MB. He subsequently was promoted to major prior to filing his affidavit with the court. For clarity purposes, he will be referred to as only MAJ MB throughout the entirety of the opinion.

[6] This memorandum was included contemporaneously with the certified record of trial mailed to the court.

and independent avenues to provide relief for dilatory post-trial processing: (1) **[*5]** the *Due Process Clause of the Fifth Amendment*; and (2) the statutory basis under *Article 66* when there is no showing of 'actual prejudice.'" *Abdullah, 85 M.J. 501, 2024 CCA LEXIS 479, at *9* (quoting *United States v. Anderson, 82 M.J. 82, 85 (C.A.A.F. 2022)*).

Whether there is a due process violation resulting from post-trial delay is analyzed using the four factors from *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: "(1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant." *Toohey I, 60 M.J. at 102*. When there is no finding of prejudice under the fourth *Barker* factor, a due process violation still occurs if "in balancing the three other factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson, 82 M.J. at 87* (quoting *United States v. Toohey (Toohey II), 63 M.J. 353, 362 (C.A.A.F. 2006)*).

As to analyzing prejudice under the fourth *Barker* factor, appellant concedes that prong "is in the Government's favor." Appellant urges us, however, after balancing the three other *Barker* factors, to provide appellant relief for post-trial delay because it was "so egregious" [hereinafter "so egregious" delay]. Before determining if the delay was "so egregious" as to warrant relief, we can easily conclude it was "excessive." Even if post-trial delay is not a due process violation, this court *"may provide"* under *Article 66(d)(2), UCMJ*, "appropriate **[*6]** relief if the accused demonstrates error or *excessive* delay in the processing of the court-martial after the judgment was entered into the record." *UCMJ art. 66(d)(2)* (emphasis added).

More than 650 days (more than 21 months) expired between the issuance of the EOJ and our receipt of the record. This timeframe is certainly excessive for a record of appellant's nature and in no way demonstrates the efficient administration of military justice. We reviewed the memorandum for record prepared by the COJ, but we do not find the explanation for the delay persuasive. Having found excessive delay, we may (but not must) provide relief. We considered the length and reasons for the delay, appellant's assertion of his right to speedy trial, and the entirety of his case.[7] After our complete review, we determine 3 months of confinement relief is appropriate for the excessive post-trial delay in this case.[8]

CONCLUSION

The findings of guilty are AFFIRMED.[9] Only so much of the sentence extending to a dishonorable discharge, 110 months and 20 days of confinement, and total forfeitures of all pay and allowances is AFFIRMED.[10]

Judge WILLIAMS concurs.

Concur by: SCHLACK (In Part)

Dissent by: SCHLACK (In Part)

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[7] Appellant alleges in his brief that he made "multiple assertions" to the government regarding his right to speedy post-trial processing. He submitted a written submission, through the SJA, to the convening authority prior to issuance of the EOJ. This weighs fully in his favor. As to his other alleged "multiple assertions," we reviewed the three emails submitted by MAJ MB, only one of which (the second email from early October 2022) referenced an assertion to invoking speedy post-trial processing. These three emails from MAJ MB to MAJ C R-V apparently never received a returned response. We can easily determine these emails carry a significantly lower probative value than the written memorandum, but the relative weight of their probative value is moot, as we have not only fully weighted this factor in appellant's favor, but we are also granting "appropriate relief."

[8] Although we did not decide if a due process violation occurred under the three *Barker* factors for "so egregious" delay, we grant "appropriate relief' under *Article 66, UCMJ*. If our relief is "appropriate," we have determined no further relief is left to provide. In simpler terms—no harm is left to cure. We have found no precedent that a due process violation mandates our Court to provide more relief than the relief we would provide under *Article 66, UCMJ*. Even if, assuming arguendo, we found a due process violation for "so egregious" delay, we deem no additional relief would be warranted in appellant's case.

[9] The STR, as incorporated in the Judgment of the Court, is amended to reflect that appellant was convicted by exceptions and substitutions of Additional Charge II, Specification 1, excepting the word "hands" and substituting therefor the word "hand." This change was explicitly agreed to by the parties during appellant's providence inquiry and accurately reflects appellant's plea to this specification.

[10] Block 12 of the STR is amended to reflect the accurate adjudged confinement period of "113 months, 20 days."

Dissent

SCHLACK, Judge, concurring in part and dissenting **[*7]** in part:

I concur with my colleagues that there is excessive delay warranting relief under *Art 66, UCMJ* and agree with the majority's assessment of the first three *Barker* factors. However, I find the delay to be egregious under these facts and thus a due process violation under *Toohey II*. As such, I would give relief that adequately addresses the harm caused by the delay; the harm being the adverse impact to the public's perception of the fairness and integrity of the military justice system.

When relief is warranted for a due process violation under a public perception theory, there is a possibility, as is the case here, that an appellant who did not experience prejudice from the delay will receive a benefit. In my view, that should not be in the relief calculation under a *Toohey II* due process analysis. Determining what relief is appropriate to rehabilitate the public's perception should be the central and only consideration.

When an appellant pleads guilty to or is proven guilty of a crime, the public expects punishment commensurate with that offense to keep it safe. That said, the public also expects the military justice system to adhere to its standards because, despite that finding of guilty, **[*8]** the appellant still has rights.

I acknowledge that there is no hard and fast timeline for post-trial processing. But, there are guidelines established by case law. When those guidelines are not followed, without adequate explanation or reason, the government should have to compensate for failing to reasonably adhere to the standard—compensation that is appropriate after considering *both* public interests in the fairness and integrity of the system and in safety.

Appellant committed violent offenses against three different victims. The sentence at trial was lawful and served the public's safety interests under at least three theories of punishment—retribution, deterrence, and prevention. However, there was a complete breakdown in the processing of this record between the EOJ and the record's certification. Three months of confinement relief for the government's temporary but significant abdication is, in my opinion, inadequate to rectify the damage to the public's perception of the fairness and integrity of the military justice system where appellant was sentenced to over nine years of confinement. Such relief—setting aside less than three percent of appellant's sentence, approximately **[*9]** three and a half years after his conviction—hardly constitutes the strong message demanded by these circumstances, nor is it an adequate deterrent for the government. Under the circumstances here, I would give 12 months of confinement relief.

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United States v. Thomas

United States Air Force Court of Criminal Appeals

September 29, 2025, Decided

No. ACM 22083

Reporter
2025 CCA LEXIS 477 *; 2025 LX 451882; 2025 WL 2879792

UNITED STATES, Appellee v. Daryl A. THOMAS
Master Sergeant (E-7), U.S. Air Force, Appellant

Prior History: Sentence: Sentence adjudged 10 August 2022 by SpCM convened at Whiteman Air Force Base, Missouri. Sentence entered by military judge on 7 September 2022: Reduction to E-5, forfeiture of $750.00 pay per month for 12 months, 2 months hard labor without confinement, and a reprimand. Appeal from the United States Air Force Trial Judiciary[1] **[*1]** . Military Judge: Thomas A. Smith.

Counsel: For Appellant: Captain Samantha M. Castanien, USAF.

For Appellee: Colonel Matthew Talcott, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Captain Deyana Unis, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, KEARLEY, and MCCALL, Appellate Military Judges. Judge KEARLEY delivered the opinion of the court, in which Chief Judge JOHNSON and Judge MCCALL joined.

Opinion by: KEARLEY

Opinion

KEARLEY, Judge:

A special court-martial composed of a military judge alone found Appellant guilty, in accordance with his pleas, of five specifications of wrongful use of a controlled substance (methamphetamine) in violation of *Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912*.[2] A panel of officers sentenced Appellant to reduction to the grade of E-5, forfeiture of $750.00 pay per month for 12 months, two months hard labor without **[*2]** confinement, and a reprimand. The convening authority took no action on the findings or the sentence.

Appellant raises one issue on appeal, which we have rephrased: (1) whether Appellant's sentence including a two-rank reduction is inappropriately severe. We consider an additional issue: (2) whether Appellant is entitled to relief for a presumptively unreasonable post-trial delay.

I. BACKGROUND [3]

Appellant served 22 years in the United States Air Force. Appellant's record reflects combat service where he "experienced quite a bit of trauma." Appellant was diagnosed with Post-Traumatic Stress Disorder (PTSD) and struggled with basic social activities like going shopping with his family and being in public places. Appellant argues that the "trauma" from a particular assignment "infected [his] dreams" and he would wake up frantically looking for his son.

When Appellant moved on to a new assignment at Whiteman Air Force Base, Missouri, he continued to have bad dreams and tried to cope with PTSD. To help him with his mental state, Appellant poured himself into his workouts and relied on a variety of supplements to get him through his difficulties. He bought **[*3]** some supplements at major retail stores, but others he bought from places he "probably shouldn't have" such as vape shops, a gas station, and places he referred to as

[1] Appellant appeals his conviction under *Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A)* (Manual for Courts-Martial, United States (2024 ed.)).

[2] Unless otherwise indicated, all references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] Most of the background comes from Appellant's own words during the plea inquiry with the military judge, reflected in the record of trial.

"shady." He bought and used pills that were unmarked. He did not know what the pills contained as there was no accompanying documentation with them; however, based on where and how he bought the pills, he knew that they could have contained "something [he] should not have been taking."

Appellant deliberately avoided finding out what was in the pills he took.[4] A stranger told Appellant the pills would make him feel better and Appellant trusted him, even though he recognized the stranger's job was to "sell whatever it is they are selling." Appellant further stated that the "pills [he] purchased were marked or advertised as being able to help [him] focus or sleep." He took some of the pills at night to help him sleep and others during the day to help him focus. During the providence inquiry, he admitted to the military judge that at the time he took the pills he was aware that there was a high probability that the substance he took was of a contraband nature.

Appellant explained that after he tested positive for methamphetamine **[*4]** during a random urinalysis, he then tested positive in a second urinalysis and kept being tested under his command's *Bickel* policy until he tested negative.[5] As Appellant began to have positive drug tests, he became convinced the pills "probably . . . contain[ed] methamphetamine." He stopped taking the pills; however, several months later he was "in a lot of pain" and took the pills again because he was "in a dark place" and they made him feel better and "helped [him] cope with [his] pain."

A military judge accepted Appellant's guilty pleas and found him guilty of five specifications of wrongful use of methamphetamine, a controlled substance, in violation of *Article 112a, UCMJ*. During sentencing, a panel of officer members heard Appellant's statements about his drug abuse by hearing portions of the recorded *Care* [6] inquiry. The panel also heard the mitigating evidence of Appellant's career through three witnesses who testified on Appellant's behalf about the positive impact Appellant made in their lives, and one provided details about Appellant's struggles post-deployment. During his unsworn statement, Appellant spoke of his challenges with PTSD and associated nightmares. He asked to have a chance to **[*5]** continue his Air Force career. Appellant's trial defense counsel argued for a sentence involving forfeiture of pay, restriction, and/or hard labor, and argued against confinement or a bad-conduct discharge. The Government did not argue for a reduction in grade but argued only for 30 days of confinement and a bad-conduct discharge.

II. Discussion

A. Sentence Severity

1. Additional Background

Appellant argues that with 22 years of service, any rank reduction would force Appellant to separate (or retire) as he would have reached High Year Tenure.[7] Appellant recognizes that this court and the members at Appellant's court-martial cannot consider administrative collateral consequences; however, Appellant claims any reduction was inappropriately severe because of his individual circumstances, his record of service, and the

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[4] The military judge explored this concept of deliberate avoidance at trial and explained to Appellant that one may not "willfully and intentionally remain ignorant of a fact important and material to [one's] conduct in order to escape the consequences of criminal law." Appellant confirmed that he still had the requisite knowledge in order to prevent this offense.

[5] According to the record of trial, Appellant's command's *Bickel* policy was that "if [one] test[s] positive, [they] are subject to continued inspection, meaning [they] can continue to be required to take a urinalysis[.]" This process is authorized. *See United States v. Bickel, 30 M.J. 277, 288 (C.M.A. 1990)* (where the second urinalysis was conducted as the result of a policy previously established by the commander for rescreening those individuals who tested positive during a random urinalysis, the follow-on screening was a continuation of the original inspection and therefore did not violate Army directives).

[6] *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969)*.

[7] A High Year Tenure is "[a] year point at which the Department of the Air Force determines an enlisted Service member is ineligible for reenlistment and extension due to grade and length of service." *See* Department of the Air Force (DAFI) 36-3203, *Service Retirements*, Attachment 1, *Terms*, at 108 (8 Jul. 2025). A High Year Tenure "is set at the following service points: Senior Airman/Specialist 4 (E-4) at 10 years of service; Staff Sergeant/Sergeant (E-5) at 20 years of service; . . . Master Sergeant (E-7) at 24 years of service . . . ." *See* DAFI 36-3203, ¶ 3.10.

circumstances surrounding his offenses. Appellant asks this court to disapprove the portion of the sentence reducing Appellant to the grade of E-5. We decline to do so.

2. Law

We review issues of sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (footnote omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis **[*6]** of the entire record. *Article 66(d), UCMJ*, *10 U.S.C. § 866(d)*. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015)* (en banc) (per curiam) (alteration in original) (citation omitted). Although the Courts of Criminal Appeals are empowered to "do justice[ ] with reference to some legal standard," we are not authorized to grant mercy. *United States v. Guinn, 81 M.J. 195, 203 (C.A.A.F. 2021)* (quoting *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)*).

3. Analysis

Appellant contends his sentence is inappropriately severe. He asserts that at the time of the offenses he was struggling with PTSD from his duties in the military. Appellant argues that "the record does not — and likely could not — reflect the specifics of his responsibilities to include what he saw or what he had to do for this country." Appellant contends that this is not a situation where a servicemember was using methamphetamine at a party just to get high. Instead, Appellant argues his methamphetamine use was the result of "coping mechanisms failing him," and he abused prescription medication to continue serving.[8] He highlights having an excellent service record prior to the use, that he pleaded guilty to the **[*7]** offenses, and that his court-martial took place after eight months of not testing positive.

[8] Appellant took methamphetamines in the pill form. Appellant argues that because methamphetamine can be prescribed in a pill form, his use was more similar to abusing prescription medication than "shooting up meth" or "smoking meth at a party just to get high."

Based on his guilty pleas alone, Appellant might have been sentenced to a bad-conduct discharge, confinement for 12 months, forfeitures of two-thirds pay per month for 12 months, and reduction to the grade of E-1. Appellant received a sentence of hard labor without confinement for two months, reduction to the grade of E-5, forfeiture of $750.00 of his pay for 12 months, and a reprimand.

Taking into account the mitigating circumstances, we do not find Appellant's sentence inappropriately severe. The members followed the trial defense counsel's recommendations closely. They did not sentence Appellant to confinement nor adjudge a punitive discharge. While neither party recommended a two-rank reduction, this reduction is not overly harsh for a military member who used methamphetamine on multiple occasions and continued to use it even after testing positive. Furthermore, even after Appellant stopped, he started using methamphetamine again because it "helped [him] cope with [his] pain." Additionally, the military judge provided sentencing instructions to the members that made them aware that a punitive **[*8]** discharge would preclude the possibility of retirement and the benefits that flow from retirement, such as receiving retired pay and benefits. Therefore, a two-rank reduction, without a punitive discharge, is not inappropriate under the circumstances.

We have carefully considered Appellant's personal history and characteristics, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial. *See* *Anderson, 67 M.J. at 705*. We conclude Appellant's sentence is not inappropriately severe.

B. Post-Trial Delay

Although not raised by Appellant, we note that this decision is not rendered within 18 months of this court docketing Appellant's case. Therefore, we review Appellant's case for excessive post-trial delay.

1. Additional Background

Appellant was sentenced on 10 August 2022. The military judge signed the entry of judgment on 7 September 2022. At that time, Appellant's sentence did not meet the jurisdictional requirements for direct appeal to this court. On 23 December 2022, Congress

amended *Articles 66* and *69, UCMJ, 10 U.S.C. §§ 866*, *869*. *See The National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582-84 (23 Dec. 2022)*. As amended, *Article 66(b)(1)(A), UCMJ*, expanded Court of Criminal Appeals (CCA) jurisdiction to any judgment of a special or general court-martial, irrespective of sentence, that **[*9]** included a finding of guilty. *10 U.S.C. § 866(b)(1)(A)* (*Manual for Courts-Martial*, *United States* (2024 ed.) (2024 *MCM*)).

On 3 January 2024-375 days after the enactment of *Article 66(b)(1)(A), UCMJ* (2024 *MCM*)—the Government notified Appellant of his right to appeal before this court along with a copy of a summarized record of trial.

On 14 February 2024, Appellant filed his notice of appeal pursuant to *Article 66(b)(1)(A), UCMJ*, with this court, and we docketed his case this same date. In this docketing notice, the court stated that it had not yet received the record of trial in Appellant's case and ordered the Government to "forward a copy of the record of trial to the court forthwith." When 120 days had elapsed and the court had not received Appellant's record of trial, on 25 June 2024 we ordered the Government to produce the record of trial not later than 25 July 2024. The Government provided the record of trial, with a verbatim transcript, to this court on 26 July 2024.

Subsequently, Appellant requested and received nine enlargements of time and ultimately submitted his brief on 9 July 2025. On 8 August 2025, the Government submitted its answer to Appellant's assignments of error.

2. Law

We review de novo whether an appellant is entitled to relief for post-trial **[*10]** delay. *United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020)* (citing *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*).

In *Moreno*, the United States Court of Appeals for the Armed Forces (CAAF) identified thresholds for facially unreasonable delay during three particular segments of the post-trial and appellate process. *63 M.J. at 141-43* (citations and footnotes omitted). Specifically, our superior court established a presumption of facially unreasonable delay where: (1) the convening authority did not take action within 120 days of the completion of trial, (2) the record was not docketed with the CCA within 30 days of the convening authority's action, or (3) the CCA did not render a decision within 18 months of docketing. *Id. at 142*.

In *Livak*, this court recognized that "the specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules." *80 M.J. at 633*. Accordingly, this court established an aggregated sentence-to-docketing 150-day threshold for facially unreasonable delay in cases that were referred to trial on or after 1 January 2019. *Id.* (citation omitted).

However, in light of subsequent statutory changes, this court recently found the 150-day threshold established in *Livak* does not apply to direct appeals, such as Appellant's, that **[*11]** are submitted under the amended *Article 66(b)(1)(A), UCMJ*, effective 23 December 2022. *See United States v. Boren, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at *47 (A.F. Ct. Crim. App. 19 Mar. 2025)* (unpub. op.). This court noted, "[t]hese statutory changes substantially altered the sequence of post-trial events in such [direct appeal] cases" as compared to the mandatory review cases our superior court contemplated in *Moreno*. *2025 CCA LEXIS 103 at 47-48*. Therefore, although we acknowledge appellants in such cases still enjoy constitutional due process rights to timely post-trial review, we decline to establish a new specific timeframe for a facially unreasonable delay from sentence-to-docketing in direct appeal cases.

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: "(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 [to the appellant]." *Moreno, 63 M.J. at 135* (citations omitted). In *Barker*, the Supreme Court also identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) "particularized" anxiety and concern "that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the **[*12]** appellant's grounds for appeal or ability to present a defense at a rehearing. *Id. at 138-40* (citations and footnotes

omitted). "Of those, the most serious is the last [type], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker, 407 U.S. at 532*.

Additionally, where an appellant has not shown prejudice from the delay, we cannot find a due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*.

Independent of any due process violation, this court may provide appropriate relief where there is "excessive delay in the processing of the court-martial after the judgment was entered into the record." *United States v. Valentin-Andino, 85 M.J. 361, 364 (C.A.A.F. 2025)* (citing *Article 66(d)(2), UCMJ*, *10 U.S.C. § 866(d)(2)*).

If a CCA decides relief is warranted for excessive post-trial delay under *Article 66(d)(2), UCMJ*, "that relief must be 'appropriate,' meaning it must be suitable considering the facts and circumstances surrounding that case." *Id. at 367*. "This does not require a [CCA] to provide relief that is objectively meaningful, and it does not obligate a [CCA] to explain its reasoning regarding the relief it does provide." *Id.*

3. Analysis

We evaluated the 553-day lapse of time between Appellant's **[*13]** sentencing and docketing with this court; in particular, we considered the 375 days that elapsed between the enactment of *Article 66(b)(1)(A), UCMJ* (2024 *MCM*), and the Government's notification to Appellant that he was eligible to appeal to this court. Although we continue to decline to establish a new specific timeframe for a facially unreasonable delay from sentence-to-docketing in direct appeal cases, *see Boren, unpub. op. at *47-48*, we recognize an appellant may be able to demonstrate a case-specific facially unreasonable delay that warrants a due process analysis in light of the *Barker* factors. *See United States v. Gonzalez, No. ACM 24001, 2025 CCA LEXIS 412, at *16-17 (A.F. Ct. Crim. App. 29 Aug. 2025)* (unpub. op.) (citation omitted). However, assuming without holding there was a facially unreasonable pre-docketing delay in this case, Appellant has not claimed any prejudice, and we do not find the delay so egregious as to affect public perception of the fairness and integrity of the military justice system. *See Toohey, 63 M.J. at 362*.

We also evaluated the post-docketing delay since this court did not render a decision within 18 months of docketing, and as such, there has been a facially unreasonable appellate delay. *Moreno, 63 M.J. at 142*. However, Appellant does not claim prejudice from this delay either. In addition, Appellant asked for nine enlargements of time even after receiving **[*14]** the transcribed record of trial. This court is issuing its opinion within two months of receiving the Government's answer to Appellant's assignment of error. Under the circumstances, we do not find the appellate delay in this case so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey, 63 M.J. at 362*.

Finally, recognizing our authority under *Article 66(d)(2), UCMJ*, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. We conclude it is not.

III. Conclusion

As entered, the findings are correct in law. *Article 66(d), UCMJ*, *10 U.S.C. § 866(d) (2024 MCM)*. In addition, the sentence is correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. *Article 59(a)* and *66(d), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(d)*. Accordingly, the findings and sentence are **AFFIRMED**.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Valdez, Crim. App. Dkt. No. 20220274, USCA Dkt. No. 26-0122/AR was electronically filed with the Court and Government Appellate Division on April 15, 2026.

MELINDA J. JOHNSON
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