1IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Christopher ST. HELEN Midshipman U.S. Navy, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202400264 USCA Dkt. No. 26-0290/NA

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

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Issue Presented

Did the lower court err by (1) declining to apply the presumption of unreasonable delay from *United States v. Moreno* to non-automatic appeals; (2) miscalculating the amount of unreasonable delay; and (3) determining that Appellant was not entitled to relief?

Statement of Statutory Jurisdiction

The Navy-Marine Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).[1] Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.[2]

Statement of the Case

A general court-martial composed of a military judge sitting alone found Appellant guilty, consistent with his pleas, of two specifications of assault consummated by a battery in violation of Article 128, UCMJ, and one specification of simple assault in violation of Article 128, UCMJ.[3] He was sentenced to fifty-six days of confinement.[4] The NMCCA affirmed the findings and sentence on July 10, 2026.[5] The Office of the Judge Advocate General sent

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[1] *United States v. St. Helen*, No. 202400264, slip op. (N-M. Ct. Crim. App. July 10, 2026).
[2] 10 U.S.C. § 867(a)(3) (2024).
[3] R. at 58; Charge Sheet; 10 U.S.C. § 928 (2018).
[4] R. at 67.
[5] *St. Helen*, slip op. at 17.

Appellant a copy of the NMCCA's decision via FedEx on July 14, 2026. Appellant timely petitioned this Court on September 10, 2026.

Statement of Facts

The following applies to the post-trial handling of this case:

- Appellant's court-martial adjourned on March 10, 2022.[6]
- The judgment was entered into the Record on April 29, 2022.[7]
- The Government did not mail Appellant his Notice of Right to Appeal until November 21, 2024, 987 days after the announcement of sentence.[8]
- Appellant submitted his notice of appeal to the lower court on February 18, 2025, 1076 days after the announcement of sentence. [9]
- The lower court docketed Appellant's case 1076 days after the announcement of sentence.[10]
- Appellant filed his brief on August 1, 2025, 1240 days after the announcement of sentence.[11]

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[6] R. at 68.
[7] Entry of Judgment (Apr. 29, 2022) at 3.
[8] *St. Helen*, slip op. at 8.
[9] *Id*.
[10] *Id*.
[11] *Id*.

- The lower court decided the case on July 10, 2026, 1583 days after the announcement of sentence.[12]

The lower court noted that, in *United States v. Moreno*, this 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 court of criminal appeals within 30 days of the convening authority's action; or (3) the court of criminal appeals did not render a decision within 18 months of docketing.[13] The lower court noted that in its previous published decision of *United States v. Rivera*, it deemed "the first two *Moreno* deadlines were superseded" due to "statutory and regulatory changes[.]"[14] Therefore, it "would only test for prejudice relating to post-trial processing delay when the time between announcement of sentence and docketing with this Court exceeds 150 days."[15]

Despite this precedent, the lower court concluded "that the aggregated 150-day threshold announced in *Rivera* is not workable for direct appeals of sentences that were deemed 'sub-jurisdictional' under the earlier statutory regime."[16] The

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[12] *Id*. at 1.
[13] *Id*. at 12 (citing *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006)).
[14] *Id*. (citing *United States v. Rivera*, 81 M.J. 741, 746 (N-M. Ct. Crim. App. 2021)).
[15] *Id*.
[16] *Id*.

lower court agreed with the Air Force Court of Criminal Appeals (AFCCA) that the applicable "'statutory changes substantially altered the sequence of post-trial events in such [direct appeal] cases' as compared to the mandatory review cases [CAAF] contemplated in *Moreno*."[17] The lower court explained that "'an appellant is now in the driver's seat' regarding both whether appellate review occurs and the timing of any such review."[18]

Accordingly, the lower court wrote that it would "decline to establish a new specific timeframe for a facially unreasonable delay between announcement of sentence and docketing with this Court [for] direct appeal cases under Article 66(b)(1)(A), UCMJ."[19] Rather, the lower court explained that it would "assess each case of this nature under its own specific facts and circumstances to determine whether an appellant has demonstrated that there has been a due process violation."[20] The lower court cited the four factors from *Barker v. Wingo*.[21]

Regarding the length of the delay, the lower court determined that "Appellant ha[d] demonstrated a facially unreasonable delay in the post-trial

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[17] *Id*. (quoting *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, *47 (A.F. Ct. Crim. App. Mar. 19, 2025)).
[18] *Id*. (quoting *Boren*, 2025 CCA LEXIS 103, at *47-48).
[19] *Id*. at 12-13.
[20] *Id*. at 13.
[21] *Id*. (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

processing of his case."[22] The lower court noted that "1076 days elapsed between the military judge's announcement of sentence and the docketing of Appellant's case with this Court."[23] However, the lower court only deemed 226 days of this period to be "excessive."[24] The lower court noted that "[t]he first 288 days occurred before Congress passed the National Defense Authorization Act for Fiscal Year 2023 expanding [the lower court's] jurisdiction under Article 66(b)(1)(A), UCMJ, to encompass formerly 'sub-jurisdictional' sentences like the one announced in Appellant's case."[25] The lower court also noted that "it took another 699 days for the Government to notify Appellant of his right to appeal his conviction."[26] But the lower court wrote that only 226 days of this period occurred after its April 9, 2024, decision in *United States v. Hirst* "confirmed that the Judge Advocate General of the Navy must notify individuals convicted of an offense at a special or general court-martial of their eligibility for direct review under Article 66(b)(1)(A), UCMJ."[27] The lower court added that the next "89 days" consisted of "the time between the notice of right to appeal and Appellant's filing of his notice

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[22] *Id*. at 15.
[23] *Id*. at 13.
[24] *Id*. at 15.
[25] *Id*. at 13.
[26] *Id*.
[27] *Id*. at 13-14 (citing *United States v. Hirst*, 84 M.J. 615, 626 (N-M. Ct. Crim. 2024)).

of appeal with this Court."[28]

Regarding the reasons for the delay, the lower court noted the Government's explanation that "its review of cases potentially subject to the expanded jurisdiction of Article 66(b)(1), UCMJ, [w]as a 'considerable undertaking.'"[29] The lower court deemed this a "self-serving characterization" that was "not supported by any meaningful insight as to what made the review a considerable undertaking or, more importantly, why it took so long."[30]

Regarding the "assertion of the right to timely review and appeal," the lower court noted that Appellant filed his notice in timely fashion but "did not, however, demand speedy appellate review."[31] The lower court noted that Appellant sought "four requests for enlargement of time to file his brief" and thus concluded "that this factor weigh[ed] against Appellant, but this weight is slight."[32]

Regarding the final *Barker v. Wingo* factor, the lower court found that Appellant did not suffer any prejudice from the delay.[33] The lower court noted that "[i]n any event, any claim of prejudice would be diminished by Appellant having

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[28] *Id*. at 14.
[29] *Id*. at 15.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*. at 16.

sought four requests for enlargement of time to file his brief."[34]

The lower court then wrote: "[f]inally, 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 find that the delay was not so egregious as to 'adversely affect the public's perception of the fairness and integrity of the military justice system.'"[35] The lower court added: "[w]hile we do not endorse or condone the Government's unsubstantiated delay in providing Appellant with notice of his right to appeal, 'we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity.'"[36]

[34] *Id*.
[35] *Id*. (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).
[36] *Id*. (quoting *United States v. Anderson*, 82 M.J. 82, 88 (C.A.A.F. 2022)).

Reasons to Grant Review

I.

By declining to apply the *United States v. Moreno* presumption of unreasonable delay to Article 66(b)(1) appeals, the lower court (i) decided a question of law that this Court has not, but should, settle; and (ii) decided a question of law in a way that conflicts with an applicable decision of this Court.[37]

A. In *Moreno*, this Court adopted a presumption of unreasonable post-trial processing delay for appeals not docketed with a CCA within 150 days after adjournment.

In *United States v. Moreno*, 1,688 days passed between the conclusion of the appellant's court-martial and the Court of Criminal Appeals' decision.[38] In reviewing the appellant's assertion that his due process right had been violated by this delay, this Court "recognized that convicted servicemembers have a due process right to timely review and appeal of courts-martial convictions."[39]

This Court explained that asserted denials of this constitutional right are analyzed under the following *Barker v. Wingo* factors: "(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."[40]

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[37] C.A.A.F. R. 21(b)(5)(A), 21(b)(5)(B).
[38] 63 M.J. at 135.
[39] *Id*.
[40] *Id*. (citing 407 U.S. at 530).

This Court explained that "[o]nce this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation."[41] This Court explained that it will "analyze each factor and make a determination as to whether that factor favors the Government or the appellant" and will "then balance [its] analysis of the factors to determine whether there has been a due process violation."[42] This Court explained that "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding."[43]

This Court also explained that "some action [was] necessary to deter excessive delay in the appellate process and remedy those instances in which there is unreasonable delay and due process violations."[44] Therefore, this Court established a rule specifying that:

> For courts-martial completed thirty days after the date of this opinion, we will apply a presumption of unreasonable delay that will serve to trigger the *Barker* four-factor analysis where the action of the convening authority is not taken within 120 days of the completion of trial. We will apply a similar presumption of unreasonable delay for courts-martial completed thirty days after the date of this opinion where

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[41] *Id*. at 136.
[42] *Id*.
[43] *Id*.
[44] *Id*. at 142.

the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action.[45]

B. The NMCCA, AFCCA, and CGCCA have deemed *Moreno*'s 150-day presumption of unreasonable delay inapt to Article 66(b)(1)(A) appeals.

The lower court declined to apply the *Moreno* standard of presumption of unreasonable delay. Quoting a decision by the AFCCA, the lower court explained that "'statutory changes substantially altered the sequence of post-trial events in such [direct appeal] cases' as compared to the mandatory review cases [CAAF] contemplated in *Moreno*."[46] The court appeared to focus on the fact that in Article 66(b)(1)(A), UCMJ, appeals, an appellant decides whether to file an appeal with a Court of Criminal Appeals. Echoing the AFCCA, the lower court reasoned that "'an appellant is now in the driver's seat' regarding both whether appellate review occurs and the timing of any such review."[47]

Likewise, the Coast Guard Court of Criminal Appeals (CGCCA) has determined that the time standards from *Moreno* "cannot be applied to an Article 66(b)(1) case without modification."[48] In *United States v. Mieres*, the CGCCA

[45] *Id*. (citing 407 U.S. at 530).
[46] *St. Helen*, slip op. at 12 (quoting *Boren*, 2025 CCA LEXIS 103, at *47)).
[47] *Id*. (quoting *Boren*, 2025 CCA LEXIS 103, at *47-48).
[48] *United States v. Chock*, 84 M.J. 578, 580 (C.G. Ct. Crim. App. 2024).

stated that it would "revert to conducting 'case-by-case analysis to determine if a given delay is facially unreasonable.'"[49]

C. The lower court's departure from *Moreno*'s 150-day standard was error.

As this Court has explained, a "Court of Criminal Appeals 'is not generally free to ignore our precedent.'"[50] As this Court once explained in *United States v. Allbery*, if a CCA believes "the underlying logic of [a prior] decision had changed in the meantime, its recourse was to express that viewpoint and to urge our reconsideration of our precedent."[51] Beyond this, the CCA is "bound to follow [the applicable precedent] or to distinguish it."[52]

The lower court's attempt to distinguish *Moreno* by claiming that its presumption of unreasonable delay standard does not apply to Article 66(b)(1) appeals was error. The lower court correctly noted that Article 66(b)(1) appeals afford an appellant time to consider whether to file an appeal. However, the lower court failed to explain why this justified wholesale abandonment of the 150-day standard *Moreno* established. An appellant's decision whether to appeal does not negate the Government's need to process the record of trial and provide it to an appellate defense counsel so that an accused can make an informed decision

[49] 84 M.J. 682, 688 (C.G. Ct. Crim. App. 2024) (citation omitted).
[50] *United States v. Allbery*, 44 M.J. 226, 227 (C.A.A.F. 1996) (citation omitted).
[51] *Id*. at 228.
[52] *Id*.

regarding whether to file an appeal.[53]

By the same token, the lower court's suggestion that the standards from *Moreno* should not apply in non-automatic appeals because an appellant is in the "'driver's seat'" regarding whether to appeal is an exaggeration.[54] The Government must inform the appellant of his appellate rights; this did not occur here until 987 days after the announcement of sentence.[55]

To illustrate further, under Article 65(c)(1), the Judge Advocate General "shall provide notice to the accused of the right to file an appeal under [Article 66(b)(1), UCMJ] by means of depositing in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the official service record of the accused."[56]

Then, pursuant to Article 66(c)(1), UCMJ, an appellant must generally file his notice of appeal within ninety days of being advised of his right to appeal or

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[53] R.C.M. 1116(b)(1)(2)(A) (explaining that in Art. 66(b)(1) appeals, "the Judge Advocate General shall forward a copy of the record of trial and attachments required . . . to an appellate defense counsel who shall be detailed to review the case, and upon request of the accused, to represent the accused before the Court of Criminal Appeals").
[54] *St. Helen*, slip op. at 12 (citation omitted).
[55] *Id*. at 8.
[56] 10 U.S.C. § 865(c)(1) (2018).

within the time established by a rule or order of the Court of Criminal Appeals.[57] The NMCCA Rules of Appellate Procedure require an appellant to file a notice of appeal "within 90 days of the date that the Office of the Judge Advocate General places in the mail . . . the Article 65(c) notice to the accused of the right to file an appeal."[58] As soon as the appellant files his notice with the court, the appeal is docketed.[59]

Put simply, *Moreno*'s emphasis on the need for the Government to process a record of trial so that it can be docketed with a CCA within 150 days of adjournment should not change under Article 66(b)(1) appeals. As this Court noted in *Moreno*, "'[a]n appeal that is inordinately delayed is as much a 'meaningless ritual,' . . . as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings.'"[60] That Congress and the NMCCA gave Appellant 90 days to decide whether to file an appeal should not change the Government's obligation to proceed in a timely fashion post-trial. The time an appellant takes to decide whether to appeal is irrelevant to the 150-day analysis.

In short, applying a presumption of unreasonable delay in cases where the Government, as occurred here, failed to meet this standard would serve *Moreno*'s

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[57] 10 U.S.C. § 866(c)(1)(A)-(B) (2018).
[58] N-M. Ct. Crim. App. R. 18.5(a)(1) (June 1, 2022).
[59] *Id*.
[60] *Id*. at 135 (citations omitted).

goal of deterring unreasonably delayed appeals.[61]

D. The lower court erred by deeming only 226 days of delay excessive.

The lower court further erred in its calculation of excessive delay. The lower court calculated 226 days of delay to be "excessive."[62] The lower court reached this figure by counting only the period of time following April 9, 2024, when it determined in *United States v. Hirst* "that the Judge Advocate General of the Navy must notify individuals convicted of an offense at a special or general court-martial of their eligibility for direct review under Article 66(b)(1)(A), UCMJ."[63]

This computation of time was arbitrary. As this Court concluded in *United States v. Folts*, "[o]n December 23, 2022, Congress passed the FY23 [National Defense Authorization Act [NDAA]]" which "significantly expanded eligibility for direct appeals of general and special court-martial convictions under Article 66, UCMJ."[64] In *United States v. Folts*, this Court made clear that "Congress gave clear direction to what cases could not take advantage of the FY23 NDAA by providing that the changes to Articles 66 and 69, UCMJ," would not apply to acts

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[61] *Moreno*, 63 M.J. at 142 (applying a "presumption of unreasonable delay . . . where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action" and requiring the convening authority's action to occur "within 120 days of the completion of trial").
[62] *St. Helen*, slip op. at 15.
[63] *Id*. at 13-14 (citing 84 M.J. at 626).
[64] 86 M.J. 84, 87 (C.A.A.F. 2025).

submitted to a CCA or to the Judge Advocate General "before the date of enactment of" the FY23 NDAA, which was December 23, 2022.[65] Therefore, the lower court should have used December 23, 2022—not April 9, 2024—as the date on which the Government's obligation to timely process Appellant's court-martial with an eye toward Article 66(b)(1) review began.

As the lower court observed, "it took another 699 days for the Government to notify Appellant of his right to appeal his conviction" following the changes to the FY23 NDAA.[66] Therefore, at a minimum, the lower court should have deemed 699 days of delay excessive rather than 226 days. This error, which resulted in the lower Court drastically miscalculating the amount of excessive delay, led to a faulty and misinformed weighing of the *Barker v. Wingo* factors, prejudicing Appellant.

E. The lower court demonstrated other misunderstandings of the law.

Additionally, the lower court demonstrated an incorrect understanding of the *Moreno* framework for assessing prejudice for post-trial delay.

First, the lower court determined that "any claim of prejudice would be diminished by Appellant having sought four requests for enlargement of time to

[65] *Id*. (citation omitted).
[66] *St. Helen*, slip op. at 13.

file his brief."[67] The lower court failed to explain why this would undermine prejudice. In *Moreno*, this Court expressly refused to presume that an appellate defense counsel's request for enlargements benefitted the appellant.[68] This Court quoted a previous decision explaining that "[a]ppellate counsel caseloads are a result of management and administrative priorities and as such are subject to the administrative control of the Government."[69]

Second, the lower court misapplied the standard for assessing relief in the absence of prejudice. The lower court wrote that "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 find that the delay was not so egregious as to 'adversely affect the public's perception of the fairness and integrity of the military justice system.'"[70]

However, the correct test requires the court to balance the first three *Barker* factors and then determine whether "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.'"[71] Here, there is no indication the lower court factored in

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[67] *Id*.
[68] 63 M.J. at 137.
[69] *Id*. (quoting *Diaz v. JAG of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003)).
[70] *Id*. (quoting *Toohey*, 63 M.J. at 362).
[71] *Anderson*, 82 M.J. at 88.

the first three *Barker* factors—two of which it found favored Appellant—in making this determination.

Accordingly, this Court should set aside the lower court's decision and return the case to the lower court to apply the proper framework.

Conclusion

There is good cause to grant review. The lower court refused to apply the presumption of unreasonableness from *Moreno* to Article 66(b)(1), UCMJ, appeals, which decided a question of law decided by various CCAs but that has not been—though should be—decided by this Court. Further, the lower court's refusal to apply this aspect of *Moreno* conflicted with *Moreno* itself. This Court should grant review and set aside the lower court's decision.

Respectfully Submitted,



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Appellate Defense Counsel

List of Appendices

A. *United States v. St. Helen*, No. 202400264, slip op. (N-M. Ct. Crim. App. July 10, 2026).
B. *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, (A.F. Ct. Crim. App. Mar. 19, 2025).

Certificate of Compliance

1. This supplement complies with the type-volume limitations of Rule 21(b) because it contains fewer than 9,000 words.

2. This supplement complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on October 13, 2026.



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Appendix A

This opinion is subject to administrative correction before final disposition.

United States Navy–Marine Corps Court of Criminal Appeals

Before
KISOR, FLUHR, and GANNON
Appellate Military Judges

UNITED STATES
Appellee

v.

Christopher J. ST. HELEN
Midshipman, U.S. Navy
Appellant

No. 202400264

Decided: 10 July 2026

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Angela J. Tang

Sentence adjudged 10 March 2022 by a general court-martial tried at the Washington Navy Yard, District of Columbia, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: confinement for 56 days.[1]

For Appellant:
Lieutenant Commander Michael W. Wester, JAGC, USN

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[1] Appellant was credited with 56 days of pretrial confinement credit.

For Appellee:
Lieutenant Commander Philip J. Corrigan, JAGC, USN
Commander John T. Cole, JAGC, USN

Judge FLUHR delivered the opinion of the Court, in which Senior Judge KISOR and Judge GANNON joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

FLUHR, Judge:

Appellant was convicted, consistent with his pleas, of two specifications of assault consummated by a battery and one specification of simple assault with an unloaded firearm, in violation of Article 128, Uniform Code of Military Justice (UCMJ).[2] All three specifications stem from an incident in which Appellant pointed the barrel of an unloaded firearm at Seaman (SN) Hotel[3] and unlawfully touched SN Hotel's face and neck with the unloaded firearm. We have jurisdiction to review this case under Article 66(b)(1)(A), UCMJ.[4]

Appellant asserts two assignments of error (AOEs): (1) whether the military judge abused her discretion by accepting Appellant's guilty pleas without inquiring into the mental responsibility affirmative defense; and (2) whether Appellant is entitled to relief because of post-trial processing delay. We find no prejudicial error and affirm.

I. BACKGROUND

While enrolled as a Midshipman at the Naval Academy, Appellant attended a party at the home of a friend in Norfolk, Virginia, on 17 December

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[2] 10 U.S.C. §928.

[3] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

[4] 10 U.S.C. § 866(b)(1)(A).

2021.[5] Upset at a perceived slight in a group text thread, Appellant confronted SN Hotel, an acquaintance who had been a Midshipman at the Naval Academy, as he arrived at the party location.[6] Appellant and SN Hotel argued and then Appellant removed an unloaded firearm from behind his back, pointing the barrel of the weapon at SN Hotel's head from a short distance away.[7] Appellant also brought the unloaded firearm into contact with SN Hotel's face and neck, which resulted in a cut on SN Hotel's face.[8] After the altercation with SN Hotel ended, Appellant returned to the party and did not see SN Hotel for the remainder of that evening.[9]

The Government charged Appellant with three specifications under Article 128, UCMJ, all relating to the incident with SN Hotel on 17 December 2021. Prior to referral of the Charge, the convening authority directed that Appellant undergo an inquiry into his mental capacity and mental responsibility pursuant to Rule for Courts-Martial (R.C.M.) 706.[10] In a report dated 23 February 2022, the R.C.M. 706 board members diagnosed Appellant with the following conditions both at the time of the alleged offenses and at the time of their evaluation: "Posttraumatic Stress Disorder, Chronic"; "Suicidality, Chronic"; "Antisocial Personality Disorder"; and "Intermittent Explosive Disorder."[11] However, the R.C.M. 706 board concluded that the Appellant did not suffer from a *severe* mental disease or defect at the time of the alleged criminal conduct.[12] Moreover, the R.C.M. 706 board found that Appellant "was not unable to appreciate the nature and quality or wrongfulness of his conduct."[13] Finally, the R.C.M. 706 board found that "a mental disease or defect currently does not render [Appellant] unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in his defense."[14]

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[5] Pros. Ex. 1, paras. 4, 8.

[6] Pros. Ex. 1, paras. 9, 10, 12.

[7] Pros. Ex. 1, paras. 11, 28.

[8] Pros. Ex. 1, paras. 11, 14, 18, 19.

[9] Pros. Ex. 1, para. 24.

[10] App. Ex. I.

[11] App. Ex. I, para. 2(b).

[12] App. Ex. I, para. 2(a) (emphasis added).

[13] App. Ex. I, para. 2(c).

[14] App. Ex. I, para. 2(d).

Also prior to referral of the Charge, the parties engaged in plea negotiations and on 28 February 2022, Appellant and his counsel signed a plea agreement.[15] That agreement specified, among other things, that Appellant agreed "to waive all motions except those that are non-waivable pursuant to R.C.M. 705(c)(1)(B) or otherwise."[16] Further, through the written plea agreement, Appellant agreed to waive his right to a preliminary hearing.[17] After executing the plea agreement submitted by Appellant and with the waiver of a preliminary hearing, the convening authority referred the Charge and Specifications 1, 2, and 3 to a general court-martial.[18] Through the plea agreement, Appellant agreed to plead guilty to the Charge and all three underlying specifications.[19]

On 10 March 2022, Appellant appeared for trial. In preparation for that hearing, Appellant signed a stipulation of fact admitting guilt to the three specifications under the Charge.[20] He acknowledged in the stipulation of fact that, as to each offense, he "acted with no legal justification or excuse."[21] Significantly for our review, Appellant also stated the following:

> At the time of the offenses to which I am pleading guilty, I did not suffer from any mental defect or disease that caused me to commit the offenses. I have not suffered from any mental defect or disease that has prevent[ed] me from knowingly, consciously, and intelligently participating in my defense and signing the pretrial agreement and this stipulation.[22]

During the providence inquiry, Appellant reiterated that, with respect to Specifications 1 and 2, he did not have any legal justification or excuse for causing the unloaded firearm to come into contact with SN Hotel's face and neck.[23] Similarly, regarding Specification 3, Appellant affirmed that he did not

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[15] App. Ex. IV at 8.

[16] App. Ex. IV, para. 8(g).

[17] App. Ex. IV, para. 8(f).

[18] App. Ex. IV, at 8.

[19] App. Ex. IV, para. 8(a).

[20] Pros. Ex. 1; R. at 20 (admitting the stipulation of fact into evidence).

[21] Pros. Ex. 1, paras. 13, 22, 31.

[22] Pros. Ex. 1, para. 5.

[23] R. at 25.

have any legal justification or excuse for pointing an unloaded firearm at SN Hotel and that he did so as a demonstration of violence.[24]

The military judge also engaged in a colloquy with Appellant regarding the terms of the plea agreement.[25] As part of that discussion, the military judge questioned Appellant and trial defense counsel regarding the agreement "to waive all motions except those that are non-waivable pursuant to R.C.M. 705(c)(1)(B) or otherwise."[26] Trial defense counsel did not identify lack of mental responsibility as an issue when discussing potential motions being waived through the plea agreement.[27] Moreover, Appellant expressed his understanding that he was giving up the relief he could seek through those motions and that he believed that it was in his "best interest to waive [the] motions and to enter into this plea agreement."[28]

After accepting the plea agreement, the military judge found that Appellant entered his plea of guilty "voluntarily and with full knowledge of its meaning and effect" and that his guilty plea was provident.[29] As such, the military judge accepted Appellant's guilty plea and entered findings on the Charge and specifications.[30]

Next, the military judge turned to presentencing.[31] During that stage of the proceeding, Appellant introduced a character statement from Jack Smith, a medically-retired Navy officer, who was then serving as a deputy chief financial officer for a government agency.[32] In the character statement, Mr. Smith opined that Appellant "has dealt with a lot of difficulties in his upbringing and uses those past traumatic experiences to help him see it through this current situation."[33]

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[24] R. at 31.

[25] R. at 33-56.

[26] R. at 41 (referring to App. Ex. IV, para. 8(g)).

[27] R. at 41.

[28] R. at 41-42.

[29] R. at 56-58.

[30] R. at 58.

[31] *Id.*

[32] Def. Ex. A; R. at 61 (admitting the subject character statement into evidence).

[33] Def. Ex. A, para. 6.

In addition, Appellant read an unsworn statement that included the following points: (1) "[s]ince a young age, I have dealt with mental health issues resulting from incidents of abuse in my childhood";[34] (2) that his mental health issues were exacerbated by the deaths of three people close to him while at the Naval Academy;[35] and (3) that he has "sought mental health treatment multiple times," which disrupted his progress at the Naval Academy, resulting in separation processing.[36]

Trial counsel waived argument on sentencing, while trial defense counsel made a brief argument to the military judge seeking a sentence of time served, that is, 56 days of confinement.[37] The military judge took a short recess to deliberate before she imposed a sentence of 56 days of confinement (time served) with no further punishment.[38] The adjudged sentence was consistent with the sentencing limitations of the plea agreement.[39]

At the time of Appellant's sentencing on 10 March 2022, the sentence imposed did not meet the jurisdictional requirements for direct appeal to this Court. Instead, on 10 June 2022, it was reviewed by a judge advocate pursuant to Article 65(d), UCMJ.[40] Under the statutory scheme in place at the time, Appellant then had one year to apply to the Judge Advocate General of the Navy for further review pursuant to Article 69(a), UCMJ.[41] There is no evidence in the record before us that Appellant sought such further review.

That statutory scheme changed, however, on 23 December 2022, when Congress amended Articles 66 and 69, UCMJ, 10 U.S.C. §§ 866, 869.[42] The amend-

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[34] R. at 62.

[35] R. at 62-63.

[36] R. at 63.

[37] R. at 64-65.

[38] R. at 67.

[39] App. Ex. IV, para. 9.

[40] 10 U.S.C. § 865(d)(1)(2016) ("A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.").

[41] 10 U.S.C. § 869(a)(2016).

[42] National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582-84 (23 Dec. 2022).

ment to Article 66(b)(1)(A), UCMJ, expanded the jurisdiction of Courts of Criminal Appeals to include any judgment of a special or general court-martial, irrespective of sentence, that includes a finding of guilty.[43]

In the aftermath of that legislative change, this Court considered its jurisdiction over cases involving "sub-jurisdictional" sentences announced prior to the amendments to Article 66(b)(1)(A), UCMJ. On 9 April 2024, in *United States v. Hirst*, we found that so long as an appellant had not applied for relief to the Judge Advocate General of the Navy pursuant to Article 69, UCMJ, or appealed to this Court, we have jurisdiction over a general or special court-martial conviction, without regard to the sentence, even as to a conviction announced before the statutory change.[44] Furthermore, concerning implementation of this jurisdictional expansion, we emphasized the non-discretionary nature of the statutory requirement for the Judge Advocate General of the Navy to notify individuals convicted of an offense at special or general court-martial of their eligibility for direct review under Article 66(b)(1)(A), UCMJ.[45]

On 21 November 2024, the Navy and Marine Corps Appellate Review Activity transmitted a letter to Appellant advising him of his right to appeal under the amended statutory provisions discussed above.[46] On 18 February 2024, Appellant timely filed a notice of appeal[47] with this Court and we docketed his case that same day. Thereafter, Appellant moved for four enlargements of time.[48] Appellant submitted his brief with assignments of error on 1 August 2025.[49] Prior to the filing of briefs with this Court, Appellant did not request speedy appellate review. Key post-trial processing events are summarized as follows:

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[43] 10 U.S.C. § 866(b)(1)(A).

[44] *United States v. Hirst*, 84 M.J. 615, 625 (N-M. Ct. Crim. App. 2024) (Order).

[45] *Id.* at 625 (citing 10 U.S.C. § 865(c); 10 U.S.C. § 866(b)(1)(A)).

[46] Appellant Mot. to Attach, App'x A.

[47] *See* 10 U.S.C. § 866(c)(1)(A) ("An appeal under subsection (b)(1) is timely if . . . it is filed before the . . . the end of the 90-day period beginning on the date the accused is provided notice of appellate rights . . . .").

[48] Appellant's Mot. For First Enlargement of Time, dated 16 April 2025; Appellant's Mot. For Second Enlargement of Time, dated 14 May 2025; Appellant's Mot. For Third Enlargement of Time, dated 13 June 2025; Appellant's Mot. For Fourth Enlargement of Time, dated 11 July 2025.

[49] Appellant Br. at 31.

Date	Event
10 March 2022	Announcement of sentence
6 April 2022	Convening authority's action (27 days after announcement of sentence)
29 April 2022	Entry of judgment (50 days after announcement of sentence)
10 June 2022	Review completed under Article 65(d), UCMJ (92 days after announcement of sentence)
23 December 2022	Passage of the NDAA for Fiscal Year 2023 (288 days after announcement of sentence)
21 November 2024	Notice of right to appeal transmitted to Appellant (987 days after announcement of sentence) (699 days after passage of the NDAA for Fiscal Year 2023) (226 days after decision in *United States v. Hirst*)
18 February 2025	Appellant's notice of appeal filed and docketed (1,076 days after announcement of sentence) (89 days after notification of right to appeal transmitted to Appellant)
1 August 2025	Appellant's brief and assignments of error filed (1,240 days after announcement of sentence) (253 days after notification of right to appeal transmitted to Appellant)

II. DISCUSSION

A. The Military Judge Did Not Abuse Her Discretion when Accepting Appellant's Guilty Plea Without Inquiring into a Possible Affirmative Defense.

1. Legal Standards

Appellant asks this Court to set aside the findings and sentence because the military judge erred by accepting his guilty pleas without inquiring into the affirmative defense of lack of mental responsibility.[50] Acceptance of a guilty plea is reviewed for an abuse of discretion, and questions of law arising from the plea are reviewed de novo.[51] We look at the record as a whole to determine whether there is a substantial basis in law or fact for questioning the guilty

[50] Appellant Br. at 11-22.

[51] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

plea.[52] "If an accused 'sets up matter inconsistent with the plea' at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea."[53] A "mere possibility" of a conflict is not sufficient basis to overturn the trial results.[54]

In the absence of evidence to the contrary, a military judge can presume that an accused is sane.[55] The affirmative defense of lack of mental responsibility requires the accused to prove, by clear and convincing evidence, that at the time of the offense: (1) the accused suffered from a "severe mental disease or defect"; and (2) as a result of that mental disease or defect, the accused was "unable to appreciate" either (a) the "nature and quality" of his acts or (b) the "wrongfulness" of his acts.[56] Like other affirmative defenses, the defense of lack of mental responsibility can be waived.[57]

2. Analysis

Appellant has failed to establish that his mental health history raises a conflict with his guilty pleas.[58] Considering the entirety of the evidence before the military judge, the facts and circumstances at most raised the "mere possibility" of a lack of mental responsibility. This is insufficient for relief.[59]

Regarding Appellant's mental responsibility, a pretrial sanity board conducted an inquiry pursuant to R.C.M. 706 and concluded that Appellant was able to appreciate the wrongfulness as well as the nature and quality of his

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[52] *Id.*

[53] *United States v. Shaw*, 64 M.J. 462, 463 (C.A.A.F. 2007) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) and Article 45(a), UCMJ, 10 U.S.C. § 845(a)).

[54] *Id.* (citation omitted).

[55] *Id.* at 462; *see also* R.C.M. 916(k)(3)(A) ("[An] accused is presumed to have been mentally responsible . . . .").

[56] 10 U.S.C. § 850a; *see also* R.C.M. 916(k)(3)(A) ("[An] accused is presumed to have been mentally responsible at the time of the alleged offense[,] . . . [u]ntil the accused establishes, by clear and convincing evidence, that he [ ] was not mentally responsible at the time of the alleged offense.").

[57] *United States v. Halsema*, No. 200001337, 2006 CCA LEXIS 297, at *22 (N-M. Ct. Crim. App. 2006) (unpublished) (citing R.C.M. 905(e); *United States v. Lewis*, 34 M.J. 745, 750 (N.M.C.M.R. 1991)).

[58] *See United States v. Phillips*, 74 M.J. 20, 21-22 (C.A.A.F. 2015).

[59] *See Shaw*, 64 M.J. at 463; *see also United States v. Hayes*, 70 M.J. 454, 459-60 (C.A.A.F. 2012).

conduct.[60] The R.C.M. 706 board also concluded that Appellant was not suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in his defense.[61] Following the R.C.M. 706 board, Appellant confirmed the absence of any concern regarding his mental capacity through a stipulation of fact, representing that "[a]t the time of the offenses to which I am pleading guilty, I did not suffer from any mental defect or disease that caused me to commit the offenses" and that "I have not suffered from any mental defect or disease that has prevent[ed] me from knowingly, consciously, and intelligently participating in my defense and signing the pretrial agreement and this stipulation."[62]

Here, the record reflects that Appellant was diagnosed with posttraumatic stress disorder, suicidality, antisocial personality disorder, and intermittent explosive disorder.[63] He attributed his mental health struggles to childhood trauma exacerbated by events at the Naval Academy.[64] The R.C.M. 706 board determined that Appellant's diagnosed conditions were not severe, that he was able to appreciate the wrongfulness of his conduct, and that he was not suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings.[65] There was no effort on the part of trial defense counsel to contradict these findings. In fact, Appellant's stipulation of fact admitted at trial reflected a concerted effort to assure the military judge that Appellant did not have a mental responsibility defense.

Appellant's unsworn statement asserting general references to "mental health issues" stemming from childhood abuse and aggravating events at the Naval Academy did not raise any conflict with his guilty pleas requiring clarification by the military judge. Significantly, through his stipulation of fact, Appellant disavowed the existence of a defense of lack of mental responsibility or competence to stand trial.[66] Under the circumstances, no further inquiry from the military judge was necessary to assure the providence of Appellant's guilty pleas.

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[60] App. Ex. I, para. 2(c).

[61] App. Ex. I, para. 2(d).

[62] Pros. Ex. 1, para. 5.

[63] App. Ex. I, para. 2(b).

[64] R. at 62-63.

[65] App. Ex. I, para. 2.

[66] Pros. Ex. 1, para. 5.

Even assuming, arguendo, that Appellant's mental health issues referenced in his unsworn statement rose to the level of a severe mental disease or defect at the time of the charged offenses, there was no information in the record that this condition rendered Appellant unable to appreciate the nature and quality or the wrongfulness of his acts, as would be required to mount an affirmative defense of lack of mental responsibility. Indeed, the R.C.M. 706 board found to the contrary.[67] No further inquiry is required for a "mere possibility" of a lack of mental responsibility relating to conditions determined not to be severe.[68] Nor has Appellant to date offered any indication that his diagnosed conditions raise a substantial question regarding his mental responsibility.

Under these circumstances, to include Appellant's repudiation of any defense of lack of mental responsibility, and the findings of the R.C.M. 706 board, Appellant's matters raised in sentencing were properly considered as matters in mitigation,[69] but did not provide a "substantial basis" to undermine the validity of his guilty plea. Accordingly, we find no substantial basis in law or fact for questioning Appellant's plea and find that the military judge did not abuse her discretion in finding Appellant's plea provident.

B. The Delay in Providing Appellant with Notice of His Right to Appeal is Facially Unreasonable, but Appellant is Not Entitled to Relief Because He Suffered No Prejudice and the Delay Does Not Otherwise Warrant Relief.

1. *Legal Standards*

Appellant seeks relief due to an alleged failure to timely process his case after trial.[70] In particular, he asks us to set aside the trial court's findings with prejudice or, in the alternative, to set aside Specifications 1 and 2 of the Charge

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[67] App. Ex. I, para. 2.

[68] *See United States v. Riddle*, 67 M.J. 335, 339-40 (C.A.A.F. 2009) (citing *Shaw*, 64 M.J. at 464) (where reference to a history of bipolar disorder "at most raised only the 'mere possibility' of a conflict with the plea," and therefore, "it was not an abuse of discretion for the military judge to accept [the appellant]'s plea without conducting further inquiry into his mental health").

[69] Appellant himself seems to acknowledge this, noting that his mental health struggles "do not justify Appellant's behavior but rather provide context into his state of mind around the relevant time." Appellant Br. at 29.

[70] Appellant Br. at 22-30.

because those "specifications effectively exaggerate Appellant's criminality."[71] We review Appellant's claim to relief for post-trial delay de novo.[72]

In *United States v. Moreno*, our superior court identified thresholds for facially unreasonable delay during three stages of the post-trial and appellate process.[73] 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 court of criminal appeals within 30 days of the convening authority's action; or (3) the court of criminal appeals did not render a decision within 18 months of docketing.[74] Following statutory and regulatory changes, we determined in *United States v. Rivera* that the first two *Moreno* deadlines were superseded and we held that we would only test for prejudice relating to post-trial processing delay when the time between announcement of sentence and docketing with this Court exceeds 150 days.[75]

However, in light of further amendments to Article 66, UCMJ, which expanded this Court's jurisdiction to include any judgment of a special or general court-martial that includes a finding of guilty regardless of sentence, we find that the aggregated 150-day threshold announced in *Rivera* is not workable for direct appeals of sentences that were deemed "sub-jurisdictional" under the earlier statutory regime. As our sister court, the Air Force Court of Criminal Appeals, has observed, "[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*.[76] Indeed, under the new procedures for direct appeals under Article 66(b)(1)(A), UCMJ, "an appellant is now in the driver's seat" regarding both whether appellate review occurs and the timing of any such review.[77] Therefore, like the Air Force Court of Criminal Appeals, we too decline to establish a new specific timeframe for a facially unreasonable delay between announcement of sentence and dock-

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[71] Appellant Br. at 30.

[72] *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

[73] *Moreno*, 63 M.J. at 141-43 (citations and footnotes omitted).

[74] *Id.* at 142.

[75] *United States v. Rivera*, 81 M.J. 741, 746 (N-M. Ct. Crim. App. 2021).

[76] *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at *47 (A.F. Ct. Crim. App. 19 Mar. 2025) (unpublished).

[77] *Id*. at *47-48.

eting with this Court direct appeal cases under Article 66(b)(1)(A), UCMJ. Instead, we will assess each case of this nature under its own specific facts and circumstances to determine whether an appellant has demonstrated that there has been a due process violation.

Our analysis of whether post-trial delay constitutes a due process violation is guided by the four factors announced by the Supreme Court in *Barker v. Wingo*: "(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]."[78] "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding."[79]

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 to present a defense at a rehearing.[80] "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[81] In addition, 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."[82]

2. Analysis

In total, 1076 days elapsed between the military judge's announcement of sentence and the docketing of Appellant's case with this Court. The first 288 days occurred before Congress passed the National Defense Authorization Act for Fiscal Year 2023 expanding our jurisdiction under Article 66(b)(1)(A), UCMJ, to encompass formerly "sub-jurisdictional" sentences like the one announced in Appellant's case. After that statutory change, it took another 699 days for the Government to notify Appellant of his right to appeal his conviction. Of that 699-day period, 226 days elapsed after the issuance of our opinion

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[78] *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

[79] *Id.*, 63 M.J. at 136 (citing *Barker*, 407 U.S. at 533).

[80] *Id.* at 138-40 (citations and footnotes omitted).

[81] *Barker*, 407 U.S. at 532.

[82] *Anderson*, 82 M.J. at 87-88 (citing *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

in *United States v. Hirst*, in which we confirmed that the Judge Advocate General of the Navy must notify individuals convicted of an offense at special or general court-martial of their eligibility for direct review under Article 66(b)(1)(A), UCMJ.[83] The last 89 days of the overall 1076-day sentence-to-docketing period is comprised of the time between the notice of right to appeal and Appellant's filing of his notice of appeal with this Court.

Appellant contends that the Government was neglectful, resulting "in considerable delays to Appellant's post-trial processing."[84] More specifically, Appellant argues that while the record of trial in this case "is very small" and the case is "relatively non-complex," the Government nevertheless took "more than two-and-a-half years—937 days—to inform Appellant of his right to appeal the findings and sentence of his court-martial."[85] In his reply, Appellant narrows his focus further, pointing to the 699 days it took the Government to notify him of his right to appeal after the passage of the National Defense Authorization Act for Fiscal Year 2023.[86]

The Government argues in response that the "pre-docketing delay was not facially unreasonable" because even after the statutory expansion of appellate jurisdiction, its obligation "to identify affected cases and issue notices" regarding appellate rights only "crystallized" after our *Hirst* decision in April 2024.[87] The Government characterizes this retroactive review process as a "considerable undertaking."[88]

As we noted in *Hirst*, Article 65(c), UCMJ, as amended by the National Defense Authorization Act for Fiscal Year 2023, "affords the JAG no discretion to withhold a notice of right to appeal" in cases subject to direct appeal under Article 66(b)(1)(A), UCMJ.[89] Moreover, providing individuals with notice of the right to make a direct appeal under Article 66(b)(1)(A), UCMJ, "is a 'ministerial

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[83] *Hirst*, 84 M.J. at 626 (citing 10 U.S.C. §§ 865(c), 866(b)(1)(A)).

[84] Appellant Br. at 26.

[85] *Id.* In calculating this 937-day period, Appellant used the date of the entry of judgment (29 April 2022) as the commencement date, rather than the earlier date of the announcement of sentence (10 March 2022).

[86] Appellant Reply Br. at 6-9.

[87] Gov't Answer at 30.

[88] *Id.*; *see also id.* at 33 (Government noting that it "necessarily had to review records of previously-ineligible cases to determine if they were now eligible for review.").

[89] *Hirst*, 84 M.J. at 626 (citing 10 U.S.C. § 865(c) 10 U.S.C. § 866(b)(1)(A)).

act, routinely accomplished in a brief period of time in the absence of special circumstances.'"[90]

Here, the Government did not notify Appellant of his right to appeal until 11 November 2024, which was 226 days after this Court made clear in *Hirst* that appellants who met certain criteria were eligible for direct appeal with this Court and were required to receive appropriate notification.[91] We find that the 226-day delay between this Court's decision in *Hirst* and the Government's notice to Appellant of his right to appeal is excessive.[92] Under these circumstances, Appellant has demonstrated a facially unreasonable delay in the post-trial processing of his case.

We turn then to the remaining *Barker* factors. Regarding reasons for the delay, the Government seeks to excuse its notification delay by referring to its review of cases potentially subject to the expanded jurisdiction of Article 66(b)(1), UCMJ, as a "considerable undertaking."[93] This self-serving characterization is not supported by any meaningful insight as to what made the review a considerable undertaking or, more importantly, why it took so long. When did the review begin? How many cases were subject to the review? How many people were involved in conducting the review? Neither the record nor the Government's Answer provides us with any useful information. Absent a more fulsome articulation of the basis for the Government's delay, we must conclude that the nature of the undertaking did not justify a delay of 226 days.

Next, concerning assertion of the right to timely review and appeal, Appellant filed his notice to appeal in a timely manner (i.e., within 90 days) after receiving notice of his right to appeal. He did not, however, demand speedy appellate review. Rather, through counsel, Appellant sought four requests for enlargement of time to file his brief. Under these circumstances, we conclude that this factor weighs against Appellant, but this weight is slight.[94]

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[90] *Id.* (citing *United States v. Simon*, 64 M.J. 205, 207 (C.A.A.F. 2006)).

[91] The Court focuses on the timeframe after *Hirst*. Because of the uncertainty that existed prior to that decision, the Court excuses the 473-day period between the passage of the National Defense Authorization Act for Fiscal Year 2023 and the Government's notice to Appellant of his right to appeal under the amended statute.

[92] 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.

[93] Gov't Answer at 30.

[94] *See Moreno*, 63 M.J. at 138 ("While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests

As to the fourth *Barker* factor, we do not find Appellant suffered any prejudice. Appellant's claim of prejudice is that he has carried the weight of a "faulty conviction" while his post-trial processing was undertaken.[95] Appellant did not develop any argument as to precisely how his conviction—involving a guilty plea and a time served sentence—was somehow "faulty."[96] Regardless of that omission, Appellant is not subject to oppressive incarceration because he received a time served sentence of 56 days and completed his confinement on the date the military judge announced his sentence—more than nine months prior to the legislative change allowing direct appeals in cases like his.

Furthermore, Appellant has not alleged particularized anxiety or impairment related to the delay in notification of his new right to a direct appeal. In addition, Appellant "does not claim any specific prejudice to his appeal" stemming from the delay.[97] In any event, any claim of prejudice would be diminished by Appellant having sought four requests for enlargement of time to file his 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 find that the delay was not so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system."[98] While we do not endorse or condone the Government's unsubstantiated delay in providing Appellant with notice of his right to appeal, "we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity."[99]

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with the Government and those to whom he could complain were the ones responsible for the delay.").

[95] Appellant Br. at 27.

[96] Presumably, Appellant's claim to a faulty conviction would relate to his other assignment of error regarding a potential defense of lack of mental responsibility. However, as discussed in the preceding section, we determined that Appellant's argument regarding his guilty plea lacks merit.

[97] Appellant Br. at 26; Appellant Reply Br. at 8-9.

[98] *Toohey*, 63 M.J. at 362.

[99] *Anderson*, 82 M.J. at 88. In addition, we recognize that even in the absence of a due process violation, we still have authority under Article 66(d)(2), UCMJ, to consider whether to grant relief for excessive post-trial delay. We have carefully considered Appellant's argument that under the totality of the circumstances, "there is no reasonable explanation" for the Government's delay in notifying him "of his right to appeal a relatively simple guilty plea such as this." Appellant Br. at 27. While we have found that

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[100]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

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the Government's delay in providing Appellant with notice of his right to appeal to be excessive, we nevertheless conclude that there is no appropriate relief available under Article 66(d)(2), UCMJ, because Appellant was sentenced to a time served sentence of 56 days confinement with no further punishment, which we find to be an appropriate sentence for pointing an unloaded firearm at a fellow member of the Navy as a demonstration of violence and by causing the firearm to come into contact with the other individual's face and neck. We decline to set aside this sentence or modify the findings of the military judge.

[100] Articles 59 & 66, UCMJ, 10 U.S.C. §§ 859, 866.

Appendix B

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United States v. Boren

United States Air Force Court of Criminal Appeals

March 19, 2025, Decided

No. ACM 40296 (f rev)

Reporter
2025 CCA LEXIS 103 *; 2025 LX 100449; 2025 WL 870965

UNITED STATES, Appellee v. Douglas C. BOREN First Lieutenant (O-2), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Boren, 2025 CAAF LEXIS 488, 2025 WL 1911829 (June 23, 2025)*

Motion granted by *United States v. Boren, 2025 CAAF LEXIS 531, 2025 WL 2301330 (July 7, 2025)*

Review granted by *United States v. Boren, 2025 CAAF LEXIS 1044, 2025 WL 4036469 (Dec. 22, 2025)*

Affirmed by *United States v. Boren, 2026 CAAF LEXIS 229, 2026 LX 116426 (Mar. 6, 2026)*

Prior History: Appeal from the United States Air Force Trial Judiciary[1] [*1] . Upon Further Review. Military Judge: Sterling C. Pendleton (Trial); Jeremy L. Mooney (Re-mand). Sentence: Sentence adjudged on 8 August 2021 by GCM convened at Ramstein Air Base, Germany. Sentence entered by military judge on 12 May 2022: Confinement for 30 days, forfeiture of $2,645.00 pay per month for 6 months, and a reprimand.

United States v. Boren, 2024 CCA LEXIS 246, 2024 WL 3103840 (A.F.C.C.A., June 24, 2024)

Core Terms

touching, asleep, military, sentence, vagina, sexual contact, reprimand, trial counsel, post-trial, reasonable doubt, counsel's, interview, right to counsel, de novo, court-martial, confession, facially, bed, misconduct, convene, whiskey, sexual, unreasonable delay, suppress, appellate court, sleep, factual sufficiency, verbatim transcript, defense counsel, invoke

Case Summary

Overview
Key Legal Holdings

- The Government does not violate an accused's due process rights by offering evidence and argument that the victim was asleep when the charged sexual contact began, as long as the Government ultimately proves the victim was capable of consenting but did not consent to the sexual contact that occurred while she was awake.
- An accused's initial ambiguous statement regarding the right to counsel does not require law enforcement to cease questioning if the accused subsequently clearly and unequivocally waives that right.
- No facially unreasonable post-trial delay occurred where the case was docketed promptly after the accused filed a notice of appeal under the new Article 66(b)(1)(A), UCMJ procedures.

Material Facts

- Appellant was convicted of abusive sexual contact against KK by touching her vulva through her clothing without consent.
- KK testified she awoke to Appellant touching her vagina, and after realizing what was happening, confronted him and left.

[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.).

- In texts to KK, Appellant admitted touching her vagina while he thought she was asleep.
- After requesting a lawyer, then appearing uncertain, Appellant unequivocally stated he did not want a lawyer before being questioned by investigators.

Controlling Law

- Article 120, Uniform Code of Military Justice.
- Military Rules of Evidence 304, 305.
- *Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*.
- United States v. Mendoza, CAAF LEXIS 590 (Oct. 2024).

Court Rationale

The court found the Government properly convicted Appellant of abusive sexual contact without consent, as the evidence showed KK was awake and did not consent when Appellant touched her vulva, even though the contact may have begun while she was asleep. The court determined Appellant's initial ambiguous response about wanting a lawyer did not require investigators to cease questioning once Appellant unequivocally waived that right. The court declined to find facially unreasonable delay under the new Article 66(b)(1)(A) procedures where Appellant's case was promptly docketed after he filed his notice of appeal.

Outcome
Procedural Outcome

The Air Force Court of Criminal Appeals affirmed the findings of guilty and affirmed the sentence as modified by setting aside the reprimand portion.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1 **Evidence, Weight & Sufficiency of Evidence**

Issues of legal and factual sufficiency are reviewed de novo. Assessment of legal and factual sufficiency is limited to the evidence produced at trial.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2 **Procedural Due Process, Scope of Protection**

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. In resolving questions of legal sufficiency, every reasonable inference from the evidence of record must be drawn in favor of the prosecution. The standard for legal sufficiency involves a very low threshold to sustain a conviction. This deferential standard impinges upon the factfinder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Evidence > Weight & Sufficiency

HN3 **Burdens of Proof, Proof Beyond Reasonable Doubt**

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the appellate court is convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN4 **Military Offenses, Rape & Sexual Assault**

10 U.S.C.S. 920 (d) criminalizes abusive sexual contact in the military and the UCMJ defines multiple ways in which the Government may prove the offense. The UCMJ provides that the offense of abusive sexual contact can be committed inter alia without consent, upon a person who is asleep, unconscious, or otherwise unaware the contact is occurring, or when the other person is incapable of consenting.

Criminal Law & Procedure > Defenses > Consent

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN5 **Defenses, Consent**

To convict an appellant of abusive sexual contact without consent, the Government must prove beyond a reasonable doubt: (1) that the appellant committed sexual contact upon the victim; and (2) that the appellant did so without the victim's consent.

Criminal Law & Procedure > Defenses > Consent

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN6 **Defenses, Consent**

The Government cannot charge one offense under one factual theory and then argue a different offense and a different factual theory at trial without violating the appellant's constitutional rights, as doing so robs the defendant of his constitutional right to know what offense and under what legal theory he will be tried and convicted. Accordingly, to convict under a lack of consent theory without violating an accused's constitutional rights, the Government is required to prove that the victim is capable of consenting but does not consent and cannot rely on showing that the victim was too intoxicated to consent or that the victim was asleep.

Criminal Law & Procedure > Defenses > Consent

HN7 **Defenses, Consent**

The law permits the factfinder to consider all the surrounding circumstances when determining whether a person gave consent. The Government may offer evidence of an alleged victim's intoxication to prove the absence of consent.

Legal Ethics > Prosecutorial Conduct

HN8 **Legal Ethics, Prosecutorial Conduct**

Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Prosecutorial Misconduct

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 **Plain Error, Definition of Plain Error**

Prosecutorial misconduct and improper argument are reviewed de novo. When no objection is made at trial, the review is for plain error. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

HN10 **Trial Procedures, Arguments on Findings**

Argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of inquiry should not be on words in isolation, but on the argument as viewed in context. In performing a review, it is improper to surgically carve out a portion of the argument with no regard to its context.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibition Against Improper Statements

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Evidence > Inferences & Presumptions > Inferences

HN11 **Prosecutorial Misconduct, Prohibition Against Improper Statements**

A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations. A statement that might appear improper if viewed in isolation may not be improper when viewed in context.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN12 **Procedural Due Process, Scope of Protection**

The due process principle of fair notice mandates that an accused has the right to know what offense and under what legal theory he will be convicted.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN13 **Trial Procedures, Arguments on Findings**

When a trial counsel makes an improper argument during findings, reversal is warranted only when the trial counsel's comments taken as a whole were so damaging that the court cannot be confident that the members convicted the appellant on the basis of the evidence alone. In general, appellate courts weigh three factors to determine whether trial counsel's improper arguments were prejudicial: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

HN14 **Harmless & Invited Error, Constitutional Rights**

Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. This inquiry requires the Government to demonstrate that there was no reasonable probability that the error might have contributed to the conviction.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN15 **Standards of Review, Abuse of Discretion**

A military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion. The military judge's findings of fact are reviewed for clear error, but his conclusions of law are reviewed de novo.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

HN16 **Standards of Review, Abuse of Discretion**

The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. The abuse of discretion standard is a strict one, calling for more than just a difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN17 **Clearly Erroneous Review, Motions to Suppress**

A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law. In reviewing a ruling on a motion to suppress, the evidence is considered in the light most favorable to the prevailing party.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

HN18 **Procedural Due Process, Self-Incrimination Privilege**

Servicemembers are generally entitled to the protections of *U.S. Const. amend. V*. The *Fifth Amendment* provides that no person shall be compelled in any criminal case to be a witness against himself. Once a suspect in custody has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN19 **Procedural Due Process, Scope of Protection**

The protections afforded to servicemembers under *10 U.S.C.S. 831(b)* are in many respects broader than the rights afforded under the *Fifth Amendment*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Confessions

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

Criminal Law & Procedure > ... > Defendant's

Rights > Right to Remain Silent > Self-Incrimination Privilege

HN20 Procedural Due Process, Self-Incrimination Privilege

Voluntariness of a confession is a question of law that an appellate court independently reviews de novo. A statement is involuntary if it is obtained in violation of the self-incrimination privilege or the *Fifth Amendment*, *10 U.S.C.S. 831* or through the use of coercion, unlawful influence, or unlawful inducement. Military R. Evid. 304(a)(1)(A).

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN21 Interrogation, Voluntariness

In determining whether a confession has been elicited by unconstitutional means, it is necessary to look at the totality of the circumstances concerning whether the confession was the product of an essentially free and unconstrained choice by its maker. If the confession is not, if the maker's will has been overborne and capacity for self-determination critically impaired, the use of the confession offends due process. Factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of constitutional rights; the length of questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as deprivation of food or sleep.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

HN22 Procedural Due Process, Self-Incrimination Privilege

A *10 U.S.C.S. 831(b)* and/or *U.S. Const. amend. V* Miranda rights advisement need only generally orient an accused to the general nature of the crimes of which he is suspected and advise him of the right to remain silent and/or to have counsel present during any custodial interrogation. An investigator's use of trickery, artifice, or subterfuge in obtaining a confession is generally permissible, as long as the tactic does not result in coercion or an otherwise involuntary statement within the meaning of the *Fifth Amendment*. However, an investigator's use of such tactics in securing a rights waiver or in discouraging an invocation of rights invalidates the waiver and is clearly improper. While the law may allow investigators to use deceit during other portions of an interview, the rendering of rights advice must be clear, honest, and understandable.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

HN23 Self-Incrimination Privilege, Right to Counsel During Questioning

Once an accused invokes the right to counsel, law enforcement may not conduct an interrogation about the offenses until counsel is made available or the accused initiates further communication. Military R. Evid. 305. However, this request must be unequivocal.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Right to Counsel During Questioning

HN24 Self-Incrimination Privilege, Right to Counsel During Questioning

Whether the accused actually invoked the right to counsel is an objective test. If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, precedents do not require a cessation of questioning.

Military & Veterans

Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

HN25 Admissibility of Evidence, Admissions & Confessions

With limited exceptions, an involuntary statement of an accused and any evidence derived therefrom is inadmissible at trial, provided the defense makes a timely motion or objection. Military R. Evid. 304(a).

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN26 Procedural Due Process, Scope of Protection

An appellate court reviews the question of whether an appellant's due process rights are violated because of post-trial delay de novo.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN27 Procedural Due Process, Scope of Protection

Where there is a facially unreasonable delay, courts examine four factors: (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. Three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review are: (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 to present a defense at a rehearing.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN28 Procedural Due Process, Scope of Protection

Where an appellant has not shown prejudice from the delay, a due process violation cannot be found unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN29 Procedural Due Process, Scope of Protection

In the absence of a due process violation, a court considers whether relief for excessive post-trial delay is warranted consistent with the court's authority under *10 U.S.C.S. 866(d)*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

HN30 Procedural Due Process, Scope of Protection

The 18-month Moreno standard for facially unreasonable delay from docketing to appellate decision still applies to determine if an appellant's due process right to speedy appellate review has been violated.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN31 Judicial Review, Standards of Review

As a matter of sentence appropriateness, an appellate court reviews the wording of an adjudged reprimand de novo to determine whether it was inappropriately severe.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Matters Submitted by Accused

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN32 **Postconviction Proceedings, Clemency**

An appellate court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. *10 U.S.C.S. 866(d)(1)*. Sentence appropriateness is assessed by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. Although an appellate court has broad discretion in determining whether a particular sentence is appropriate, it is not authorized to engage in exercises of clemency.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

Legal Ethics > Sanctions > Reprimands

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN33 **Imposition of Sentence, Victim Statements**

A reprimand is a punitive censure. Rules of Courts - Martial 1003(b)(1), Discussion. In practice, a reprimand is a frank and common-sense expression of formal disapproval by the convening authority to the accused regarding the offenses for which the individual was sentenced. The reprimand may be based on the offenses, the evidence and testimony admitted at trial, and other matters that are properly before the convening authority such as a clemency request or a victim impact statement. The military justice system grants the convening authority the discretion to choose the words of the reprimand.

Counsel: For Appellant: Major David L. Bosner, USAF; Catherine M. Cherkasky, Esquire.

For Appellee: Colonel Matthew D. Talcott, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Major Vanessa Bairos, USAF; Major Olivia B. Hoff, USAF; Major Brittany M. Speirs, USAF; Major Jocelyn Q. Wright, USAF; Captain Tyler L. Washburn, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, RICHARDSON, and ANNEXSTAD, Appellate Mili-tary Judges. Senior Judge ANNEXSTAD delivered the opinion of the court, in which Chief Judge JOHNSON and Senior Judge RICHARDSON joined.

Opinion by: ANNEXSTAD

Opinion

ANNEXSTAD, Senior Judge:

A general court-martial consisting of officer members convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*.[2],[3] The members sentenced Appellant to confinement [*2] for 30 days, forfeiture of $2,645.00 pay per month for six months, and a reprimand. The convening authority took no action on the findings and

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

[3] Appellant was acquitted of one specification of sexual assault in violation of *Article 120, UCMJ*, involving a different alleged victim.

approved the sentence in its entirety.

On 24 June 2024, we remanded Appellant's record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record, specifically to account for missing exhibits and documents. On 12 July 2024, Appellant's case was re-docketed with this court. Issues concerning completeness of the record of trial have been resolved.

On 29 July 2024, Appellant raised five issues on appeal which we have rephrased and reordered: (1) whether Appellant's conviction is legally and factually sufficient;[4] (2) whether trial counsel engaged in prosecutorial misconduct during findings argument; (3) whether the military judge erred in failing to suppress Appellant's statements to investigators; (4) whether the post-trial processing of Appellant's case was improperly completed when the staff judge advocate found *18 U.S.C. § 922* applied to Appellant's conviction of a non-violent offense; and (5) whether Appellant is entitled to relief for numerous post-trial processing delays. We also consider [*3] one additional issue not raised by Appellant: (6) whether the wording of the reprimand rendered Appellant's sentence inappropriately severe.

We have carefully considered issue (4) and find it does not warrant discussion or relief. *See United States v. Vanzant, 84 M.J. 671, 681 (A.F. Ct. Crim. App. 2024)* (holding the *18 U.S.C. § 922* firearm prohibition notation included in the staff judge advocate's indorsement to the entry of judgment is beyond a Court of Criminal Appeals' statutory authority to review), *rev. granted*, *M.J. , No. 24-0182/AF, 85 M.J. 198, 2024 CAAF LEXIS 640 (C.A.A.F. 17 Oct. 2024)*.

As to issue (6), we find Appellant's sentence is inappropriately severe and provide relief by modifying the sentence in our decretal paragraph.

Finding no other error that materially prejudiced Appellant's substantial rights, we affirm the findings and sentence, as modified.

I. BACKGROUND

Appellant met KK in 2019 while they were on a group trip with mutual friends. At the time, both were active duty servicemembers assigned in Germany. Following the trip, Appellant and KK became friends and socialized at Appellant's home on a few occasions, usually for dinner and a movie. While Appellant had previously hosted larger group dinners at his home for their friend group, due to COVID-19 protocols, all interactions during the spring of 2020 were limited to one-on-one [*4] get-togethers. KK viewed their relationship as friends and did not have any romantic feelings towards Appellant.

Appellant's romantic feelings towards KK did not become clear until Appellant invited her on a picnic. During the picnic Appellant placed his hand on top of KK's hand, causing her to immediately pull it away. Later that night, while Appellant and KK were at Appellant's house, Appellant communicated his romantic feelings towards KK and told her that he would like to go on a date with her. KK testified that this caught her off guard and she did not immediately respond to his offer. Later that evening, after KK returned to her residence, she sent Appellant a text message informing him that she was not "emotionally available" to date anyone due to a recent, difficult break up. Additionally, KK attempted to establish boundaries for their friendship going forward, communicating she was only available as a friend and that if Appellant was not accepting of her wishes, that they should not spend any more time together. Appellant acknowledged KK's feelings and perspective, and indicated that he was happy to continue just being friends. Subsequently, they made plans to get together [*5] for another dinner and a movie night.

On 11 May 2020, KK arrived at Appellant's house around 1830 hours. They prepared and ate dinner together. During dinner KK consumed an alcoholic seltzer. After dinner they decided to do whiskey tasting, as Appellant collected whiskey from different countries and KK enjoyed whiskey. Together they selected five different whiskey brands to sample. They poured about a half ounce of whiskey in each glass for tasting. KK testified that they spent about ten minutes sampling each whiskey. After tasting the third whiskey, they decided to break and watch the movie. During the movie, they ate dessert and KK sampled a glass of soju, another alcoholic beverage, but did not finish the glass. While watching the movie KK also consumed another alcoholic seltzer and a whiskey shot. After consuming these drinks, KK started to feel "tipsy" and a "little buzzed," but testified that she was "alert and definitely

[4] On 31 October 2024, we specified a related issue for supplemental briefing: whether Appellant's conviction for abusive sexual contact in violation of *Article 120, UCMJ*, is legally and factually sufficient in light of our superior court's recent decision in *United States v. Mendoza, M.J. , No. 23-0210, 85 M.J. 213, 2024 CAAF LEXIS 590 (C.A.A.F. 7 Oct. 2024)*.

aware of everything going on."

After watching some more of the movie, Appellant and KK decided to finish tasting the final two whiskeys they selected. KK testified that she did not finish the final sample of whiskey. At this point KK started to feel intoxicated [*6] and testified that the next thing she remembered was feeling sick, dizzy, and nauseous. She stated that she then went in the bathroom and began to vomit. While vomiting KK became emotional, "crying a lot" about her break-up with her ex-boyfriend. Appellant attempted to assist KK, holding her hair back and attempting to console her. He also brought her some Pedialyte (an electrolyte and sugar drink) and water. KK testified that she was in the bathroom for a couple of hours.

During trial, the Government presented the recording of Appellant's interview with the Air Force Office of Special Investigations (OSI). During the interview Appellant confirmed that KK was vomiting for approximately three hours. He described her demeanor while she was vomiting as emotional, shivering, and cold. He further informed OSI that KK spent some time lying on the bathroom floor and was falling asleep on the toilet. Eventually, Appellant suggested that she lie down in bed. KK testified that she thought Appellant was taking her to his guest bedroom, which they had discussed earlier that evening as an option if she had too much to drink. KK walked upstairs on her own, and went into a bedroom, immediately lying [*7] down on her side in a fetal position in Appellant's bed. She had the bed covers over her. KK testified that she thought she was in the guest bedroom, consistent with their discussion earlier that evening.

During her testimony KK explained what happened next:

> So I woke up and I was on the left side of my body, and I could feel - I could feel something touching my vagina. And I froze and I could hear [Appellant] like some sort of like mumbled, and it stopped. And then I waited and I just - I think I was in shock, like, Is this really what I'm feeling? Is this really happening? And then - and then he started stroking my vagina again.

KK stated that he was touching her vagina over her clothing. She also described he was touching her in a "stroking motion" going back and forth on her vagina with his fingers. KK continued to explain,

> So the second time I - it was very clear. There was no doubt in my mind what was happening. And I immediately shot up. I got on my knees and I - I felt like I was going to throw up again - and so I told him that and he handed me a bucket. And I didn't throw up, but I like dry heaved and spit up a little bit. And then I started calling him on what he did to me. I [*8] told him that it wasn't okay. I looked at him once and he cowered. He immediately cowered. He put his head down and his hands up and just, you know, "I'm sorry, this isn't me." And I immediately counteracted, "Well, this is you, this is what you're doing to me. . . ."

During her testimony, KK specifically stated that she did not consent to Appellant touching her vagina. She also stated that she did not want him to touch her vagina.

Upset at this point, KK told Appellant she was going to leave. She walked downstairs without any assistance and called a friend for a ride home. While downstairs KK stated that Appellant attempted to have a conversation with her, and that she ignored him until he went back upstairs. KK described that she was still in "shock" and "disbelief" when she called her friend. She also described being upset and crying when her friend finally picked her up.

The following day, after some consideration, KK filed an unrestricted sexual assault report. Following her interview with OSI, KK confronted Appellant via a social media messaging application. The following conversation was admitted as a prosecution exhibit during Appellant's court-martial.[5]

> [KK:] Hi [Appellant]. I [*9] want to address what happened last week when I woke up. I'm really concerned about how we left things. We are friends and I want to clear the air. I woke up to you touching my vagina. I know you did it multiple times because I laid there at first not believing what I was feeling and wanted to make sure that it was actually happening. You know that wasn't okay to touch me like that, especially while you knew I was sleeping?
>
> [Appellant:] What i did was definitely not okay, and I really am sorry. It wasnt okay for a multitude of reasons, and I've felt disgusted with myself for it. I betrayed your trust, and i shouldn't have put us in that situation.
>
> [KK:] How long were you touching my vagina?
>
> [Appellant:] I dont know exactly, but i dont think it was long before you woke up and started vomiting. Less than a few minutes.

[5] The text messages are in their original form with no edits.

[KK:] [Appellant], I know I'm coming on strong. I'm struggling and trying to understand. Did you touch me anywhere else?

[Appellant:] No, it's fine. And i honestly didn't

[KK:] I really appreciate you being willing to talk to me about this. I dont remember everything. I'd like to know more about the night . . . did we even finish the movie?? Haha

[Appellant:] It's understandable, [*10] and really, I can't apologize enough. We shoulda slowed down after you told me you had your friends promotion. We definitely did not finish the movie, we had half time to finish the whiskey tasting, tried to restart then you ran to the bathroom to puke, and that was the rest of the night

[KK:] What happened after I puked?

[Appellant:] You were puking for a solid 2 hours, tried to give you some Pedialyte but you weren't able to keep anything down. You started to fall asleep on the toilet, and you said you were freezing, so then i got you upstairs with a bucket to sleep.

[KK:] Thanks for taking care of me. I can't believe I got so sick. The bed I slept in was super comfy. What room did you help me into?

[Appellant:] It's not a problem, we definitely had way too much haha. And that was my bed.

[KK:] [Appellant], Why did you touch me like that?

[Appellant:] I don't know, i have no clue what came over me. I really dont have a clue why I thought it was something that was okay

[KK:] I appreciate you being honest with me.

[Appellant:] Yeah, it's the least I can do.

. . .

[KK:] Hmm ok. How long was I asleep for?

[Appellant:] I don't think we were upstairs for more than 30 minutes, if that.

[KK:] Thanks [*11] again for answering my questions.

[KK:] [Appellant], touching someone like that is not normal without consent and it's most definitely not okay. You really need to seek help from a counselor to figure out why you would touch someone like that or you are never going to have a healthy relationship with someone. Touching someone or doing anything to someone without their consent is so violating and detrimental. I recommend asking for help.

[Appellant:] I've already called my [counselor] to meet with me. i don't think I'll ever be able to apologize enough, and I dont expect you to forgive me. I honestly don't know why i did it, and I know it's not normal or right. I seriously betrayed your trust and you're right.

A panel of officer members convicted Appellant of the one specification of abusive sexual contact upon KK and found Appellant not guilty of the other specification of sexual assault upon another individual.

II. Discussion

A. Legal and Factual Sufficiency

In his appeal, Appellant challenges the legal and factual sufficiency of his conviction. Specifically, Appellant argues that his conviction is legally insufficient because the Government violated his due process rights by conflating [*12] two different theories of criminal liability under *Article 120, UCMJ*, during his court-martial. Appellant argues that the evidence is also factually insufficient to sustain a conviction because "there is a significant question as to the progression of events between [Appellant] and KK in the bed."

1. Law

HN1 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. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

HN2 "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). "[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). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted). "This deferential standard impinges upon the factfinder's discretion only to the extent necessary to guarantee the fundamental protection of [*13] due process of law." United States v. Mendoza, M.J. , No. 23-0210, 85 M.J. 213, 2024 CAAF LEXIS 590, at *9 (C.A.A.F. 7 Oct. 2024) (internal quotation marks and citations omitted).

HN3 The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting Washington, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

HN4 Article 120(d), UCMJ, criminalizes abusive sexual contact in the military and the UCMJ defines multiple ways in which the Government may prove the offense. *MCM*, pt. IV, ¶ 60.b.(4)(d). Relevant to this case, the UCMJ provides that the offense of abusive sexual contact can be committed *inter alia* "without consent," upon "a person who is asleep, unconscious, or otherwise unaware the contact is occurring," or "[w]hen the other person is incapable of consenting." *MCM*, pt. IV, ¶ 60.b.(4)(d)-(f).

HN5 To convict Appellant of abusive sexual contact without consent against KK [*14] as charged, the Government was required to prove the following elements beyond a reasonable doubt: (1) that Appellant committed sexual contact upon KK; and (2) that Appellant did so without KK's consent. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(4)(d).

"'[S]exual contact' means touching or causing another person to touch, either directly or through the clothing, the vulva, . . . of any person, with the intent to . . . gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 60.a.(g)(2).

"'[C]onsent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). "A sleeping . . . per-son cannot consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(B). "All the surrounding circumstances are to be considered in determining whether a person gave consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(C). "The burden is on the actor to obtain consent rather than the victim to manifest a lack of consent." United States v. McDonald, 78 M.J. 376, 381 (C.A.A.F. 2019); *cf.* United States v. Rodela, 82 M.J. 521, 529 (A.F. Ct. Crim. App. 2021) (finding evidence did not support "a reasonable belief that consent has been obtained (or given)").

HN6 Our superior court's recent decision in *Mendoza* held that the Government cannot [*15] "charge one offense under one factual theory and then argue a different offense and a different factual theory at trial" without violating Appellant's constitutional rights, as "[d]oing so robs the defendant of his constitutional 'right to know what offense and under what legal theory he will be tried and convicted.'" 2024 CAAF LEXIS 590, at *18 (citation omitted) (quoting United States v. Riggins, 75 M.J. 78, 83 (C.A.A.F. 2016)). Accordingly, to convict under a lack of consent theory without violating an accused's constitutional rights, the Government is required to prove that victim is capable of consenting but does not consent and cannot rely on showing that the victim was too intoxicated to consent, *id.* at *22, or that the victim was asleep.

2. Analysis

Appellant contends that his conviction is both legally and factually insufficient. Appellant argues that the Government prosecuted this case under a different theory—while asleep, rather than the charged theory of without consent. In doing so, Appellant argues that the Government failed to present sufficient evidence that KK was capable of consenting and did not consent to the sexual contact. We disagree. While the contact may have started while KK was asleep, Appellant's conduct continued after she was awake and [*16] able to consent.

Here, the Government presented convincing evidence of Appellant's guilt under a lack of consent theory. The testimony from KK was clear and corroborated by Appellant's own admissions. During Appellant's court-martial, KK testified that she awoke to the feeling of

Appellant touching her vagina with his fingers through her clothing. She also testified that after she was awakened due to Appellant's actions that the touching stopped. Next, she described for the members how she laid there awake attempting to process what had just happened and that Appellant touched her vagina again in the same manner. KK then described how Appellant's actions caused her to quickly get out of the bed and shortly thereafter confront Appellant about his conduct before leaving his residence. She also described being upset with Appellant regarding what had occurred and that the following day, after some consideration, she filed an unrestricted sexual assault report.

Additionally, the evidence introduced at trial demonstrates that, towards the end of the encounter, KK was both capable of consenting and never consented to Appellant touching her vagina. First, the Government presented ample evidence [*17] to establish that KK was awake and capable of consenting when the *actus reus*—the touching her vulva with his hand, through the clothing with intent to gratify his sexual desire—was occurring. Here, the evidence established that she was capable of recognizing what was happening, who was doing it, and was able to take action to prevent Appellant from continuing to touch her vagina.

The evidence also established that at no point prior to, during, or after the touching did KK consent to Appellant touching her vagina. KK specifically testified that she did not want Appellant to touch her vagina and that she did not, at any point, consent to him touching her vagina. Furthermore, the Government presented testimony and documentary evidence regarding KK's negative reaction to the unwanted touching and the text conversations KK had with Appellant that occurred a few days after the incident. During the latter communication between KK and Appellant, Appellant confirmed that he touched her vagina while he thought she was asleep. At no point in these communications did Appellant claim KK consented to sexual contact. To the contrary, in response to KK informing Appellant that "touching someone like [*18] that is not normal without consent and it's most definitely not okay," Appellant acknowledged that he did not have consent, responding, "I honestly don't know why i did it, and I know it's not normal or right. I seriously betrayed your trust and you're right."

Relying on *Mendoza*, Appellant argues that because the Government presented evidence and argument that the victim was asleep when the touching started, he was tried under a different theory of abusive sexual contact. We disagree. Here the Government presented the facts and circumstances surrounding the abusive sexual contact, which included the fact that KK was asleep when Appellant began to touch her vagina. ***HN7*** The law permits the factfinder to consider all the surrounding circumstances when determining whether a person gave consent. *MCM*, pt. IV, ¶ 60.a.(g)(7)(C); *cf. Mendoza, 85 M.J. 213, 2024 CAAF LEXIS 590, at *22* (the Government may offer "evidence of an alleged victim's intoxication to prove the absence of consent") (footnote omitted)). The fact that KK was asleep when the touching started supports a conclusion that at no point prior to the touching had she consented to Appellant touching her vagina when she was awake.

The Government needed to prove lack of consent, and they [*19] did. Viewing the evidence offered by the Government, we find the evidence established that prior to the events of 11 May 2020, KK and Appellant shared a friendship but were never intimate. When it became apparent to KK that Appellant might have romantic feelings towards KK, she took immediate steps to inform Appellant that she was not romantically interested in him, and that she only wanted to be friends. The Government also established that Appellant understood the boundaries of their friendship and was content with continuing the friendship. Moreover, as mentioned, *supra*, the Government established that KK did not consent to being touched by Appellant at any point prior to falling asleep on the night of the incident.

Giving full consideration to Appellant's arguments and drawing every reasonable inference from the evidence in favor of the Government, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt, and therefore the evidence is legally sufficient to support Appellant's conviction. Additionally, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [*20] [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. Therefore, we also conclude that Appellant's conviction is factually sufficient.

B. Improper Findings Argument

Appellant contends that circuit trial counsel committed prosecutorial misconduct by arguing Appellant had the

burden to obtain consent.[6] We also consider whether circuit trial counsel erred by arguing a different factual theory than the charged factual theory.

1. Additional Background

Circuit trial counsel began his findings argument by noting that Appellant violated KK's trust when he touched her "on her vagina and her vulva without her consent." He then argued that KK "[t]rusted him enough to fall asleep. And in that moment when she was asleep, unable to do or say anything, he violated that trust by touching her vulva without her consent." Circuit trial counsel continued:

> She was asleep. You have the military judge's instruction that a sleeping person cannot consent. And you know that she was asleep, not only because the accused himself admits to it, but she was able to take this stand and to explain to you the way that experience is different. The way that she could recognize the [*21] sensation and the feeling of falling asleep. Of thinking this bed is comfortable and safe. And then the alertness of when she wakes up.
>
> And, members, you're allowed to use your common sense and your knowledge of the ways of the world. That alertness she described, that's what happens when a person is asleep and something external shocks them. That's what happens when someone is asleep and there is a feeling of something on the vagina, on the vulva, on a part of the body where nothing should be. She wakes up. And because she's asleep in that moment before, she's never given the opportunity to consent.

Later in circuit trial counsel's argument he discussed the defense of mistake of fact as to consent, and stated:

> Members, there is nothing reasonable about believing that there is consent to touch someone's vagina when they are asleep. Not under the facts of this case. Not when the two of them are only friends. Not when they had no preexisting relationship. Not when she is throwing up for two to three hours in a bathroom and then goes to sleep.

Circuit trial counsel then addressed trial defense counsel's cross examination of KK:

> Now there was one point during defense counsel's cross-examination [*22] when he asked [KK], is it possible that you had consented, and she said it's possible. I want you to think about what that was, because she had already said, I did not consent. She said, I was asleep. She said, That woke me up. And when she's saying it's possible, she's just saying, You know what, it's possible I said something during that blackout state, but it is not possible that after she fell asleep that she consented in that moment. And that's what you're here to decide. It's in that moment, at that time when the accused touched her whether she had consented. That is not a fair possibility.

At the end of his closing argument circuit trial counsel stated, "What you have at the end of the day is that she trusted her friend, fell asleep at his house, and while asleep was touched without her consent."

Subsequently, during Defense's argument trial defense counsel argued:

> [KK] says to you that she woke up when he's touching her vagina, and that she feels only that for a few seconds before it stops, and then it starts again. And she's quizzed on it time and time again by the [G]overnment and by us, and she maintains it. And it's unfortunate for her because as we know when she actually [*23] gets into that car with a friend, there's a lot more to whatever was going on. He's touching her back, her thigh, her butt, and her vagina.
>
> . . . .
>
> She wakes up and she doesn't like it. You have to imagine what could be going on in that bed. The only thing that she gives you about the setting is that there's a hand. She doesn't even put [Appellant] in the bed.

Circuit trial counsel then began his rebuttal closing argument by stating:

> As the military judge has instructed you, lack of physical or verbal resistance is not consent. There are two elements to decide for you to resolve in the question of the abusive sexual contact charge against [KK]. And that is whether the sexual contact

[6] After careful consideration of Appellant's contention that circuit trial counsel erred when he argued that Appellant had the burden to obtain consent, we find the issue does not require discussion or 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)); *see also* McDonald, 78 M.J. at 381 ("The burden is on the actor to obtain consent rather than the victim to manifest a lack of consent.").

> happened and whether she consented. That is the burden that the [G]overnment bears. The [G]overnment needs to prove that she did not consent at that moment.
>
> Now defense counsel talked for a while in his closing argument about feelings. Members, feelings can be evidence. For instance, that feeling [KK] had when she woke up and felt [Appellant]'s hands on her vagina. That is a feeling that is testimony, that is evidence for you to consider. The fact that she waited because she didn't want to believe what was happening. [*24] And then she felt it again. That is evidence.
>
> . . . .
>
> There could be a case where there's an actual progression. Defense counsel talked about how there could be a natural progression to sexual activity. And that's true. Consent can be manifested through different ways. But that's not the testimony that you heard in this case. That's not the evidence before you. Because you don't have evidence of escalating sexual activity between [KK] and [Appellant]. Even assuming that [Appellant] told the truth in that subject interview.[7] Even assuming that kiss happened, there's no escalation from the kiss to touching her vagina while she's asleep. There's an interval of throwing up. There was a time of going to a bed, expecting to be alone in that bed, and then falling asleep.
>
> Is there a grace period in which someone can engage in sexual activity and then be told no and stop? Not when you begin that engagement when the other person is asleep. Because a sleeping or unconscious person cannot consent.

Circuit trial counsel then discussed Appellant's text messages to KK following the incident and stated to the members that Appellant "admits to [KK] that he touched her vagina while she was asleep because [*25] that's what happened."

Trial defense did not object to any of circuit trial counsel's argument that mentioned KK being asleep.

[7] During Appellant's recorded interview with special agents from the Air Force Office of Special Investigations, Appellant told investigators that he and KK kissed on the night of the incident while they were watching the movie.

2. Law

HN8 "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)* (citations omitted).

HN9 We review prosecutorial misconduct and improper argument de novo. *United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019)* (citation omitted). When no objection is made at trial, we review for plain error. *United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)* (footnote and citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id. at 401* (quoting *United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)*).

HN10 "[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000)* (quoting *United States v. Young, 470 U.S. 1, 16, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)*) (additional citations omitted). In performing our review, "it is improper to 'surgically carve' out a portion of the argument with no regard to its context." *Id.*

> Appellate judges must exercise care in determining whether a trial counsel's [*26] statement is improper or has improper connotations. ***HN11*** The [United States] Supreme Court has emphasized that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."

United States v. Palacios Cueto, 82 M.J. 323, 333 (C.A.A.F. 2022) (quoting *Donnelly v. DeChristoforo, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*). Thus, "[a] statement that might appear improper if viewed in isolation may not be improper when viewed in context." *Id.* (citing *Donnelly, 416 U.S. at 645*).

HN12 The due process principle of fair notice mandates that an accused has the right to know what offense and under what legal theory he will be convicted. *U.S. Const. amend. V*; *United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010)*.

HN13 "When a trial counsel makes an improper argument during findings, 'reversal is warranted only when the trial counsel's comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *United States v. Norwood, 81 M.J. 12, 19 (C.A.A.F. 2021)* (quoting *Andrews, 77 M.J. at 401-02*). In general, appellate courts "weigh three factors to determine whether trial counsel's improper arguments were prejudicial: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.'" [*27] *Andrews, 77 M.J. at 402* (quoting *Fletcher, 62 M.J. at 184*).

HN14 Where an error is of constitutional dimensions, an appellate court may not affirm the result unless the error was harmless beyond a reasonable doubt. *United States v. Mason, 59 M.J. 416, 424 (C.A.A.F. 2004)*. This inquiry requires the Government to demonstrate that there was no reasonable probability that the error might have contributed to the conviction. *United States v. Tovarchavez, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019)* (citing *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*).

3. Analysis

Because trial defense counsel did not object to the portions of circuit trial counsel's argument referenced *supra*, we review circuit trial counsel's argument for plain error. We assume without deciding that circuit trial counsel committed plain error in light of our superior court's decision in *Mendoza* by potentially suggesting during argument that Appellant be convicted of an offense under a factual theory that was different than the factual theory of the charged offense. Specifically, some of circuit trial counsel's comments could be understood to suggest Appellant was guilty of abusive sexual contact when he touched KK's vulva while she was asleep—contrary to *Mendoza*—as well as after she awoke. We further assume that the error was of constitutional dimensions and that we must determine if the error was harmless beyond a reasonable doubt.

We begin our [*28] inquiry by looking at circuit trial counsel's argument as a whole and the evidence presented by the Government during trial. We first note that while circuit trial counsel did mention during his argument that a sleeping person cannot consent, he did not argue that the theory of their case was that KK was asleep and therefore could not consent to the sexual contact. In fact, circuit trial counsel mentioned multiple times that KK awoke to the feeling that she was being touched on her vagina over her clothes and that while awake was touched again on her vagina by Appellant. Consistent with our superior court's decision in *Mendoza*, this argument emphasized Appellant touched KK while she was capable of consenting and in fact did not consent to the contact. The fact that KK was asleep when the unlawful touching started was a fact and circumstance surrounding the charged sexual contact, *i.e.*, that it explained why KK was so startled to be awakened to being groped and why she did not consent to that continued groping after she awoke, and therefore it was an appropriate fact for circuit trial counsel to comment on during closing argument.

Additionally, the fact that KK was asleep was also relevant [*29] evidence for the Government to establish that at no point that night, prior to the unlawful contact, had KK consented to the sexual contact. To this end, the Government sufficiently established that KK informed Appellant that she had no romantic interest in Appellant, and did not consent at any point prior to the contact, to include the period of time while she was vomiting in the bathroom or while she was asleep in the bedroom. Her actions after Appellant touched her vulva while she was awake are consistent with someone who did not consent to being touched in a sexual manner by Appellant. Moreover, the fact that the evidence established Appellant first touched KK's vulva while she was asleep and incapable of consenting, and then touched her vulva while she was awake and capable of consenting but did not consent, does not detract from proof Appellant committed the charged offense of abusive sexual contact without consent—it simply contextualized why she did not consent to that touching that continued after she awoke.

We also find a discussion of all the evidence offered by the Government helpful. As we noted *supra*, the Government's case was strong, and included convincing testimony [*30] from KK, corroborating evidence from an outcry witness, and Appellant's own admissions to the charged conduct. The Government's case also included evidence of Appellant's interview with investigators where he attempted to walk back his earlier admission by raising a mistake of fact defense among a number of other explanations. Here, after a thorough review of the record, including the arguments by the parties, there is no reasonable doubt that the Government's case established that Appellant touched KK's vulva while she was capable of consenting to the contact and that she did not consent to the contact.

In contrast, the Defense's case was not strong and

substantially weakened by Appellant's various post-offense statements and admissions. We do not find any evidence in the record to suggest that there was any confusion by Appellant as to what offense he was defending against. In fact, the Defense argued during their findings argument that KK may have consented to the contact, and that Appellant possessed a reasonable mistake as to consent. Additionally, the Defense argued that even if KK did not consent that the Government failed to establish that it was KK's vulva that he touched. [*31] Removing the presumptively improper portions of circuit trial counsel's argument would not have materially strengthened the Defense's arguments nor detracted from the evidence proving Appellant's guilt.

In conclusion, we find that the Government has met its burden to demonstrate that there was no reasonable probability the outcome of Appellant's court-martial would have been different had the assumed error not occurred. Therefore, we find the assumed error was harmless beyond a reasonable doubt and that Appellant is not entitled to any relief on this basis.

C. Voluntariness of Appellant's Statement to OSI

Appellant contends that the military judge abused his discretion in finding that Appellant clearly and unequivocally waived his right to counsel. Specifically, Appellant argues that his statement to investigators should have been suppressed because the OSI investigator, Special Agent (SA) NC, reordered the questions on the standard rights advisement card, which Appellant argues amounted to trickery rendering his statements involuntary. Appellant further argues that he unequivocally asserted his right to counsel at the beginning of the interview and that all subsequent questioning should [*32] have stopped until counsel was made available.

1. Additional Background

On 26 May 2020, Appellant was interviewed by OSI concerning allegations of abusive sexual contact against KK. Because he was suspected of a crime, SA NC, the agent investigating the alleged offense, advised Appellant of his rights. The following exchange between SA NC and Appellant was recorded and admitted as Prosecution Exhibit 5:

> [SA NC:] I am [SA NC], a member of the Air Force Office of Special Investigations. I am investigating the alleged offense of *UCMJ Article 120*, Abusive Sexual Contact, of which you are suspected. I advise you that under the provisions of *Article 31, UCMJ*, you have the right to remain silent, that is, say nothing at all. Any statements you make, oral or written, may be used as evidence against you in a trial by courts-martial or in other judicial or administrative proceedings. You have the right to consult a lawyer and to have a lawyer present during this interview. You have the right to military legal counsel free of charge. In addition to military counsel, you are entitled to civilian counsel of your own choosing at your own expense. You may request a lawyer at any time during this interview. If you decide to answer [*33] questions, you may stop the questioning at any time. Do you understand your rights?
>
> [Appellant:] Yes.
>
> [SA NC:] Are you willing to answer questions?
>
> [Appellant:] Yes.
>
> [SA NC:] Do you want a lawyer?
>
> [Appellant:] Yes?
>
> [SA NC:] Okay, I just want to caveat that. If you request a lawyer, we're just gonna have to stop the interview.
>
> [Appellant:] Okay.
>
> [SA NC:] Um, and then we'll stop there. Because the I can't . . . I am not going to ask you any further questions.
>
> [Appellant:] Okay.
>
> [SA NC:] Pertaining to what I just read you to without your lawyer present.
>
> [Appellant:] Okay.
>
> [SA NC:] So, that was just to clear it up. I'm just going to ask you again now. Do you want a lawyer . . . ?
>
> [Appellant:] [pauses for approximately nine seconds] Sorry, I'm just like . . .
>
> [SA NC:] Take your time, man.
>
> [Appellant:] Yeah, so, just so I understand. So if I request a lawyer now, we have to, we have to pull

them and schedule to speak to a lawyer?

[SA NC:] Yeah, we can't ask you anything, like I said, I explained earlier. If you're worried, like you are curious, but, "I've got nothing to hide and I want to talk to you guys and keep on talking." But, if you are worried that there is a question you don't like, we'll say, "[H]ey, [*34] not that question, I don't want to answer that question," we can move on . . .

[Appellant:] No lawyer.

[SA NC:] Excuse me?

[Appellant:] No lawyer. I'm good.

[SA NC:] Let me read it again, so I can make it clear. All right, um, I'm just going to read you the questions.

. . . .

[SA NC:] Do you understand your rights?

[Appellant:] Yes.

[SA NC:] Are you willing to answer questions?

[Appellant:] Yes.

[SA NC:] Do you want a lawyer?

[Appellant:] No.

After his interview, Appellant provided a written statement on Air Force Form 1168, *Statement of Suspect/Witness/Complainant*. On that form, Appellant also acknowledged his rights under the *Fifth Amendment of the Constitution*[8] and *Article 31, UCMJ, 10 U.S.C. § 831*, by personally initialing each of those rights indicated on the form. Appellant once again indicated by his initials that he did "not want a lawyer" and that he was "willing to answer questions or make a statement or both, about the offense(s) under investigation."

During his court-martial, in an *Article 39(a), UCMJ, 10 U.S.C. § 839(a)*, hearing, Appellant moved to suppress his statements made to OSI. Appellant presented testimony from SA NC followed with argument by his trial defense counsel. The military judge initially denied Appellant's motion to suppress. Appellant's trial defense counsel then requested [*35] reconsideration of the military judge's ruling and was allowed to present additional evidence and argument. After further consideration of his ruling, the military judge again denied Appellant's motion to suppress.

SA NC testified during the *Article 39(a), UCMJ*, hearing that when he provided the rights advisement to Appellant, he deviated from the order of the questions on the rights advisement card by asking Appellant "are you willing to answer questions," before asking, "do you want a lawyer." SA NC stated that based on his experience, he believed asking the questions in that order created a better flow and created less confusion on the part of an accused. SA NC specifically stated that he did not reorder the questions in an attempt to confuse Appellant or to elicit an incriminating response. SA NC explained that when Appellant initially stated "yes" to wanting a lawyer, it seemed like he was not sure, so SA NC provided additional clarification on what effects invoking his rights would have on his ability to answer questions. Specifically, SA NC informed Appellant that if he elected to have a lawyer, they would have to terminate the interview. SA NC again explained that this clarification was not intended [*36] to coerce Appellant, but instead was meant to ensure Appellant understood the rights advisement and to clarify whether Appellant was indeed invoking his right to counsel.

Having had the chance to personally observe SA NC's testimony and demeanor, the military judge found as a matter of fact that SA NC testified credibly during the motions hearing. He further found that Appellant's initial "yes" to the question regarding legal representation was given in an "equivocating and uncertain manner, with an inflection and tone reflecting ambiguity."

In his conclusions of law, the military judge analyzed the test for waiver under the applicable law. He found that based on the totality of the circumstances, Appellant "was fully aware of his rights, understood the nature of his rights and generally how they would be applied," and that he "knowingly, intelligently, and voluntarily waived his rights." He further found that Appellant's initial "yes" regarding right to counsel was not "sufficiently clear" and "a reasonable police officer under the circumstances would NOT have understood the [Appellant's] response to have been articulated 'sufficiently clearly' enough to be a request for an attorney." [*37]

2. Law

HN15 We review a military judge's ruling on a motion to

[8] *U.S. Const. amend. V.*

suppress evidence for an abuse of discretion. United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)). The military judge's findings of fact are reviewed for clear error, but his conclusions of law are reviewed de novo. United States v. Keefauver, 74 M.J. 230, 233 (C.A.A.F. 2015) (citation omitted).

HN16 "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted). "The abuse of discretion standard is a strict one, calling for more than just a difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013) (citation omitted).

HN17 "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004). "In reviewing a ruling on a motion to suppress, we consider the evidence in the light most favorable to the prevailing party." United States v. Cowgill, 68 M.J. 388, 390 (C.A.A.F. 2010) (citation omitted).

HN18 Servicemembers are generally entitled to the protections of the Fifth Amendment. United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249, 253-55 (C.M.A. 1967). The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. Once a suspect in custody [*38] has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); *see* Mil. R. Evid. 305(e)(3).

HN19 "The protections afforded to servicemembers under Article 31(b), UCMJ, 10 U.S.C. § 831(b), are in many respects broader than the rights afforded . . . under the Fifth Amendment to the Constitution." United States v. Evans, 75 M.J. 302, 303 (C.A.A.F. 2016) (citations omitted). Article 31(b), UCMJ, provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

HN20 "Voluntariness of a confession is a question of law that an appellate court independently reviews, *de novo*." United States v. Bubonics, 45 M.J. 93, 94 (C.A.A.F. 1996) (citations omitted). A statement is "involuntary" if it is "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31,[UCMJ,] or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a)(1)(A); *see also* Article 31(d), UCMJ, 10 U.S.C. § 831(d) ("No statement [*39] obtained from any person in violation of [Article 31, UCMJ], or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.").

HN21 In determining whether a confession has been elicited by means that are unconstitutional, it is necessary to look at the totality of the circumstances concerning whether "the confession [was] the product of an essentially free and unconstrained choice by its maker." Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). "If [the confession] is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." Id. at 225-26. Factors to take into consideration in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as deprivation of food or sleep. Id. at 226.

HN22 An Article 31(b), UCMJ, and/or Fifth Amendment *Miranda* rights advisement need only generally orient an accused to the general nature of the crimes of which he is suspected and advise him of his right to remain silent and/or to have counsel [*40] present during any custodial interrogation. *See* United States v. Campbell, 76 M.J. 644, 653 (A.F. Ct. Crim. App. 2017). An investigator's use of trickery, artifice, or subterfuge in obtaining a confession is generally permissible, as long as the tactic does not result in coercion or an otherwise involuntary statement within the meaning of the Due Process Clause of the Fifth Amendment. Id. at 654

(citations omitted). "However, an investigator's use of such tactics in securing a rights waiver or in discouraging an invocation of rights invalidates the waiver and is clearly improper." *Id.* (citations omitted). As we emphasized in *Campbell*, "[w]hile the law may allow investigators to use deceit during other portions of an interview, the rendering of rights advice must be clear, honest, and understandable." *Id. at 655*.

HN23 Once an accused invokes his rights to counsel, law enforcement may not conduct an "interrogation" about the offenses until counsel is made available or the accused initiates further communication. *Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)*; *see* Mil. R. Evid. 305. However, this request must be unequivocal. *United States v. Traum, 60 M.J. 226, 230 (C.A.A.F. 2004)* (citing *United States v. Sager, 36 M.J. 137, 145 (C.M.A. 1992)*).

HN24 Whether the accused actually invoked his right to counsel is an objective test. *Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)*. "If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in the light of the circumstances would have understood only that the [*41] suspect *might* be invoking the right to counsel, our precedents do not require a cessation of questioning." *Id.*

HN25 With limited exceptions, an involuntary statement of an accused and any evidence derived therefrom is inadmissible at trial, provided the defense makes a timely motion or objection. Mil. R. Evid. 304(a).

3. Analysis

On appeal, Appellant maintains his argument at trial that his statement was coerced by SA NC's reordering of the questions from the rights advisement card, and that he unequivocally asserted his right to counsel. We disagree.

After reviewing the military judge's ruling in the light most favorable to the prevailing party, we conclude the military judge did not abuse his discretion by denying the defense motion to suppress Appellant's statements. Here, the military judge's findings of fact are not disputed, nor is there any dispute that that the military judge applied the correct law. Reviewing de novo, we agree with the military judge's determination that Appellant's statements were voluntary. The military judge's conclusion that Appellant "was fully aware of his rights, understood the nature of his rights and generally how they would be applied," and that he "knowingly, intelligently, [*42] and voluntarily waived his rights" is adequately supported by the record. The military judge likewise did not abuse his discretion in concluding that Appellant made only an equivocal invocation of counsel prior to making an unequivocal waiver of this right to counsel. His findings of fact and conclusions of law that that Appellant's initial "yes?" regarding right to counsel was not "sufficiently clear" and "a reasonable police officer under the circumstances would NOT have understood the [Appellant's] response to have been articulated 'sufficiently clearly' enough to be a request for an attorney" are all supported by the record. Also, we find no error in the military judge's conclusion that the "reorganization of the questions on the rights advisement card was not designed to trick or confuse [Appellant]." *See Campbell, 76 M.J. at 655*. Based on our review of the entire exchange, we find that the military judge's ruling was accurately informed and supported by the record and applied the correct law, and that his application of the law to the facts was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Solomon, 72 M.J. at 179*. Therefore, Appellant is not entitled to any relief on this issue.

D. Post-Trial Processing [*43] **Delays**

Appellant contends that he is entitled to sentence relief because he was subjected to unreasonable post-trial delay under *United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006)*, and *United States v. Livak, 80 M.J. 631 (A.F. Ct. Crim. App. 2020)*. We disagree, and find no relief is warranted.

1. Additional Background

Appellant was sentenced on 8 August 2021. At that time, Appellant's sentence did not meet the jurisdictional requirements for direct appeal to this court. As a result, an attorney designated under regulations prescribed by the Secretary of the Air Force completed an *Article 65, UCMJ, 10 U.S.C. § 865*, review of his trial. The *Article 65, UCMJ*, review was completed on 3 June 2022.

On 23 December 2022, Congress amended *Articles 66* and *69, UCMJ*, *10 U.S.C. §§ 866*, *869*.[9] As amended, *Article 66(b)(1)(A), UCMJ*, expanded the service Courts

[9] ***National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582-84 (23 Dec. 2022)***.

of Criminal Appeals' jurisdiction to any judgment of a special or general court-martial, 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 8 March 2023, Appellant filed with this court a notice of direct appeal *pro se* pursuant to Article 66(b)(1)(A), UCMJ, and this court docketed his case on 10 March 2023. On 21 April 2023, Appellant, through detailed military appellate defense counsel, filed a motion to compel a verbatim transcript. In response, the Government filed opposition to Appellant's motion to compel a [*44] verbatim transcript and simultaneously moved this court to dismiss Appellant's case for lack of jurisdiction, arguing that the amendments to Article 66, UCMJ, expanding jurisdiction did not apply to Appellant's case. On 7 September 2023, this court granted Appellant's request for a verbatim transcript and denied the Government's motion to dismiss Appellant's case. On 16 September 2023, the court reporter began transcription of the verbatim transcript. The sealed portions of the verbatim transcript were delivered to this court on 3 January 2024; the unsealed portions of the verbatim transcript were subsequently delivered on 11 January 2024.

After the certified verbatim transcript was delivered to this court, Appellant moved for five enlargements of time, four of which were opposed by the Government. As we noted, *supra*, on 5 June 2024, Appellant asked this court to remand his case because of omissions in the record of trial. On 24 June 2024, we remanded Appellant's case. On 12 July 2024, Appellant's case was re-docketed with the court. Appellant submitted his assignments of error on 29 July 2024. On 28 August 2024 the Government submitted its answer to Appellant's assignments of error. On 4 September [*45] 2024, Appellant filed his reply brief. On 31 October 2024, this court specified an issue for supplemental briefing in light of our superior court's decision in Mendoza, 85 M.J. 213, 2024 CAAF LEXIS 590, at *12. On 16 December 2024, both parties submitted their specified issue briefs. Prior to the filing of briefs with this court Appellant did not request speedy appellate review.

2. Law

HN26 We review the question of whether an appellant's due process rights are violated because of post-trial delay de novo. Livak, 80 M.J. at 632. 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. 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 Court of Criminal Appeals (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 [*46] delay under the new procedural rules." 80 M.J. at 633. In acknowledgment of this fact, 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.

HN27 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]." 63 M.J. at 135 (citations omitted). The CAAF 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 to present a defense at a rehearing. Id. at 138-40 (citations omitted).

HN28 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 [*47] justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

HN29 "In the absence of a due process violation, this court considers whether relief for excessive post-trial delay is warranted consistent with this court's authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d)." Livak, 80 M.J. at 632; *see also* United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002); United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

3. Analysis

Appellant argues that he was subjected to unreasonable post-trial delay. Specifically, Appellant contends that his case was not docketed within 150 days of his sentencing as required by *Livak*, and also that a decision of this court was not rendered within 18 months of the docketing of his case as required by *Moreno*. Appellant requests sentence relief as a result of these delays.

We begin our analysis by stating that the 150-day threshold established in *Livak* does not apply to appeals by an accused under *Article 66(b)(1)(A), UCMJ*, filed after Congress amended *Articles 66* and *69, UCMJ*, effective 23 December 2023. These statutory changes substantially altered the sequence of post-trial events in such cases. Unlike the old procedures for post-trial processing where the Government controlled the process, under the new procedures applicable to appeals under *Article 66(b)(1), UCMJ* (2024 *MCM*), an appellant is now in the driver's seat in determining whether post-conviction review is concluded under *Article 65, UCMJ*, or whether to seek appellate review from this court [*48] pursuant to *Articles 66* and *69, UCMJ*, and exercises significant control over the timing of that determination. In light of these variables, we decline at this time to establish a new specific timeframe for a facially unreasonable delay to cover the period of time from sentencing to docketing in direct-appeal cases. In this case, Appellant's case was docketed within two days of receiving Appellant's notice of direct appeal to this court pursuant to his right under *Article 66(b)(1)(A), UCMJ*. Based on the foregoing, we do not find a facially unreasonable delay in this case under the 150-day *Livak* standard, nor do we otherwise find a facially unreasonable delay, and accordingly no relief is warranted for excessive delay in docketing.

Appellant's second contention is that he is entitled to relief because a decision on his appeal was not rendered by this court within 18 months of his case being docketed. We determine that while the post-trial procedures of Appellant's appeal are different than the appeal procedures in place at the time *Moreno* and its progeny were decided, the right to speedy appellate review continues under these new procedures. ***HN30*** We also determine that the 18-month *Moreno* standard for facially unreasonable delay from docketing to appellate [*49] decision still applies to determine if an appellant's due process right to speedy appellate review have been violated. In this case, Appellant's appeal was docketed with this court on 10 March 2023 without a verbatim transcript. We assume for purposes of this appeal that this court's remand of the record for correction and subsequent re-docketing of a corrected record did not reset the docketing date for *Moreno* purposes. We further assume that because a decision by this court on Appellant's appeal was not rendered within 18 months of 10 March 2023, Appellant has established a facially unreasonable post-trial delay.

Finding a facially unreasonable post-trial delay, we now assess whether a due process violation occurred. After considering the four *Barker* factors we conclude that no due process violation occurred because we do not find Appellant suffered any prejudice. We also do not find the 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), UCMJ*, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process [*50] violation. *See Tardif, 57 M.J. at 225*. After considering the factors enumerated in *Gay, 74 M.J. at 744*, we conclude it is not.

E. Sentence Appropriateness

As part of our charge under *Article 66(d), UCMJ*, authority, we consider sua sponte whether Appellant's sentence—30 days confinement, forfeiture of $2,645.00 pay per month for six months, and a reprimand—was inappropriately severe. Specifically, we consider whether two references in the reprimand concerning KK being asleep violated Appellant's rights by erroneously suggesting that he was convicted under a theory of liability that was not charged. As a matter of sentence appropriateness, we find it did and provide sentence relief.

1. Additional Background

A panel of officer members sentenced Appellant. Part of the adjudged sentence included a reprimand. Following trial, the convening authority provided the specific language for the reprimand, and the military judge entered it as follows:

> 1st Lt Douglas C. Boren is reprimanded as follows: You are hereby reprimanded! As an Air Force officer, you are held to a higher standard and charged with being a model for all Airmen to emulate. You have woefully failed to live up to these standards. You have dishonored yourself,

> and discredited the United States [*51] Air Force, when you committed abusive sexual contact against another officer, by touching her vagina through her clothing *while she was asleep*. There is no place in the United States Air Force for your egregious conduct. Your decision to violate a fellow officer, someone who trusted you and considered you a friend, *while she laid asleep* and vulnerable, showed that you value satisfying your own sexual desires above respecting the dignity of another. Your betrayal has had a lasting impact on her life and will forever stain her impression of fellow officers. I sincerely hope the punishment you have received causes you to appreciate the gravity of your actions and deters you from ever committing such reprehensible conduct in the future.

(Emphasis added).

2. Law

HN31 As a matter of sentence appropriateness, we review the wording of Appellant's adjudged reprimand *de novo* to determine whether it was inappropriately severe. *United States v. McAlhaney, 83 M.J. 164, 167 (C.A.A.F. 2023)* (citing *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*).

HN32 We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine [ ], on the basis of the entire record, should be approved." *Article 66(d)(1), UCMJ*. "We assess sentence appropriateness by considering [*52] 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)* (citations omitted). Although we have broad discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)*.

HN33 A reprimand is a punitive censure. R.C.M. 1003(b)(1), Discussion.

> In practice, [a reprimand] is a frank and common-sense expression of formal disapproval by the convening authority to the accused regarding the offenses for which the individual was sentenced. The reprimand may be based on the offenses, the evidence and testimony admitted at trial, and other matters that are properly before the convening authority such as a clemency request or a victim impact statement. Our military justice system grants the convening authority the discretion to choose the words of the reprimand. With few exceptions, in the Air Force, convening authorities are senior officers with a responsibility to preserve good order and discipline for the Airmen in their command.

*United States v. Wolcott, No. ACM 39639, 2020 CCA LEXIS 234, at *16 (A.F. Ct. Crim. App. 15 Jul. 2020)* (unpub. op.).

3. Analysis

Appellant was convicted of abusive sexual contact by touching KK's vulva with his hand, through the clothing, [*53] with the intent to gratify his sexual desire without her consent. In light of our superior court's finding in *Mendoza*, we find that the two references in the reprimand to Appellant touching KK while she was asleep confuse the theory of liability on which Appellant was convicted.

Having considered the nature and seriousness of Appellant's misconduct, and matters contained in the entire court-martial record, including his record of service, all matters submitted in mitigation, and his written unsworn statement, we conclude the sentence as to the reprimand is inappropriate and that Appellant is entitled to sentence relief. We provide such relief in our decretal paragraph. We set aside the reprimand.

III. CONCLUSION

We affirm only so much of the sentence as provides for 30 days' confinement and forfeiture of $2,645.00 pay per month for six months. The findings, as entered, and the sentence, as modified, are correct in law and fact, and no other 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, as modified, are **AFFIRMED**.

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