IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MATTHEW C. HARRINGTON,
Senior Airman (E-4), USAF
Appellant.

Crim. App. No. 2020-02

USCA Dkt. No. 21-0025/AF

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Cases

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Issue Presented

APPELLANT'S CONVICTION WAS SET ASIDE DUE TO THE ORIGINAL TRIAL JUDGE'S FAILURE TO ALLOW THE DEFENSE TO INTRODUCE EXCULPATORY EVIDENCE ABOUT THE COMPLAINING WITNESS' BEHAVIOR RIGHT BEFORE THE ALLEGED SEXUAL ASSAULT. THE EXCULPATORY EVIDENCE IS NO LONGER AVAILABLE AFTER A GOVERNMENT DELAY IN BRINGING THE CASE TO A REHEARING. DID THE AIR FORCE COURT ERR BY OVERRULING THE MILITARY JUDGE'S DECISION TO DISMISS THE CHARGE FOR A SPEEDY TRIAL VIOLATION?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter, the Air Force Court) reviewed this case pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (2016). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On October 11, 2016 and November 15-20, 2016, Appellant, Staff Sergeant (SSgt) Matthew C. Harrington (hereinafter, SSgt Harrington), was tried by a general court-martial in front of officer members at Nellis Air Force Base, Nevada. Original Record of Trial (Org. R.) at 1-1013. Contrary to his plea, SSgt Harrington was found

guilty of one charge and specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ); 10 U.S.C. §920 (2012). Org. R. at 900. SSgt Harrington was sentenced to a reprimand; a reduction to the grade of E-1; forfeiture of all pay and allowances; hard labor without confinement for three months; and a dishonorable discharge. Org. R. at 1011.

On 25 September 2018, the Air Force Court set aside the findings and sentence in the case and authorized a rehearing. Appendix A.

At the rehearing, the Military Judge dismissed the charge and specification for the Government's violation of SSgt Harrington's right to a speedy trial under the Sixth Amendment of the United States Constitution. R. at 315. The Government appealed under Article 62, 10 U.S.C. §862 (2016), UCMJ, and the Air Force Court overturned the Military Judge's decision. Appendix B.

SSgt Harrington timely filed a petition for review, invoking this Court's jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. §867 (2016). He submits this supplement to his petition.

Statement of Facts

Original Trial

On January 30, 2016, SSgt Harrington and SSgt F.C. attended a party at TSgt K.W.'s residence.[1] Org. R. at 477. At the original trial, SSgt F.C. testified that she and other partygoers played drinking games at the party. Org. R. at 476, 479. SSgt F.C. testified that she became intoxicated and eventually became sick and vomited. Org. R. at 486. One of SSgt F.C.'s last memories before going to sleep was TSgt K.W. checking on her in the bathroom and helping her get dressed for bed. Org. R. at 486-487. SSgt F.C. claimed that sometime later she woke up to SSgt Harrington having sex with her. Org. R. at 488. SSgt F.C. testified that she "froze" and "didn't know what to do." Org. R. at 489.

At the original trial, TSgt K.W. testified that the last drinking game she, SSgt F.C., SSgt Harrington, and others played was an adult version of Jenga. Org. R. at 261. Prior to her testimony, the Defense moved to admit evidence, under Military Rule of Evidence

[1] TSgt K.W. was a Staff Sergeant at the time of the original trial and the charged offense and SSgt F.C. was a Senior Airman. They both will be referred to by their current ranks in this brief.

(Mil. R. Evid.) 412, of SSgt F.C.'s behavior during the adult Jenga game. Appendix A at 3-4. In support of its Motion, Defense called TSgt K.W., as well as Mr. L.B., one of the partygoers and a former Airman at the time of the original trial. Appendix B at 4.[2] During the closed Article 39(a) session, Mr. L.B. and TSgt K.W. testified that SSgt F.C. lowered her pants during the Jenga game and allowed SSgt Harrington to take shots from her buttocks and between her breasts. *Id.* TSgt K.W. also remembered SSgt Harrington took a shot from SSgt F.C.'s mouth during the Jenga game. *Id.* The Government opposed the Defense's attempt to introduce this evidence. Appendix A at 4. The military judge denied the Defense's motion and only allowed limited or generalized information about the drinking games at the party—and no information about SSgt F.C.'s specific behavior with SSgt Harrington during the drinking games. *Id.* Consequently, Mr. L.B. never testified during the

[2] For ease of filing and reference, Mr. L.B.'s testimony is cited to the publicly available Air Force Court opinions vice the closed Article 39(a) session and its sealed transcript pages and exhibits. The Air Force Court's published opinions contained information from sealed material as it was necessary for the analysis behind its finding that the original military judge abused his discretion in excluding this evidence under Mil. R. Evid. 412, and for its later decision to overrule the Military Judge in the rehearing.

original trial on the merits.

On November 19, 2016, the panel found SSgt Harrington guilty of the sole charge and specification of sexual assault. Org. R. at 900. On September 25, 2018, the Air Force Court found that the Military Judge abused his discretion in excluding the evidence under Mil. R. Evid. 412, set aside the findings and sentence, and authorized a rehearing. Appendix A at 12–22.

Government Delays Prior to the Rehearing

On October 26, 2018, a representative from the Military Justice Division of the Air Force Legal Operations Agency (JAJM) sent the certified Record of Trial (ROT) to the United States Air Force Warfare Center legal office (hereinafter, the legal office). App. CII at 36. The legal office received the certified ROT sometime between October 30, 2018 and November 1, 2018. R. at 135. Rule for Court-Martial (R.C.M.) (707)(b)(3)(D) provides that if a hearing is ordered or authorized by an appellate court, a new 120-day time period shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. However, the day before the JAJM representative sent the ROT to the legal office, the Government had moved for

reconsideration of the Air Force Court's decision. App. Ex. CII at 9. After the JAJM representative sent the ROT to the legal office, she was apparently aware of the R.C.M. 707 provision and her error, as she sent a subsequent email informing the legal office that a motion for reconsideration had been filed in the case. App. Ex. CII at 36. She also instructed the legal office to not take any action "IAW AFCCA DECISION UNTIL FURTHER NOTICE." *Id.* However, that afternoon, the JAJM representative sent the legal office the Air Force Court's decision informing them that a rehearing had been authorized. App. Ex. CII at 34. Despite instructing the legal office to *not* take action, in this email she advised the legal office, "Please follow the instructions in the transmittal memo, along with [R.C.M.] 810, and AFI 51-201 to process the actions required."[3] *Id.*

On November 19, 2018, the Air Force Court denied the Government's motion to reconsider. App Ex. CII at 51. In January 2019, the Government informed the legal office that it would not be appealing to this Court and that the ROT would be delivered to them. App. CI at 1. The legal office received the ROT for the second time

[3] R.C.M. 810, Procedures for rehearings, new trials, and other trials. *Manual for Courts-Martial*, *United States* (2016 ed.)

on February 4, 2019. App. CII at 53. On March 27, 2019, the Convening Authority ordered a rehearing. App. Ex. LXI at 1. On May 13, 2019, the Convening Authority referred the original charge and specification to a rehearing. App. Ex. LXV at 2. Between March 27, 2019, the date the Convening Authority ordered a rehearing, and May 13, 2019, the referral date, there was no Article 32 hearing in the case, as it was the exact same charge and specification investigated in 2016.

On May 30, 2019, SSgt Harrington requested the appointment of the trial defense counsel from his original trial by submitting an Individual Military Defense Counsel (IMDC) request. App. Ex. LXVI. On June 7, 2019, the Government arraigned SSgt Harrington. R. at 12. On June 12, 2019, SSgt Harrington, through counsel, made a written demand for a speedy trial. R. at 138, 140; App. Ex CVII at 6. On July 2, 2019, Defense requested a status update for the IMDC request. App. Ex. CII at 59. On July 24, 2019—nearly two months after the IMDC request—the Director of the Air Force Judiciary (JAJ) denied SSgt Harrington's IMDC request, deeming that the

trial defense counsel was not reasonably available.[4] App. Ex. LXVII. On July 31, 2019, a Circuit Defense Counsel was detailed to the case to represent SSgt Harrington. App. Ex. LXIII at 2. On August 5, 2019, the Defense moved for a continuance in order for his newly detailed counsel to become prepared for the case. *Id.* The Military Judge granted the continuance on August 7, 2019 and scheduled the trial for October 2019. App. Ex. LXIII.

On September 27, 2019—only two weeks before the rehearing was scheduled to begin—the Government moved for the Military Judge to declare Mr. L.B. unavailable for the purposes of testifying at the rehearing. App. Ex. LXXI. In its motion, the Government stated that "[a]ttempts have been made to locate [Mr. L.B.] but have been futile." *Id.* In support of its statement, the Government attached a two-line email sent in June 2019 from a legal office paralegal to Mr. L.B. asking Mr. L.B. to call the paralegal. *Id.* at 24. The Defense opposed the Government's motion and provided evidence that it had success locating Mr. L.B. through simple social

[4] The IMDC request took two months to process despite the requested counsel remaining within the JAJ organization as a Circuit Trial Counsel at the time of the request. App. Ex. LXVII.

media searches and other means. App. Ex. LXXII. On October 7, 2019, the Military Judge denied the Government's motion and reasoned that there was insufficient evidence to find that the witness was unavailable. App. Ex. LXXIV at 28, 30. The Military Judge directed the Government to make further efforts to locate Mr. L.B. before he would find Mr. L.B. unavailable. *Id.*

On October 11, 2019, the Government informed the Defense they "could not find" Mr. L.B. and that they would be unable to travel him and two other witnesses to trial. App. Ex. LXXV at 1. In response, the Defense moved for a continuance and also moved for the Military Judge to compel the Government to produce Mr. L.B. *Id.* On October 13, 2019, the Military Judge granted the continuance, setting the trial for March 2020, but ordered an in-person Article 39(a) hearing on October 15, 2019, the originally scheduled trial date. App. Ex. LXXVIII.

On October 16, 2019, the Defense moved to dismiss the charge and specification due to the Government's violation of SSgt Harrington's right to a speedy trial under R.C.M. 707 and the Sixth Amendment of the Constitution. App. Ex. CII. On October 28, 2019, the Military Judge denied the Defense's Motion to Dismiss but noted

"very little was accomplished" at various times after the Government received this Court's opinion and the ROT in February 2019. App. Ex. CVIII. The Military Judge found the delay was unreasonable but did not find that the Defense had provided sufficient evidence—*at that time*—to show prejudice to SSgt Harrington. *Id.* at 5*; See, Barker v. Wingo,* 407 U.S. 514 (1972).

Key Witnesses No Longer Possess Exculpatory Evidence

On March 9, 2020, the rehearing resumed. The Defense orally moved for reconsideration of the Military Judge's denial of its Motion to Dismiss. R. at 176. In support of its motion, the Defense called Mr. L.B. and TSgt K.W. to testify. R. 198-218. Contrary to the testimony he provided at the closed Article 39(a) hearing during the original trial, Mr. L.B. testified that he had no memory of SSgt Harrington taking "body shots" from SSgt F.C.'s chest or buttocks. R. 212-213.

TSgt K.W. testified that her memory had also degraded significantly. R. at 224. When asked what she remembered about the party she hosted in January 2016, she replied "[a]lmost nothing." R. at 225. TSgt K.W. testified she did not remember anyone leaving the party (R. at 229), had no memory of anyone getting sick at her

house and throwing up (R. at 228), and had no memory of "body shots" being taken during a game of Jenga or playing Jenga at all (R. at 227-228). She attributed her lack of memory to the fact that the party was four years ago, as well as her epilepsy condition. R. at 225, 235. TSgt K.W. was diagnosed with epilepsy in June 2019 but began feeling its effects in June 2017. R. at 235. TSgt K.W. claimed that her short-term and long-term memory were "gone," and she remembered just "bits and pieces" of what she testified to during the original trial. R. at 232.

The Defense orally moved for the Military Judge to reconsider his ruling for its Motion to Dismiss, specifically on Sixth Amendment grounds. R. at 176, 315; App. Ex. CXXIV. The Military Judge granted the Defense's Motion, dismissing the charge and specification with prejudice. App. Ex. CXXIX.

The Government moved for the Military Judge to reconsider. In an effort to save its case, the Government called SSgt S.C., one of the six Airmen at the party. R. at 331-346. However, SSgt S.C. also could not remember specific details from the party. *Id.* He was unsure of the identity of all of the attendees at the party; he could not recall whether a body shot was taken from SSgt F.C.'s breast (R.

at 341); he did not remember having any conversations with SSgt F.C. that night (R. at 344); and he did not recall any time when TSgt KW and SSgt F.C. were alone in a bathroom (R. at 344-345). After hearing SSgt S.C.'s testimony, the Military Judge denied the Government's motion to reconsider his ruling to dismiss the charge and its specification. R. at 383, App. Ex. CXXIV.

The Air Force Court Opinion

The Air Force Court examined the Military Judge's decision to dismiss the sexual assault charge under a Sixth Amendment analysis, utilizing the factors articulated in *Barker v. Wingo*, 407 U.S. 514 (1972). The Air Force Court "moderately" or "very slightly" weighed the first three respective *Barker* factors in SSgt Harrington's favor but found the Military Judge erred with respect to the final *Barker* factor—prejudice to the appellant. Appendix B at 19 (citing *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014) (citing *Barker*, 407 U.S. at 530) (other citations omitted). Specifically, the Air Force Court did not find prejudice resulting from the Government's delay because: SSgt Harrington failed to demonstrate TSgt K.W. and Mr. L.B. lost their memories during the period of facially unreasonable delay, and (2) SSgt Harrington failed

to demonstrate the lost memories of TSgt K.W. and Mr. L.B. have actually prejudiced his defense, in light of their prior testimony remaining available in transcript or audio form. Appendix B at 19.

Specifically, the Air Force Court found the Military Judge erred when he made the finding of fact that "if the Government had proceeded expeditiously with bringing the case to a rehearing, it is likely that at least some of the exculpatory evidence which the [Air Force Court] directed to be admitted at this hearing…would have been available" for SSgt Harrington's defense. Appendix B at 19. In finding the Military Judge erred when he concluded SSgt Harrington was actually prejudiced by the lost memories of TSgt K.W. and Mr. LB., the Air Force Court noted that the Military Judge and the parties agreed the evidence would be admissible under Mil. R. Evid. 803(5). *Id.* at 16-17. The Air Force Court also concluded that the Military Judge erroneously determined live testimony to be superior to recorded prior testimony. According to the Air Force Court, "neither [the Defense] nor the military judge identified relevant evidence of which *the substance* has been lost to the Defense as a result of the delay." *Id.* (Emphasis in original.)

Additional facts are contained in the argument section.

Reasons to Grant Petition for Review

This case involves a successful Sixth Amendment claim at the trial level, for an appellant awaiting a rehearing, but whose defense suffered as a result of the Government's delay. In *United States v. Moreno*, this Court noted:

> If an appellant does experience problems in preparing for trial due to the delay, a Sixth Amendment speedy trial motion could appropriately be brought at the trial level. "We are inclined to believe that a consideration of the Sixth Amendment speedy trial right in its most pristine sense would be triggered by any retrial of such a person. The consideration would, of course, be an ad hoc determination based on the four factors of *Barker*."

63 M.J. 129, 141 n.19 (C.A.A.F. 2006) (quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8. (5th Cir. 1980)).

However, while the Air Force Court recognized the first three *Barker* factors favored SSgt Harrington in this case, it failed to recognize the prejudice in the case and overturned the Military Judge's decision. In his original court-martial, SSgt Harrington was convicted of sexual assault after that trial's judge erroneously precluded the Defense from presenting exculpatory evidence about the complaining witness' behavior prior to the alleged sexual assault. At the rehearing, this exculpatory evidence was supposed to be

presented through the live testimony of TSgt K.W. and Mr. L.B. However, after the Government delay in bringing the case to a rehearing, TSgt K.W. and Mr. L.B. had virtually no memory about the complaining witness' behavior. The Air Force Court discounted the importance of in-person testimony to SSgt Harrington's defense, leaving SSgt Harrington—four years after his original, now reversed, conviction—similarly situated to where he was when he was convicted at his original trial. In a case where the credibility of witnesses is paramount, SSgt Harrington is no longer able to present exculpatory evidence through live testimony, while the Government is free to present its case to the panel members with the compelling testimony of the complainant.

The Air Force Court decided a question of law which has not been, but should be, settled by this Court. (C.A.A.F. Rule 21(b)(5)(B)). This Court should grant review in this case to answer the question about how an appellant, awaiting a rehearing, may show sufficient prejudice needed to satisfy a speedy trial claim under the Sixth Amendment. This year, this Court granted review in a case involving an Article 10 speedy trial claim and analyzed the claim under the *Barker* factors. *United States v. Reyes,* 80 M.J. 218

(C.A.A.F. 2020). In *Reyes*, this Court did not find a speedy trial violation, as the appellant made no claim of oppressive incarceration or impairment of this defense. *Reyes,* 80 M.J. at 229. Conversely, SSgt Harrington alleged—and the Military Judge at trial found—impairment to the defense. This Court deciding this case will provide further guidance to the Government and future appellants about the protections of the Sixth Amendment while awaiting a rehearing.

Argument

APPELLANT'S CONVICTION WAS SET ASIDE DUE TO THE ORIGINAL TRIAL JUDGE'S FAILURE TO ALLOW THE DEFENSE TO INTRODUCE EXCULPATORY EVIDENCE ABOUT THE COMPLAINING WITNESS' BEHAVIOR RIGHT BEFORE THE ALLEGED SEXUAL ASSAULT. THE EXCULPATORY EVIDENCE IS NO LONGER AVAILABLE AFTER A GOVERNMENT DELAY IN BRINGING THE CASE TO A REHEARING. THE AIR FORCE COURT ERRED BY OVERRULING THE MILITARY JUDGE'S DECISION TO DISMISS THE CHARGE FOR A SPEEDY TRIAL VIOLATION.

Standard of Review

This Court reviews *de novo* whether an accused has received a speedy trial, giving substantial deference to a military judge's findings of fact; findings that will be reversed only if they are clearly

erroneous. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005) (internal citations omitted). When reviewing an interlocutory appeal by the Government, this Court is bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004). Furthermore, in an Article 62, UCMJ, appeal, "this [C]ourt reviews the military judge's decision and evidence in the light most favorable to the party which prevailed at trial[.]" *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2019) (citing *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)).

Law and Analysis

There are multiple sources of law—constitutional, statutory, and regulatory— for protecting an accused's right to a speedy trial. *United States v. Tippit*, 65 M.J. 69, 72-73 (C.A.A.F. 2007). In determining whether an accused has been denied his right to a speedy trial under the Sixth Amendment, appellate courts consider the following factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant has made a demand for a speedy trial; and (4) prejudice to the appellant. *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2014) (citing *Barker*, 407 U.S. at 530). Prejudice

is assessed in the light of the interests which the speedy trial right was designed to protect, including to limit the possibility that the defense will be impaired, of which is "the most serious…. because the inability of a defense adequately to prepare his case skews the fairness of the entire system." *Mizgala*, 61 M.J. at 129 (quoting *Barker*, 407 U.S. at 532). The Supreme Court found in *Klopfer v. North Carolina* that even when a defendant was not imprisoned and free to go "whithersoever he will," he was still subject to the protections of the Sixth Amendment's right to a speedy trial. 386 U.S. 213, 222 (1967).

1. SSgt Harrington suffered actual prejudice as a result of the Government delay.

The Air Force Court incorrectly determined that SSgt Harrington had not suffered actual prejudice from the Government delay. The prejudice in this case was obvious: TSgt K.W. and Mr. L.B. could once testify to the exculpatory evidence about SSgt F.C.'s behavior before the alleged sexual assault—but can no longer do so. The evidence of SSgt F.C. allowing SSgt Harrington to take shots of alcohol off of her breasts, buttocks, and mouth, just shortly before

the alleged sexual assault, is extremely relevant to an affirmative defense of mistake of fact.

The Air Force Court stated that the *substance* of the evidence remains, as the Defense could present the testimony through Mil. R. Evid. 803(5). However, this hardly cures the prejudice in the case. This Court has previously recognized the importance of in-person testimony. *United States v. Powell,* 49 M.J. 220 (C.A.A.F. 1998) ("The Fifth and Sixth Amendments to the Constitution give an accused the right to present the testimony of relevant witnesses." (other citations omitted.))[5]

In this case, in-person testimony is crucial to SSgt Harrington's ability to defend himself, as the case hinges on the credibility of witnesses. Specifically, the Government will prove its case with the live testimony of SSgt F.C. and the Defense is left with much less compelling evidence as a direct result of the Government's delay in

[5] Other jurisdictions have also recognized the importance of in-person testimony, finding in-person testimony aids in evaluating witness credibility, establishing witness identity, impressing formalities upon the witness, assuring no outside influences exist, and assuring no documents are referred to improperly. *See*, *e.g.*, *Bonamarte v. Bonamarte*, 263 Mont. 170, 866 P.2d 1132, 1134 (Mont. 1994); *Kelly v. Kelly*, 445 S.W.3d 685, 694 (Tenn. 2014).

this case. Indeed, the original record notes multiple times when SSgt F.C. became emotional during her testimony ("[Momentary pause while the witness was sobbing]"). Org. R. at 488. This was obviously effective in the absence of TSgt K.W. and Mr. L.B.'s testimony about her behavior during the party, as SSgt Harrington was ultimately convicted at his original court-martial. Now, to combat SSgt F.C.'s compelling and emotional live testimony, the Defense will still be without the ability to present live testimony from TSgt K.W. and Mr. L.B. about the complainant's behavior just before the alleged sexual assault. Instead, the Defense must utilize a stale record from a closed Mil. R. Evid. 412 hearing to present the exculpatory evidence. In a case where credibility will be key, the panel members will likely afford TSgt K.W.'s and Mr. L.B.'s testimony less weight and be more likely to believe SSgt F.C.'s allegations. [6]

While this Court has not decided whether lost memories are sufficient prejudice for speedy trial violation, federal courts have asserted that "vague assertions of faded memory are insufficient to

[6] This is especially true given Mr. L.B.'s original testimony occurred exclusively in a closed Mil. R. Evid. 412 hearing where the questions and motivations of counsel are much different than an open session in a litigated trial in front of members.

show prejudice for establishing a speedy trial violation." *United States v. Edwards,* 577 F.2d 883, 889 (5th Cir. 1978). In this case, there is more than just vague assertions of faded memories. In 2016, TSgt K.W. and Mr. L.B. testified to exculpatory information but, as the Military Judge noted in his findings of fact, they no longer have those memories. R. at 304-305. Accordingly, the Air Force Court erred in finding SSgt Harrington did not establish actual prejudice from the Government delay.

2. The Air Force Court failed to properly view the evidence in the light most favorable to SSgt Harrington and give deference to the Military Judge's findings of fact.

In this case, the Military Judge took the extraordinary step of dismissing a sexual assault case. He made this decision after contemplating multiple motions to dismiss, more than one motion to reconsider, and after he repeatedly reminded the Government to remain vigilant for prejudice. R. at 150, 311. However, despite the Air Force Court's responsibility to defer to the Military Judge's findings of fact and to view the evidence in the light most favorable to SSgt Harrington, it wholly failed to do so. The most prominent example of this is when the Court concluded the Military Judge erred

in making the finding of fact that had the Government proceeded expeditiously with bringing the case to a rehearing, it was likely that at least some of the exculpatory evidence would still be available. Appendix B at 15. The Court questioned whether this determination could be a finding of fact and stated, "even assuming that a finding that something is 'likely' is a finding of fact," the Military Judge's finding was not supported by the record. *Id.*

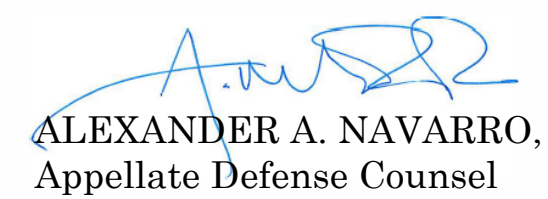
Where there is a mixed question of fact and law, "a military judge abuses [their] discretion if [their] findings of fact are clearly erroneous or [their] conclusions of law are incorrect." *Gore*, 60 M.J. at 185 (internal quotation marks and citations omitted). This standard requires "more than a mere difference of opinion." *United States v. Buford*, 74 M.J. 98, 100 (C.A.A.F. 2015) (internal quotation marks and citation omitted). "[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire of the evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).

Under this deferential standard, the Military Judge did not abuse his discretion. The Military Judge received evidence during

the motion hearing in March 2020 that TSgt K.W. remembered more information in October 2019—when the rehearing was originally scheduled—than she did in March 2020. R. at 281. Nonetheless, the Government was still not prepared for trial in October 2019 (when TSgt K.W. remembered more) because its trial counsel "could not find" Mr. L.B. App. Ex. LXXV at 1. Furthermore, the Government apparently did not interview TSgt K.W. until March 8, 2020, as this is the first time the Government provided notice to the Defense about TSgt K.W.'s memory issues. App. Ex. CXI at 1. Therefore, the Military Judge's finding—that had the Government moved more expeditiously in bringing the case to a rehearing, at least some exculpatory evidence would still be available—was not clearly erroneous.

WHEREFORE, SSgt Harrington respectfully requests this Honorable Court grant review of the presented issue.

Respectfully Submitted,



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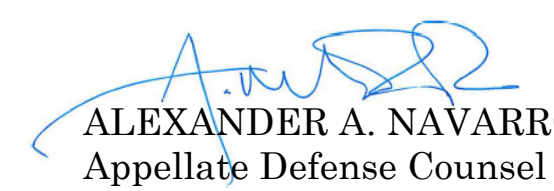
I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on November 16, 2020.



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APPENDIX A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39223

UNITED STATES
Appellee

v.

Matthew C. HARRINGTON
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 25 September 2018

Military Judge: Joseph S. Imburgia.

Approved sentence: Dishonorable discharge, forfeiture of $1,066.00 pay per month until completion of appellate review, reduction to E-1, and a reprimand. Sentence adjudged 20 November 2016 by GCM convened at Nellis Air Force Base, Nevada.

For Appellant: Major Patricia Encarnación Miranda, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Captain Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Before MAYBERRY, JOHNSON and DENNIS, *Appellate Military Judges*.

Chief Judge MAYBERRY delivered the opinion of the court, in which Judge DENNIS joined. Senior Judge JOHNSON filed a separate dissenting opinion.

MAYBERRY, Chief Judge:

A general court-martial composed of officer and enlisted members found Appellant guilty, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. The court-martial sentenced Appellant to a dishonorable discharge, hard labor without confinement for three months, total forfeiture of pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority deferred the forfeitures until he took action on the court-martial and approved only the dishonorable discharge, forfeiture of $1,066.00 pay per month until completion of appellate review, reduction to E-1, and a reprimand.

On appeal, Appellant raises a single issue: whether the military judge abused his discretion by applying Military Rule of Evidence (Mil. R. Evid.) 412 to exclude evidence the Defense sought to admit. We find the military judge abused his discretion by excluding the evidence, and we set aside the findings and sentence.[1]

I. BACKGROUND

In January 2016, Appellant and Senior Airman (SrA) FC were co-workers stationed at Creech Air Force Base (AFB), Nevada. On 30 January 2016, SrA FC and her then-boyfriend agreed to end their relationship. Later that day, SrA FC attended a party at the off-base residence of another co-worker, Staff Sergeant (SSgt) KW. Appellant and several other individuals, mostly Airmen, also attended the party. SrA FC's recently-estranged boyfriend and Appellant's wife did not attend. SrA FC and Appellant had no prior sexual relationship.

Appellant, SrA FC, and several others played adult party games. Of note, one game was an "adult" or "drinking" version of Jenga that involved removing individual blocks from a tower of blocks. In the version of the game they played, each block had an instruction printed on it for the participant to perform, often of a titillating nature—for example, removing an article of clothing or electing to take a "body shot" of alcohol from a location on another player's body. In the course of the game, SrA FC removed her pants, and Appellant elected to take "body shots" from SrA FC's mouth, from her cleavage, and from between her buttocks. SrA FC permitted Appellant to do so.

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[1] All pretrial motions regarding Appellant's request to introduce evidence under Military Rule of Evidence 412 were sealed as were the transcripts of the multiple hearings involving the motions. As a result of our finding the military judge abused his discretion in excluding this evidence, the opinion contains discussion of sealed material necessary for our analysis.

The partygoers consumed alcohol before and during the games, and SrA FC became highly intoxicated. SrA FC had to leave the games at certain points because she felt sick, and she vomited at least three times over the course of the evening. Eventually, SSgt KW and another partygoer, SSgt RD, put SrA FC to bed in an upstairs bedroom as the party continued downstairs. According to SSgt RD, the party began to "wrap up" a short time thereafter. Later, as the party was ending, SSgt RD noticed Appellant lying on the bed next to SrA FC. SSgt RD described SrA FC as appearing "intoxicated [and] falling asleep" at that point, but not "completely asleep." SSgt RD briefly made eye contact with Appellant, who was awake but also appeared "drunk" and "about to fall asleep." SSgt RD "didn't think much of it" when he saw Appellant on the bed.

SrA FC testified that when she awoke, her pants were lowered to around her thighs. Appellant was lying behind her with his penis inside her and his hand on her hip. SrA FC initially "froze." As she lay immobile, Appellant "thrusted a few times" and kissed her on the shoulder. When SrA FC moved slightly, Appellant withdrew and moved away from her on the bed. When everything was "still," SrA FC arose, pulled her pants up, and looked back at Appellant, who was lying on the bed with his eyes closed. SrA FC went downstairs with her phone and sent a text message to a friend. Shortly thereafter, Appellant came downstairs and said to SrA FC, "Man, last night was crazy." SrA FC went out to her car to speak with her friend, who she informed of the sexual assault. SrA FC then went to a hospital and underwent a sexual assault forensic examination later that day. Subsequent analysis of evidence collected during the exam disclosed the presence of semen on vaginal, cervical, rectal, and external genital swabs. DNA testing of the cervical and rectal swabs matched Appellant's DNA profile.

Appellant was charged with a single specification of sexual assault by causing bodily harm. Before trial, the Defense filed a motion pursuant to Mil. R. Evid. 412(c) regarding its intent to offer evidence of, *inter alia*, SrA FC's behavior during the Jenga game. Trial defense counsel contended such evidence was admissible under Mil. R. Evid. 412(b)(1)(B) as evidence of sexual behavior by the alleged victim which Appellant offered to prove consent, as well as under Mil. R. Evid. 412(b)(1)(C) as evidence the exclusion of which would violate Appellant's constitutional rights. Specifically, the trial defense counsel argued:

- The intimate nature of the Jenga game activities between Appellant and SrA FC "go[es] to the likelihood that she would be willing to consent to further sexual behavior later on in the evening."
- For similar reasons, the evidence "goes to show a mistake of fact as to consent," which would be relevant under both the (b)(1)(B) and (C) exceptions to Mil. R. Evid. 412, and exclusion of the evidence mischaracterizes the facts and circumstances, bolstering the conclusion there may

be no reasonable mistake of fact, thereby depriving Appellant the ability to put on his theory of the case.

- The evidence is relevant as to SrA FC's credibility regarding her expected testimony that she did not consent. Specifically, the evidence available established that neither SrA FC nor Appellant remembered what happened, and the defense would be prejudiced by not being able to argue that based on the facts and circumstances, her failure to remember is not independent evidence that she did not consent.

The Government and SrA FC (through her Special Victims' Counsel) opposed the motion. After receiving evidence and argument in a closed hearing, the military judge denied the motion in a written ruling. The military judge permitted evidence that SrA FC and other participants played party games that involved drinking alcohol, but did not permit references to anyone's specific individual behavior during the games.

The Defense sought reconsideration of this ruling multiple times as the trial progressed. The Defense requested reconsideration after a prosecution expert witness testified that the number of sperm cells found inside SrA FC was indicative of a full ejaculation; after a court member submitted a question as to whether Appellant and SrA FC had engaged in consensual sexual contact prior to the alleged offense; and after another court member submitted a question regarding the rules for "drunk Jenga." The military judge denied each of these requests to modify his ruling.

The Defense also requested reconsideration after SrA FC testified regarding Appellant's "last night was crazy" remark. Trial defense counsel argued the Government had opened the door to the excluded evidence. Trial defense counsel contended that, without further information of the facts and circumstances of what happened the night before, the members might interpret the comment as some sort of admission to sexual intercourse when instead Appellant may have been referring to the risqué activities associated with the Jenga game. Based on the judge's ruling, at the time SrA FC testified, the members knew only that the party included drinking games, not that the games also included nudity and touching between Appellant and SrA FC. The military judge agreed that trial counsel had opened the door to the Mil. R. Evid. 412 evidence, but declined to change his ruling excluding the evidence. Instead, he gave the following instruction prior to the cross-examination of SrA FC:

> You may or may not have heard [SrA FC] testify about a statement that [Appellant] may or may not have made to her at [SSgt KW's] house during the charged timeframe. You are to completely disregard any and all statements you may have heard in that regard. This includes any and all statements [SrA FC] may or may not have testified that she heard [Appellant] make at

> [SSgt KW's] house on 30 and 31 January 2016. You may not consider them for any purpose or discuss them amongst yourselves. You may not consider the contents of the statements, nor may you consider whether a statement was, in fact, made. I cannot give you any more specifics on this matter, and you may not make any inferences about why this instruction is being given. To the extent that any other statements of the accused came into evidence through other witnesses, you may consider them along with the other evidence in this case. In short, anything said by [SrA FC] during her testimony about statements by [Appellant] at [SSgt KW's] house cannot be considered by you as evidence in this case.

Only after giving this instruction did the military judge realize that the Sexual Assault Nurse Examiner (SANE), a witness for the Government, had also testified as to the "crazy night" statement SrA FC attributed to Appellant and that a page from the SANE report offered by the defense also contained the same language. The military judge ruled that based on his prior rulings, he would preclude the Government from arguing "any inference from that statement being made, to the extent that it was made by the accused" and he would further instruct the members that "any reference that may or may not have been made by [Appellant] to [SrA FC] that it was a 'crazy night' was not in reference to the sexual act that may or may not have occurred between them."

During his instructions on findings, the military judge repeated the instruction above to disregard the testimony of SrA FC and also included an instruction regarding the testimony of the SANE:

> Additionally, you may or may not have heard testimony from Ms. [TR] that, while conducting her forensic examination of [SrA FC], [SrA FC] told her that, after the alleged incident, the accused told her that the night of 30 and 31 January 2016 was a "crazy night." That statement is also summarized in Defense Exhibit Alpha, a summary which Ms. [TR] made. To the extent you believe the accused made that statement to [SrA FC] and to the extent you believe that [SrA FC] subsequently and accurately relayed that statement to Ms. [TR], and that Ms. [TR] accurately summarized that statement, you shall not infer that the statement "it was a crazy night" was in any way referring to the sexual act alleged, and you shall not infer that it was referring in any way to any consensual or nonconsensual sexual contact with [SrA FC].

II. DISCUSSION

A. Law

"We review a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Erickson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citation omitted). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts was clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)). The application of Mil. R. Evid. 412 to proffered evidence is a legal issue that appellate courts review de novo. *United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010).

Mil. R. Evid. 412 provides that in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions, the second and third of which are pertinent to this case. The burden is on the defense to overcome the general rule of exclusion by demonstrating an exception applies. *United States v. Carter*, 47 M.J. 395, 396 (C.A.A.F. 1998).

The second exception under Mil. R. Evid. 412 includes "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent . . . ." Mil. R. Evid. 412(b)(1)(B). Evidence that fits this exception may nevertheless be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice to the alleged victim's privacy. Mil. R. Evid. 412(c)(3). In addition, like other evidence, evidence otherwise admissible under Mil. R. Evid. 412(b)(1)(B) may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. Where a military judge conducts a proper balancing test under Mil. R. Evid. 403, an appellate court will not overturn the ruling absent a clear abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (quoting *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998)).

The third exception under Mil. R. Evid. 412 provides that the evidence is admissible if its exclusion "would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). Generally, evidence of other sexual behavior by an alleged victim is constitutionally required and "must be admitted within the ambit of [Mil. R. Evid.] 412(b)(1)(C) when [it] is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice."

United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011) (citation omitted). Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable or less probable than it would be without the evidence. Mil. R. Evid. 401. Materiality "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue." *Ellerbrock*, 70 M.J. at 318 (alteration in original) (citations omitted) (internal quotation marks omitted). The dangers of unfair prejudice to be considered "include concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id*. (citation omitted) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

B. Analysis

Appellant contends the military judge abused his discretion by excluding evidence the Defense sought to admit under two exceptions to Mil. R. Evid. 412's general rule of exclusion. We conclude that the military judge's reasoning was flawed and his decision to exclude the evidence was an abuse of discretion. We further find the error was not harmless beyond a reasonable doubt.

1. "Sexual Behavior"

The military judge began his analysis by finding the evidence of SrA FC's actions during the Jenga game qualified as evidence of "sexual behavior" or "sexual predisposition" for purposes of Mil. R. Evid. 412(a). Because the behavior in question may have had a "sexual connotation for the factfinder," we agree. *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), App. 22, at A22–42 (explaining that Mil. R. Evid. 412(a) is intended to "exclude evidence that does not directly refer to sexual activities or thoughts but that the accused believes may have a sexual connotation for the factfinder"). Therefore, the evidence was inadmissible unless an exception applied.

2. Mil. R. Evid. 412(b)(1)(B): Behavior by the Alleged Victim with Respect to the Accused Offered to Prove Consent

The military judge then found this evidence did not meet the exception for specific instances of sexual behavior by the alleged victim with respect to Appellant offered to prove consent under Mil. R. Evid. 412(b)(1)(B). He reasoned that SrA FC was "merely playing a party game similar to truth or dare" according to its rules, and her actions "were not sexual advances towards [Appellant]." We find this analysis flawed. To meet criteria for admissibility under Mil. R. Evid. 412(b)(1)(B), evidence of the alleged victim's behavior must be "with respect to" the accused and offered to prove consent or mistake of fact as to consent. *See United States v. Gordon*, 2007 CCA LEXIS 415 (N.M. Ct. Crim.

App. 27 Sep. 2007), *rev. denied,* 2008 CAAF LEXIS 939 (C.A.A.F. 12 Jun. 2008). We find the behavior in question was sufficiently "with respect to" Appellant to meet the exception. True, SrA FC was playing a game according to its rules; however, it was a sexually provocative game that SrA FC voluntarily participated in generally, but she specifically permitted Appellant to drink alcohol from sexually suggestive parts of her body. This was sexual behavior between SrA FC and Appellant. For the exception to be satisfied there is no requirement that evidence offered under Mil. R. Evid. 412(b)(1)(B) must amount to a "sexual advance" by an alleged victim. The Defense offered this evidence in order to prove consent or mistake of fact as to consent. The theory of the case presented by trial defense counsel was that SrA FC and Appellant "had consensual sex while they were both blacked out" at some point between the end of the party and when SrA FC awoke the following morning, and that SrA FC's testimony regarding Appellant penetrating her as she awoke reflected a faulty reconstructed memory. Accordingly, we find the offered evidence met the Mil. R. Evid. 412(b)(1)(B) exception.

The military judge further found evidence of SrA FC's behavior during the Jenga game "not logically relevant to whether she consented to vaginal intercourse with [Appellant] later that evening." We agree with the military judge that evidence meeting an exception under Mil. R. Evid. 412(b) must also be relevant to be admissible. *See* Mil. R. Evid. 402(b) ("Irrelevant evidence is not admissible."); 412(c)(3) (stating evidence meeting a Mil. R. Evid. 412(b) exception may be admissible if, *inter alia*, it is "relevant" for such a purpose). Yet relevance is a "low threshold." *Roberts*, 69 M.J. at 27. Evidence is relevant if it has *any* tendency to make the existence of a fact more probable or less probable than it would be without the evidence. Mil. R. Evid. 401(a). We conclude SrA FC's willingness to remove her pants and in particular to permit Appellant to drink alcohol from her mouth, breasts, and buttocks has *some* tendency to lead the court members to find she may also have consented to engage in sexual intercourse with Appellant later that night, or that Appellant may have believed she would consent. Although we agree with the military judge that these prior activities do not *by themselves* constitute consent to sexual intercourse, *see* Article 120(g)(8)(A), UCMJ, 10 U.S.C. § 920(g)(8)(A), that is not the test for relevance. It is enough that the evidence had a tendency to support the Defense's case.

The military judge's analysis did not end there. Assuming *arguendo* the evidence was relevant to whether SrA FC consented to vaginal intercourse, the military judge found its probative value was "substantially outweighed by the

danger of unfair prejudice to the trial process."[2] *See* Mil. R. Evid. 403. The military judge explained the risk was "the old [unfair] argument" that Mil. R. Evid. 412 was designed to prevent, that "simply because of [SrA FC's] actions during the Jenga game, she must have wanted to engage in sexual acts with [Appellant] that night."

We find the military judge erred in his application of Mil. R. Evid. 403. The military judge failed to fully appreciate the relevance and materiality of this evidence to the Defense's case. Though he assumed relevance on the issue of consent in weighing the probative value, his analysis omitted any consideration of the probative value that Appellant could have had the mistaken belief that she consented. The excluded evidence of the sexual behavior between SrA FC and Appellant prior to the sexual assault precluded the Defense from establishing evidence that SrA FC may have consented to sexual intercourse, and that Appellant may have reasonably believed SrA FC did so.

The events taking place after the military judge's ruling further highlight the error. The court members' specific questions about whether there were any prior sexual interactions between Appellant and SrA FC and about what happened during the Jenga game underscore the significance of the excluded evidence. Their questions were not surprising given how interwoven the Jenga game was into the evening's events. The efforts to resolve SrA FC's "crazy night" comment serve as another example of the potential significance of this evidence. Yet, when both parties indicated they would potentially recall witnesses to provide previously prohibited facts and circumstances to provide context to the "crazy night" statement, the military judge stood by his original determination as to the limited probative value of the evidence and supplemented his Mil. R. Evid. 403 analysis to say ". . . just to go into this issue that the court has already ruled has marginal benefit to either prove consent, or to prove anything else for that matter other than sexual predisposition or sexual behavior. . . . it would be time consuming, and also a waste of time, under the analysis of 403, for that to happen on a matter that the court has already ruled has limited probative value."

Without this evidence, the Defense was left with little more than speculation based on generalized expert testimony regarding memory and the effects

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[2] Significantly, the military judge did not base his prejudice analysis on "the danger of unfair prejudice to the alleged victim's privacy." Mil. R. Evid. 412(c)(3). In part, this appears to be because the military judge was reluctant to invoke the victim's privacy interest as a countervailing interest to be weighed in light of *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011), although *Gaddis* dealt specifically with the "constitutionally required exception" of Mil. R. Evid. 412(b)(1)(C) rather than Mil. R. Evid. 412(b)(1)(B). Instead, the military judge focused on the prejudice to the truth-seeking purpose of the trial process itself.

of alcohol with which to counter SrA FC's testimony at trial that Appellant penetrated her while she was asleep. Again, SrA FC's behavior during the game did not need to independently prove consent to sexual intercourse in order to be relevant, material, and important to the Defense's case. Moreover, the absence of the evidence forced the Defense to offer only an incomplete picture of the events leading up to the charged sexual assault.

Accordingly, we find the military judge's conclusion that the risk of unfair prejudice "substantially outweighed" the probative value of this otherwise admissible evidence to be a clear abuse of discretion. *See Ediger*, 68 M.J. at 248.

3. Mil. R. Evid. 412(b)(1)(C): Constitutionally Required Evidence

Our analysis of the application of the "constitutionally required" exception under Mil. R. Evid. 412(b)(1)(C) follows a similar track. Generally, evidence of the alleged victim's prior sexual behavior or predisposition must be admitted when it "is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *Ellerbrock*, 70 M.J. at 318 (citation omitted). For the reasons stated above, we find the evidence was relevant to the questions of whether SrA FC consented to sexual intercourse with Appellant or whether Appellant may have reasonably believed she consented. Similarly, we find the evidence was material. In this case, the evidence was offered on the critical disputed issue of whether SrA FC consented to sexual intercourse with Appellant, and no other evidence fulfilled the same purpose for the Defense.

With respect to the "dangers of unfair prejudice," we acknowledge the standard for admissibility articulated in *Ellerbrock* is more demanding than that imposed by Mil. R. Evid. 403. Specifically, the probative value must outweigh the dangers of unfair prejudice, rather than simply not be "substantially outweighed" by such dangers as under Mil. R. Evid. 403. To be clear, we do not take lightly the purpose Mil. R. Evid. 412 serves. We agree with the military judge's assessment that it would have been improper for the Defense to argue that "simply because of [SrA FC's] actions during the Jenga game, she must have wanted to engage in sexual acts with [Appellant] that night." We disagree with his failure to consider the probative value of SrA FC's actions on whether Appellant could have reasonably, but mistakenly, believed that she consented. In conducting such an analysis, the military judge could have curbed the countervailing Mil. R. Evid. 412 concern that the court members would misapply this evidence with an appropriate limiting instruction.

Nevertheless, for the reasons articulated above, we find the probative value of the evidence outweighed such dangers. The materiality of the evidence to the Defense's case coupled with the availability of limiting instructions to guide the court members' deliberations required the admission of the evidence in this

case. Accordingly, we conclude the evidence of SrA FC's behavior during the Jenga game was admissible under Mil. R. Evid. 412(b)(1)(C) exceptions, and the military judge abused his discretion by excluding it.

4. Harmless Error Analysis

Having concluded the military judge erred in excluding the evidence, we must test that error for prejudice. Where the proffered evidence was constitutionally required and admissible under Mil. R. Evid. 412(b)(1)(C), we test for prejudice by determining whether the error was harmless beyond a reasonable doubt. *Ellerbrock*, 70 M.J. at 318. In other words, we must assess whether there is a "reasonable possibility" the error "might have contributed to the conviction." *Id*. We find there was such a possibility.

The Government's case, although solid, was not overwhelming. The Government introduced compelling evidence of sexual intercourse, but its proof that SrA FC did not consent hinged primarily on her testimony. The Government introduced no incriminating statements by Appellant, other than SrA FC's testimony regarding Appellant's arguably prejudicial "crazy night" comment, which the military judge instructed the court members not to consider. The excluded evidence was relevant and material to the Defense's contention that Appellant and SrA FC may have engaged in consensual intercourse, and that SrA FC's trial testimony was based on a faulty reconstructed memory resulting from an alcohol-induced blackout. In particular, the court members' questions suggested they believed evidence of prior sexual contact between SrA FC and Appellant and of SrA FC's behavior during "drunk Jenga" would have been significant. We cannot say there was no "reasonable possibility" that the excluded evidence of sexual behavior earlier in the evening might have affected the court members' findings.

Accordingly, because of our holdings that the military judge erred in excluding the evidence under both Mil. R. Evid. 412(b)(1)(B) and b(1)(C) we cannot sustain Appellant's conviction.

III. CONCLUSION

The findings of guilt and the sentence are **SET ASIDE**. A rehearing is authorized. Article 66(c), UCMJ, 10 U.S.C. § 866.

JOHNSON, Senior Judge (dissenting)

I concur with my colleagues that the proffered evidence met the exception for sexual behavior by an alleged victim with respect to the accused and offered to prove consent under Military Rule of Evidence (Mil. R. Evid.) 412(b)(1)(B), and that the military judge erred in finding otherwise. Likewise, I agree the

evidence met the low threshold for relevance under Mil. R. Evid. 401(a). However, because I cannot say the military judge's determination that the dangers of unfair prejudice substantially outweighed the probative value under Mil. R. Evid. 403 was a clear abuse of discretion, I respectfully dissent.

In my view, our decision in this case would turn on the standard of review. The relevant question is not whether the judges of the appellate court would have made the same ruling the trial judge did. Rather, we examine whether the military judge abused the discretion entrusted to him. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). In particular, as the majority notes, where a military judge articulates a proper balancing test under Mil. R. Evid. 403, an appellate court will not overturn the ruling absent a "clear" abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (quoting *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998)).

In this case, the military judge explained his Mil. R. Evid. 403 analysis in his written ruling. For purposes of the test, he assumed the proffered evidence had relevance. Nevertheless, he could reasonably conclude the probative value was low. Permitting someone to drink alcohol off one's body as part of a risqué drinking game in the presence of co-workers and friends is a far cry from consenting to sexual intercourse. In addition, the evidence tended to show Appellant was focusing his attention on SrA FC rather than vice versa, and was therefore more probative of Appellant's intent than SrA FC's. Furthermore, the evidence was that SrA FC became intoxicated to the point of being physically ill and was put to bed. SrA FC testified that when she awoke, Appellant had already penetrated her as she slept. As the military judge instructed the court members, a sleeping or unconscious person is not competent to consent to sexual activity. *See* Article 120(g)(8)(B), Uniform Code of Military Justice, 10 U.S.C. § 920(g)(8)(B).

"[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 military judge concluded the probative value of the excluded evidence was low. For the reasons stated above, I believe that conclusion was reasonable and within the range of choices available to the military judge. At the same time, the military judge's concern that the court members might misapply this evidence to conclude that SrA FC's consent to Appellant's actions during the Jenga game implied consent to sexual intercourse hours later was not arbitrary, fanciful, or clearly unreasonable. *See McElhaney*, 54 M.J. at 130.

Therefore, I would hold the military judge did not abuse his discretion in excluding the evidence under Mil. R. Evid. 403 with respect to the Mil. R. Evid. 412(b)(1)(B) exception. Furthermore if, as the military judge concluded, the danger of unfair prejudice substantially outweighed the probative value of the evidence, the evidence would also necessarily fail to meet the "constitutionally required" exception of Mil. R. Evid. 412(b)(1)(C). *See United States v. Ellerbrock*, 70 M.J. 314, 318 (citation omitted) (stating evidence is constitutionally required if it is "relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice").

Regarding the Defense's request for reconsideration, I concede the military judge's handling of the court member instructions regarding Appellant's "crazy night" remark was awkward. Nevertheless, court members are presumed to follow the military judge's instructions absent evidence to the contrary. *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012) (quoting *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)). Ultimately, the military judge instructed the members to completely disregard SrA FC's testimony regarding Appellant's statement, and not to consider the Sexual Assault Nurse Examiner's testimony regarding it as referring to the charged offense or any consensual or nonconsensual sexual contact between Appellant and SrA FC. I do not find any evidence the members failed to follow this instruction, and therefore I would presume the members did not draw the unfair inference that this remark was a reference to sexual intercourse, which was the basis for the Defense's claim that the Government had opened the door.

Accordingly, I would affirm the findings and sentence.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Misc. Dkt. No. 2020-02

UNITED STATES
Appellant

v.

Matthew C. HARRINGTON
Senior Airman (E-4), U.S. Air Force, *Appellee*

Appeal by the United States Pursuant to Article 62, UCMJ

Decided 26 August 2020[1]

Military Judge: Christopher M. Schumann (arraignment); Bryan D. Watson.

GCM convened at: Nellis Air Force Base, Nevada.

For Appellant: Major Dayle P. Percle, USAF (argued); Colonel Shaun S. Speranza, USAF; Mary Ellen Payne, Esquire.

For Appellee: Captain Alexander A. Navarro, USAF (argued); Mark C. Bruegger, Esquire.

Before J. JOHNSON, POSCH, and KEY, *Appellate Military Judges.*

Chief Judge J. JOHNSON delivered the opinion of the court, in which Senior Judge POSCH and Judge KEY joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

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[1] We heard oral argument in this case in a closed session on 24 July 2020.

J. JOHNSON, Chief Judge:

One Charge and Specification alleging Appellee committed sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, were referred for trial by general court-martial on 13 May 2019.[2] Appellee was arraigned on 7 June 2019; the military judge presided over a motions hearing on 15 and 16 October 2019; and the court-martial resumed on 9 March 2020. On 10 March 2020, the military judge dismissed the Charge and Specification, with prejudice, finding a violation of Appellee's Sixth Amendment[3] right to speedy trial.

The Government brings this interlocutory appeal under Article 62, UCMJ, 10 U.S.C. § 862, challenging the military judge's ruling on the grounds that he erred in finding a violation of Appellee's Sixth Amendment right to a speedy trial. We agree.

I. BACKGROUND

The court-martial that is the subject of this appeal represents the Government's second attempt to prosecute Appellee for this particular Charge and Specification. In November 2016, a general court-martial convicted Appellee for this offense, contrary to his pleas, but on 25 September 2018 this court set aside the findings and sentence and authorized a rehearing. *United States v. Harrington*, No. ACM 39223, 2018 CCA LEXIS 456 (A.F. Ct. Crim. App. 25 Sep. 2018) (unpub. op.) (*Harrington I*). A fuller account of the events that gave rise to the Charge and Specification and of the first court-martial are set forth in that opinion. For purposes of the present appeal, a more abbreviated account is sufficient.

A. Factual Background[4]

In January 2016, Appellee and Staff Sergeant (SSgt) FC[5] were co-workers stationed at Creech Air Force Base (AFB), Nevada. On 30 January 2016, SSgt

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[2] Unless otherwise noted, references to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2012 ed.); all other references to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[3] U.S. CONST. amend. VI.

[4] The background is drawn from the record of the first court-martial and this court's opinion in *Harrington I*.

[5] SSgt FC was a senior airman (SrA) at the time of the alleged offense, but a SSgt at the time of the rehearing.

FC attended a party at the off-base residence of another co-worker, Technical Sergeant (TSgt) KW.[6] Appellee and several other individuals, mostly Airmen, also attended the party. SSgt FC and Appellee had no prior romantic or sexual relationship.

Appellee, SSgt FC, and several others played adult party games. One game was an "adult" or "drinking" version of Jenga, a game that involves removing individual blocks from a tower of blocks. In this version, each block had an instruction printed on it for the participant to perform, often of a titillating nature—for example, removing an article of clothing or electing to take a "body shot" of alcohol from a location on another player's body. In the course of the game, SSgt FC lowered or removed her pants, and Appellee elected to take "body shots" from SSgt FC's mouth, from her cleavage, and from between her buttocks. SSgt FC permitted Appellee to do so as part of the game. TSgt KW and another attendee, LB,[7] were among those present during the Jenga game.

Most of the partygoers consumed alcohol before and during the games, and SSgt FC became highly intoxicated. She had to leave the games at certain points because she felt sick. Eventually, TSgt KW and another individual put SSgt FC to bed in an upstairs bedroom to sleep as the party continued downstairs. SSgt FC testified at the first trial that when she awoke sometime later, her pants were lowered to around her thighs, and Appellee was lying behind her with his penis inside her and his hand on her hip. As SSgt FC initially lay immobile, Appellee "thrusted a few times" and kissed her on the shoulder. When SSgt FC moved slightly, Appellee withdrew and moved away from her on the bed. When Appellee stopped moving, SSgt FC arose, pulled her pants up, and left the room.

B. First Court-Martial and *Harrington I*

Appellee was charged with a single specification of sexual assault by causing bodily harm to SSgt FC in violation of Article 120, UCMJ. Before the first trial, the Defense filed a motion to admit certain evidence regarding SSgt FC under Mil. R. Evid. 412, including *inter alia* SSgt FC's behavior during the Jenga game. The Defense contended this evidence was admissible as both evidence of prior sexual behavior with the Appellee under Mil. R. Evid. 412(b)(1)(B) and was constitutionally required evidence under Mil. R. Evid.

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[6] TSgt KW was a SSgt at the time of the alleged offense, but a TSgt at the time of the rehearing.

[7] LB was a SrA at the time of the party, but separated from the Air Force between the time of the original trial and the rehearing.

412(b)(1)(C), in support of defenses based on both actual consent and reasonable mistake of fact as to consent. The Government and SSgt FC—through her Special Victims' Counsel (SVC)—opposed the motion.

The military judge who presided over the first court-martial conducted a closed Article 39a, UCMJ, 10 U.S.C. § 839(a), session where he received evidence and heard argument. Both LB and TSgt KW testified at this hearing. LB testified, *inter alia*, that SSgt FC lowered her pants during the Jenga game, and that Appellee took shots from SSgt FC's buttocks and between her breasts. TSgt KW testified, *inter alia*, that she remembered Appellee took a shot from SSgt FC's mouth during the Jenga game. The military judge ruled the evidence of SSgt FC's behavior with Appellee during the Jenga game was not admissible under Mil. R. Evid. 412(b)(1)(B) or (C). He allowed evidence that SSgt FC, Appellee, and other attendees played party games that involved drinking alcohol, but he did not permit references to anyone's specific behavior during the games.

The Defense repeatedly requested reconsideration of this ruling throughout the trial, but the military judge denied each request. On 20 November 2016, the court members convicted Appellee as charged. The sentence approved by the convening authority included a dishonorable discharge, forfeiture of $1,066.00 pay per month until completion of appellate review, reduction to E-1, and a reprimand.

On 25 September 2018, a divided panel of this court found the military judge erred by excluding the Mil. R. Evid. 412 evidence of the interactions between Appellee and SSgt FC during the Jenga game. *Harrington I*, unpub. op. at *12–22. The court set aside the findings and sentence, returned the record of trial, and authorized a rehearing. *Id.* at *22.

C. Toward a Rehearing

On 25 October 2018, the Government moved this court for reconsideration. On 26 October 2018, the Military Justice Division at Joint Base Andrews, Maryland, returned the record of trial to the legal office at Nellis AFB—prematurely, in light of the pending motion at the Court of Criminal Appeals. After the record arrived at Nellis AFB, the legal office sent it back to the Military Justice Division pending resolution of the motion for reconsideration and a possible appeal to the United States Court of Appeals for the Armed Forces (CAAF).

On 19 November 2018, this court denied the motion for reconsideration. The Judge Advocate General elected not to refer *Harrington I* to CAAF, and the record was ultimately returned to the Nellis AFB legal office on 4 February 2019. At some point between 19 and 22 February 2019, the Government determined SSgt FC was willing to participate in a rehearing and did not support

an alternative disposition of the case. Over the next several weeks, various individuals and offices at Nellis AFB and elsewhere coordinated in order to return Appellee to duty for a rehearing. As of 23 April 2019, Appellee had reported to Creech AFB and was represented by an Area Defense Counsel (ADC). On 13 May 2019, the convening authority referred the Charge and Specification to a general court-martial for a rehearing. The trial was originally set for 19 August 2019.

On 30 May 2019, Appellee's ADC submitted on behalf of Appellee a request for individual military defense counsel (IMDC) in order to be represented by Appellee's trial defense counsel from the first court-martial, who had changed positions and was serving as a senior trial counsel.

Appellee was arraigned on 7 June 2019, while the IMDC request was pending. Appellee deferred forum selection, motions, and pleas at that time.

On 12 June 2019, the Defense made a written demand for speedy trial in conjunction with a discovery request. The IMDC request was denied on 24 July 2019. On 31 July 2019, a circuit defense counsel (CDC) was detailed to join the ADC in representing Appellee, and on 5 August 2019 the Defense moved for a continuance in order to give the CDC time to prepare. The military judge granted the continuance and set 15 October 2019 as the new trial date.

On 27 September 2019, as the new trial date approached, the Government moved to have LB declared unavailable for purposes of testifying at the rehearing. In support of its motion, the Government attached an email that a paralegal sent LB in June 2019 requesting that LB call the paralegal regarding the rehearing. The Defense opposed the motion, and the military judge denied it, finding the Government had provided insufficient evidence of LB's unavailability.

On 11 October 2019, the Government informed the Defense it could not find LB and would be unable to arrange for him to travel to the rehearing. The Defense then moved for a continuance and to compel the Government to produce LB. On 13 October 2019, the military judge granted the defense request for a continuance and set a new trial date of 9 March 2020. The military judge held a motions hearing on 15 October 2019, the previously scheduled trial date.

D. Speedy Trial Motion and Rulings

The motions hearing continued into 16 October 2019, when the Defense moved to dismiss the Charge and Specification for violation of Appellee's right to speedy trial under both R.C.M. 707 and the Sixth Amendment. The military

judge denied the motion to dismiss in a written ruling dated 28 October 2019.[8] With respect to the Sixth Amendment, the military judge applied the four factors from *Barker v. Wingo*, 407 U.S. 514, 530–33 (1972). First, he found the length of the delay was facially unreasonable under the circumstances and warranted a full *Barker* analysis; in particular, he found very little progress was made in bringing Appellee to trial between 4 February 2019 and the arraignment on 7 June 2019. The military judge noted that because this was a rehearing, the investigation was already complete, no Article 32, UCMJ, 10 U.S.C. § 832, hearing was required, and the Charge and Specification were the same as previously litigated. Second, he found the reasons for the delay were "nearly all . . . primarily attributable to the Government's processing of this case, or . . . derived immediately therefrom." He particularly noted the record disclosed little explanation for the delay between 4 February 2019 and referral on 13 May 2019, and again noted that because this was a rehearing, the investigation was already complete and no Article 32, UCMJ, hearing was required. Third, the military judge found the June 2019 demand for speedy trial tipped that factor in the Defense's favor, but "only very slightly." Finally, and at this point decisively, the military judge found no demonstrated prejudice to Appellee at that time. In particular, he found that because the Defense's requested witnesses had not been produced or provided testimony, he could not assess whether the Defense's case at trial had been impaired. Accordingly, he denied the motion to dismiss at that point, but enjoined the parties to be "vigilant for evidence of prejudice to the Accused as this case progresses toward trial."

The court-martial reconvened on 9 March 2020. The Defense orally moved for reconsideration of its motion to dismiss for violation of Appellee's right to a speedy trial, specifically under the Sixth Amendment. The military judge conducted a hearing at which LB and TSgt KW testified. LB testified, *inter alia*, that even after reviewing his prior motion testimony from the original trial, he could no longer remember some details of the night of the party, and of the Jenga game in particular. Although he now remembered Appellee taking a body shot from SSgt FC's belly (and vice versa), he could not remember Appellee taking shots from SSgt FC's breasts or buttocks. LB also acknowledged he had "dodged" the Government's efforts to contact him prior to October 2019. TSgt KW testified that in June 2017 she began to experience symptoms of epilepsy, and in June 2019 she was formally diagnosed with that disorder. She testified this condition had dramatically impaired her short-term and long-

[8] With respect to the requirement in Rule for Court-Martial (R.C.M.) 707 that the Government bring Appellee to trial within 120 days, the military judge found the 120 days began running on 4 February 2019; with excludable time excluded, he found the Government arraigned Appellee within the 120-day requirement.

term memory. As of March 2020, TSgt KW barely recalled the night of the party and remembered nothing of the Jenga game.

On 10 March 2020, the military judge granted the defense motion to dismiss with prejudice. He again assessed the *Barker* factors, reaching similar findings and conclusions with respect to the length of the delay, reasons for the delay, and demand for speedy trial as he had in his 28 October 2019 ruling. He added that the reason the trial had been continued until 9 March 2020 was that until that point the Government's efforts to secure the presence of LB had been "wholly inadequate." As to the fourth *Barker* factor, prejudice, the military judge now found Appellee's ability to defend himself at trial had been impaired due to the lost memories of LB and TSgt KW. He included in his findings of fact the conclusion "that if the United States had proceeded expeditiously with bringing this case to a rehearing, it is likely that at least some of the exculpatory evidence which [the Court of Criminal Appeals] directed to be admitted at this hearing[9] (and which the Defense seeks to introduce) would have been available."

The military judge rejected the Government's arguments that admitting LB's and TSgt KW's prior testimony from the first trial under either Mil. R. Evid. 803(5) or Mil. R. Evid. 804(b)(1) would be an adequate substitute. With regard to Mil. R. Evid. 804(b)(1), the military judge found the prior trial defense team did not have a sufficiently similar motive for presenting testimony at a Mil. R. Evid. 412 motion hearing as the current defense team would have in using the testimony for findings, given the respective burdens and purposes involved. With regard to Mil. R. Evid. 803(5), the military judge acknowledged that although the Defense would be permitted to avail itself of that rule, he would not require the Defense to "rely nearly-exclusively upon this rule as the sole source of the very information which the [Court of Criminal Appeals] has directed should now be admissible, while simultaneously leaving the Government free to attempt to prove its own case with live witnesses."

E. Reconsideration

The Government promptly moved for reconsideration, which the military judge agreed to entertain. The Government offered additional evidence in support of its motion. First, it attached numerous emails from the period between

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[9] This characterization of *Harrington I* is inaccurate. The court's opinion did not "direct" that any evidence be admitted at a rehearing; it directed only that the findings and sentence of the first court-martial were set aside due to an error, and that the record be returned, and a rehearing authorized. *Harrington I*, unpub. op. at *22.

4 February 2019 and 28 May 2019 indicating the administrative steps the Government was taking to bring Appellee to a rehearing. Second, it called SSgt SC, another individual who attended the January 2016 party, to provide motion testimony.[10] SSgt SC testified that he recalled Appellee taking body shots from SSgt FC's mouth, belly, and rear. He could not recall whether someone took a shot from SSgt FC's chest. After SSgt SC testified, the military judge noted for the record his observations of SSgt SC's demeanor when he testified. The military judge observed that SSgt SC appeared "thoughtful" and "careful with his words," but "hesitant" and "halting" when he was "trying to recollect." During argument on the reconsideration motion, the Government offered to stipulate to the relevant facts; however, when the military judge asked the Defense whether it would agree to such a stipulation, the Defense declined to do so.

After receiving argument, the military judge denied the Government's reconsideration motion orally and in writing. The military judge adopted the findings of fact from his 10 March 2020 ruling dismissing the Charge and Specification with prejudice, but accepted the Government's recitation of the administrative steps the Government took to retry Appellee. The military judge found SSgt SC's testimony to be an insufficient substitute for the lost memories of LB and TSgt KW. He found SSgt SC's memory was "flawed, . . . due, in some part, to the passage of time," and that SSgt SC's "reliability as a witness [was] low." In addition, SSgt SC could not remember Appellee taking a shot from SSgt FC's breasts, as LB had previously testified to. The military judge further commented that under the circumstances he would "not force" Appellee to agree to a stipulation of fact. With regard to the Government's evidence of administrative steps, the military judge stated:

> [T]he United States has provided insufficient information that would, in any way, excuse the amount of time that the United States took in order to bring [Appellee] properly before this rehearing. The obvious delay in getting the case referred to trial, about 100 days, from receipt of the requisite materials until the actual referral, plus the amount of time that passed as a result of the continuance necessitated by the inadequacy of the Government's action to locate [LB], totals approximately 246 days.
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> Regarding . . . the period from late January through May of 2019, the Court notes that the Government's filing contains numerous

[10] SSgt SC did not testify at Appellee's first court-martial.

> references to a list of administrative tasks which had to be accomplished by military personnel . . . .
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> However, . . . [a]ccording to that list of activities, apparently little or no effort was made during this timeframe in order to actually interview, prepare, or even locate actual live witnesses for this rehearing.
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> [ ] The Court is well aware of the various administrative tasks required in order to bring an Accused onto active duty for a rehearing. . . . However, that is not the point of this Motion to Dismiss. Had the Government begun preparing this case for actual litigation, the Government's representatives would have had the opportunity to detect the memories which were degrading, along with [TSgt KW's] worsening medical condition. . . . Because the Government was, apparently, not actually preparing for courtroom litigation during this timeframe, these issues went undetected for months. . . .

The military judge reiterated that preparing Appellee's rehearing should have been simplified by the fact that the Charge, Specification, and witnesses were the same as for the prior trial, and the Government provided "no evidence" that any of the witnesses were actually difficult to locate—to include LB after the military judge's "intervention in October 2019." The military judge continued:

> Upon reconsidering this matter, this Court must continue to arrive at the conclusion that the United States, even if it has not been derelict or negligent, has nonetheless fallen short in its obligations in bringing this case to a rehearing, and the Defense has been directly and substantially prejudiced as a result. All of this has had the ultimate result of thwarting the express intent of [the Court of Criminal Appeals] when it authorized a rehearing in this case.
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> [ ] If the United States had proceeded expeditiously and effectively with bringing this case to a rehearing, it is likely that at least some of the exculpatory evidence which [the Court of Criminal Appeals] specifically directed to be admitted at this rehearing, and which the Defense seeks to introduce, would have been available for [Appellee's] use.

On 13 March 2020, the Government provided timely notice of its intent to appeal. The record was delivered to the court on 31 March 2020.

II. DISCUSSION

A. Law

1. Jurisdiction and Standard of Review

This court has jurisdiction to hear this appeal under Article 62(a)(1)(A), UCMJ, 10 U.S.C. § 862(a)(1)(A), which authorizes the Government to appeal "[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification."

When the Government appeals a ruling under Article 62, UCMJ, this court reviews the military judge's decision "directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019) (quoting *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017)). Because this issue is before us pursuant to a Government appeal, we may act only with respect to matters of law. Article 62(b), UCMJ, 10 U.S.C. § 862(b). We may not make findings of fact, as we are limited to determining whether the military judge's factual findings are clearly erroneous or unsupported by the record. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004).

We review Sixth Amendment speedy trial issues de novo. *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014) (citing *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). "In analyzing an appellant's speedy trial right, we 'giv[e] substantial deference to the military judge's findings of fact unless they are clearly erroneous.'" *Id.* (alteration in original) (quoting *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010)).

2. Speedy Trial

An accused's right to speedy trial is protected by statute, by regulation, and by the Constitution. *United States v. Tippit*, 65 M.J. 69, 72 (C.A.A.F. 2007); *see also United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995)). For military servicemembers, the Sixth Amendment right to speedy trial is triggered by the preferral of charges or the imposition of pretrial restraint. *Reed*, 41 M.J. at 451. "In determining whether an appellant has been denied his right to a speedy trial under the Sixth Amendment, this Court considers the following factors: '(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.'" *Danylo*, 73 M.J. at 186 (quoting *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005) (citing *Barker*, 407 U.S. at 530)). However, "none of the four factors . . . [i]s either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533. With regard to prejudice, the Court in *Barker* explained:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Id. at 532. An accused who asserts a violation of the Sixth Amendment right to speedy trial bears the burden of persuasion to demonstrate the existence of prejudice. *See* R.C.M. 905(c)(2)(A); *Danylo*, 73 M.J. at 189.

In contrast to the Sixth Amendment, the Fifth Amendment[11] speedy trial guarantee applies even before an accused is formally charged or subjected to pretrial restraint. *See Reed*, 41 M.J. at 451 (analyzing alleged violation of speedy trial under Fifth Amendment because "Sixth Amendment speedy-trial protection does not apply to pre-accusation delays where there has been no restraint") (citations omitted). However, "[a]bsent restraint, the 'primary guarantee' . . . against pre-accusation delay is the statute of limitations." *Id.* (quoting *United States v. Marion*, 404 U.S. 307, 322 (1971)). In order to demonstrate a speedy trial violation under the Fifth Amendment, "the defendant has the burden of proof to show an egregious or intentional tactical delay and actual prejudice." *Id.* at 452. For example, "[t]here may be a due process violation when [delay is] 'incurred in wreckless [sic] disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.'" *Id.* (quoting *United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977)).

3. Exceptions to the Hearsay Rule

Hearsay, defined as an out-of-court statement offered for the truth of the matter asserted in the statement, is generally inadmissible unless an exception applies. Mil. R. Evid. 801(c); Mil. R. Evid. 802. One such exception is Mil. R. Evid. 803(5), which provides that a record "on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately," "was made or adopted by the witness when the matter was fresh in the witness's memory," and "accurately reflects the witness's knowledge," is not excluded by the rule against hearsay and may be read into evidence.

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[11] U.S. CONST. amend. V.

Mil. R. Evid. 804(b)(1) provides another exception to the rule against hearsay for, *inter alia*, former testimony that:

> (A) was given by a witness at a trial, hearing, or lawful deposition, . . . and (B) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination. . . . [A] record of testimony given before a court-martial, court of inquiry, military commission, other military tribunal, or preliminary hearing under Article 32 is admissible . . . if the record of the testimony is a verbatim record.

B. Analysis

Although Appellee has not been confined, the Charge and Specification have never been dismissed and have remained pending since *Harrington I* was decided. Accordingly, Appellee's Sixth Amendment right to speedy trial has remained in effect throughout the time period relevant to the instant appeal.[12] *See Reed*, 41 M.J. at 451. Therefore, we turn to the military judge's assessment of the *Barker* factors.

1. Length of Delay

The military judge focused on two particular periods to find facially unreasonable delay: the "about 100 days" that elapsed between 4 February 2019, when the record was returned to Nellis AFB, and 13 May 2019, when the convening authority referred the Charge and Specification to trial;[13] and the 146 days that elapsed between the 15 October 2019 scheduled trial date and the rescheduled date of 9 March 2020 resulting from the granted defense motion for a continuance.[14]

With respect to the delay between 4 February 2019 and 13 May 2019, we agree with the military judge in certain respects. First, based on the record before us, it appears the Government approached the steps required to retry Appellee in a sequential manner, focusing first on contacting SSgt FC, then on the process to return Appellee to duty for trial, then on routing the referral to

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[12] Because Appellee fails in his burden to demonstrate prejudice to prevail under a Sixth Amendment analysis, we find it unnecessary to analyze the higher threshold to demonstrate a Fifth Amendment violation. *See Reed*, 41 M.J. at 452.

[13] The exact period is 98 days.

[14] To a lesser extent, the military judge also suggested the Government contributed to the first defense request for a continuance from 19 August 2019 until 15 October 2019 in order to give the newly appointed senior defense counsel time to prepare, because Appellee's 30 May 2019 IMDC request was not denied until 24 July 2019. However, the military judge does not appear to have factored this period in the "approximately 246 days" of delay he specified in his ruling on the motion for reconsideration.

the convening authority. According to the Government's own chronology, periods of up to a week or more passed without discernible progress toward the rehearing; there is little doubt the case could have been processed faster than it was. In addition, we agree with the military judge that, other than contacting SSgt FC through SVC channels to determine if she was willing to participate in a rehearing, it appears that prior to June 2019 the Government did little to prepare for actual litigation—for example, locating or contacting other witnesses. Furthermore, we agree with the military judge that in some respects the rehearing on the same Charge and Specification should have been simpler to prepare than the original trial, because it had been done before and no Article 32, UCMJ, hearing was required.

Moreover, we disagree with the Government's reliance on R.C.M. 707's 120-day deadline for bringing an accused to arraignment as establishing the standard for a presumptively unreasonable delay in a Sixth Amendment context. As the Court explained in *Barker*, the Sixth Amendment right to speedy trial is not amenable to bright-line rules, and "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530–31. The Government would have us apply the R.C.M. 707 standard out of its intended context—as an additional rule-based requirement for the Government to meet—and use it to limit an accused's ability to invoke the constitutional protections of the Sixth Amendment. We are not persuaded R.C.M. 707 is intended to shield the Government from scrutiny for what is an otherwise facially unreasonable delay.

However, we are also mindful that "[w]hile justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed." *Smith v. United States*, 360 U.S. 1, 10 (1959). There was a certain logic to how the Government proceeded through the steps of bringing Appellee to a rehearing. Ascertaining SSgt FC's willingness to participate was a legitimate starting point, and returning an accused from civilian life to active duty for trial may be a relatively unusual situation for a legal office to navigate. Although the Government was certainly not swift, even the military judge implied he did not find it had been "derelict or negligent" in its responsibilities.

Turning to the continuance from 15 October 2019 to 9 March 2020, the 146-day delay is certainly significant. However, whether it is "unreasonable" requires some consideration of what the delay was for. On the surface, the delay was requested by the Defense in order to secure the presence of LB, a witness the Defense desired. In addition, the specific date of 9 March 2020 appears to have been driven at least in part by trial defense counsel's availability.

Nevertheless, the military judge placed responsibility squarely on the Government's "wholly inadequate" efforts to secure the presence of LB. It is true the Government provided scant evidence of its pre-October 2019 efforts in that

regard. Moreover, in its response to the Defense's motion to dismiss, the Government "freely acknowledge[d] that the second Defense continuance was largely the result of the Government's inability to secure a necessary witness."

Yet there is also little evidence that the Defense specifically requested LB's presence prior to its motion to compel on 11 October 2019. The Defense had evidently relied on the fact that LB was on the Government's list of anticipated witnesses; however, the Government was under no obligation to call LB at trial or to keep him on its witness list. Although the military judge repeatedly asserted in his rulings that this court's opinion in *Harrington I* had "directed" that LB's testimony be admitted at the rehearing, this court's opinion did not require the admission of any evidence or the production of any witnesses. Rather, this court directed only that the findings and sentence of the first court-martial be set aside due to an error, that the record be returned, and a rehearing was authorized. *Harrington I*, unpub. op. at *22. Whether there would be a rehearing, and what evidence would be admitted at it, of course depended on subsequent decisions by the relevant authorities and upon the parties themselves.

In summary, we are less certain than the military judge of the existence of a facially unreasonable delay. Nevertheless, for purposes of our analysis we will assume the military judge did not err in this respect, that there was sufficient facially unreasonable delay to warrant an analysis of all the *Barker* factors, and that this factor weighs in Appellee's favor.

2. Reasons for Delay

Any facially unreasonable delay between 4 February 2019 and 13 May 2019 must be attributed to the Government, as the processing of the case was entirely in the Government's hands. There is no indication that Appellee resisted or obstructed the process of being returned to duty for trial. Similarly, as discussed above, although we find the Government's actions less patently offensive to the Sixth Amendment than the military judge evidently did, we assume for purposes of our analysis that the Government also bore primary responsibility for the delay from 15 October 2019 until 9 March 2020. Accordingly, we weigh this factor moderately in Appellee's favor.

3. Demand for Speedy Trial

The third factor is "[w]hether the appellant made a demand for a speedy trial." *Mizgala*, 61 M.J. at 129 (citing *Barker*, 407 U.S. at 530) (additional citation omitted). As the Government conceded in its response to the defense motion to dismiss, Appellee included a demand for speedy trial with a discovery request on 12 June 2019. Accordingly, we agree with the military judge's assessment that Appellee "met the minimum threshold," and this factor weighs in his favor, albeit "only very slightly."

4. Prejudice

It is with respect to the final *Barker* factor that we find the military judge erred. As an initial matter, we note that the burden to demonstrate the existence of prejudice rested with the Defense at trial. *See* R.C.M. 905(c)(2)(A); *Danylo*, 73 M.J. at 189. In addition, Appellee was not confined at any point, and we agree with the military judge that Appellee has not demonstrated specific anxiety or concern distinguishable from that experienced by other accuseds awaiting trial. *See Danylo*, 73 M.J. at 188–89. However, the military judge's conclusion that Appellee's ability to defend himself at the rehearing was impaired as a result of the delay was erroneous in two significant respects.

a. Finding of "Fact" that Delay "Likely" Caused Loss of Evidence

The first error is the military judge's purported finding of fact that "if the United States had proceeded expeditiously with bringing this case to a rehearing, it is likely that at least some of the exculpatory evidence which the [Court of Criminal Appeals] directed to be admitted at this hearing . . . would have been available for [Appellee's] use at this rehearing." We question whether the finding that something is "likely"—that is, a possibility—is a finding of "fact"—that is, something that actually exists—by the military judge for purposes of our review. *See United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) ("Military judges must be careful to restrict findings of fact to things, events, deeds or circumstances that 'actually exist' as distinguished from 'legal effect, consequences, or interpretation.'"). The evidence before the military judge simply did not establish at what point between the first trial in November 2016 and the motion hearing on 9 March 2020 either LB or TSgt KW lost their memories of the events during the Jenga game to which they previously testified. To be clear, the point is not that the military judge could not reach any conclusion regarding the existence of prejudice based on the limited evidence before him; our point is simply that we doubt that a finding that something was possible, even "likely," is a determination of "fact" which we are bound to review under a clear error standard.

Moreover, even assuming that a finding that something is "likely" is a finding of fact, we conclude the military judge's finding that "it is likely that at least some" of the lost evidence might have been preserved had the Government proceeded "expeditiously" is not supported by the record. With regard to TSgt KW, the record indicates that in November 2016 she remembered the January 2016 party and the Jenga game generally, and specifically remembered Appellee took a shot from SSgt FC's mouth. In June 2017, TSgt KW began experiencing symptoms of epilepsy. In June 2019, she was formally diagnosed with the disorder, a side effect of which can be a dramatic impairment of long-term memory. On 9 March 2020, TSgt KW remembered "almost noth-

ing" about the party, and could not remember the Jenga game at all. For purposes of analysis, even if we subtract the full 246 days the military judge refers to in his ruling on reconsideration—which effectively assumes the convening authority referred the case on the same day the record was returned to Nellis AFB—the rehearing would have convened around 7 July 2019, after TSgt KW's epilepsy had set in and, in any event, more than two and a half years after her previous testimony. We conclude any finding of fact that at some point between 7 July 2019 and 9 March 2020, and not earlier, it is "likely" TSgt KW lost the specific memory of Appellee taking a shot from SSgt FC's mouth is speculative and unsupported by the record.

Although the passage of time has had a less dramatic impact on LB's memory in general, our analysis is similar. In November 2016, LB testified that during the Jenga game SSgt FC lowered her pants, and that Appellee took shots from SSgt FC's buttocks and between her breasts. On 9 March 2020, LB still had some memory of the Jenga game, and remembered Appellee took a shot from SSgt FC's belly and vice versa, but he did not recall SSgt FC lowering her pants or the shots from her buttocks and breasts. The record provides no basis to conclude it is "likely" these memories were lost during the eight months between July 2019 and March 2020. Rather, it is equally if not more likely these memories were lost during the more than 31 months that elapsed between the first trial in November 2016 and July 2019—and again, this essentially assumes the case could have been referred as soon as it returned to Nellis AFB, which is not necessarily what "orderly expedition" required under the circumstances. *See Smith*, 360 U.S. at 10.

The record does not support a finding of "fact" that memories were "likely" lost as a result of the Government's facially unreasonable delay. Moreover, our review of the evidence indicates the Defense did not carry its burden to demonstrate that the memories were lost as a result of the facially unreasonable delay. *See Danylo*, 73 M.J. at 189 (citing *Doggett v. United States*, 505 U.S. 647, 654 (1992)).

b. Prejudice from LB's and TSgt KW's Lost Memories

Equally significant, we find the military judge erred in his conclusion that Appellee was actually prejudiced by the lost memories of LB and TSgt KW.

At trial and on appeal, the Government contends that the record of the prior testimony of TSgt KW and LB regarding the now-forgotten shots from SSgt FC's mouth, buttocks, and breasts, and the lowering of her pants, will be admissible under Mil. R. Evid. 803(5) and Mil. R. Evid. 804(b)(1). Therefore, the substance of the specific evidence that this court found in *Harrington I* had been erroneously excluded from Appellee's first trial will be available to the

Defense at the rehearing. The military judge did not deny that the prior testimony would be admissible under Mil. R. Evid. 803(5).[15] However, he "refuse[d] to require the Defense to use . . . [Mil. R. Evid.] 803(5) in order to mount their defense of [Appellee]." He explained his reasoning as follows:

> While the witness' [sic] former testimony may meet the definition of recorded testimony in order to permit its admissibility, this Court will not require that the Defense rely nearly-exclusively upon this rule as the sole source of the very information which the [Court of Criminal Appeals] has directed should now be admissible, while simultaneously leaving the Government free to attempt to prove its own case with live witnesses.
>
> . . . [T]his Court specifically notes that this Accused attempted to introduce substantial amounts of [Mil. R. Evid.] 412 evidence at his 2016 trial in an effort to show his own innocence. The Government opposed that effort, and was successful in having the potentially exculpatory evidence kept from the members. This Court will require the Government to live with its own success.
>
> [ ] This is because the Government's success was error, as the Air Force Court of Criminal Appeals has clearly instructed us through its unpublished opinion that authorized the instant rehearing.
>
> [ ] Now, the Government persists in attempting to further benefit from its own erroneous success, to the specific detriment of [Appellee] and despite [Appellee's] best efforts to the contrary at his first trial. If the Government were to prevail on the motion now before this Court, the outcome would be that [Appellee] would be forever foreclosed from presenting the exact evidence which (a) he was capable of presenting at his first trial, (b) he was prevented by the Government from presenting, and (c) the

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[15] The parties and military judge have devoted considerable attention to whether the prior testimony would also be admissible under Mil. R. Evid. 804(b)(1). In particular, the Government challenges the military judge's conclusion that the original trial defense team had an insufficiently similar motive to develop TSgt KW's and LB's testimony during the Mil. R. Evid. 412 motion hearing, as compared to the current defense team's intended use of the testimony on the merits at the rehearing. *See* Mil. R. Evid. 804(b)(1); *United States v. Hutchins*, No. 200800393, 2018 CCA LEXIS 31, at *51 (N.M. Ct. Crim. App. 29 Jan. 2018) (unpub. op.) (quoting *United States v. DiNapoli*, 8 F.3d 909, 914–15 (2d Cir. 1993)). However, the military judge apparently concluded the evidence would be admissible under Mil. R. Evid. 803(5), and we agree, which moots the question of admissibility under Mil. R. Evid. 804(b)(1). Accordingly, we need not resolve this question.

> Air Force Court of Criminal Appeals has found to be so important that it set aside his resulting conviction.
>
> [A]llowing this case to proceed against [Appellee], in the absence of any wrongdoing on the part of the Defense, would compound the Government's error even further. Moreover, it would specifically violate [Appellee's] Sixth Amendment rights and would permanently skew the fairness of this entire proceeding.

We find the military judge's reasoning problematic in several respects. First, it appears the military judge implicitly considered live testimony would be superior to recorded prior testimony, but he did not explain why this is so, and we are not convinced this is necessarily the case. The record of the prior motion testimony, which is the very evidence that prompted this court to set aside the original conviction, remains available to the Defense. Neither Appellee nor the military judge has identified any piece of relevant evidence of which *the substance* has been lost to the Defense as a result of the delay.

Second, as discussed above, this court's opinion in *Harrington I* did not mandate that any particular evidence must be admitted at a rehearing, or that Appellee was necessarily entitled to live testimony. *Harrington I* merely determined that Appellee had been prejudiced by the erroneous exclusion of evidence in the context of that particular trial.

Third, the military judge appears to lay at least some degree of responsibility for the erroneous exclusion of evidence at the first trial on the Government. This is unwarranted. Regardless of whether the Government opposed the introduction of the evidence, SSgt FC opposed it through her SVC, and the military judge was obliged to conduct a hearing and make an independent determination of admissibility. *See* Mil. R. Evid. 412(c)(2). The prior error was made by the previous military judge, not by the Government. We see nothing inappropriate in the Government having litigated the Mil. R. Evid. 412(c)(2) motion in good faith, such that equity somehow now favors Appellee as a result. Nor do we perceive that the Government is "persist[ing]" in pursuing any improper benefit, where it fully agrees with the admissibility of the prior testimony, and has expressed its willingness to stipulate to the prior testimony as fact.[16]

Fourth, in assessing the prejudice to Appellee's defense, it is appropriate to consider that the prior testimony of TSgt KW and LB does not stand alone. The prior testimony is part of a larger body of evidence available to the Defense to

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[16] Of course, this is not to suggest the Defense was under any obligation whatsoever to agree to such a stipulation. The point is simply that the Government's offer is some evidence that it was not seeking to capitalize on the previous error.

portray what happened between SSgt FC and Appellee during the Jenga game. In addition to the prior testimony regarding shots from the mouth, buttocks, and breasts, and SSgt FC lowering her pants, as of 9 March 2020, LB was able to testify Appellee took a shot from SSgt FC's belly, and SSgt FC from Appellee's. In addition, as of 9 March 2020, SSgt SC could testify that he saw Appellee take a shot from SSgt FC's mouth, buttocks, and "stomach." It is true that the military judge found SSgt SC's reliability as a witness to be "low," based on his in-court observations; but SSgt SC's testimony need not stand alone. In combination, the prior testimony of TSgt KW and LB, LB's testimony at the rehearing, and SSgt SC's testimony at the rehearing offer a fairly clear portrayal of the nature of the interactions between SSgt FC and Appellee during the Jenga game, a portrayal that goes beyond the evidence this court found relevant and admissible in *Harrington I*.

For the reasons stated above, we find the military judge erred in concluding that the Defense demonstrated prejudice.

5. Summary of *Barker* Factors

In summary, for purposes of our analysis we assume the existence of a facially unreasonable delay and we weigh the length of delay in Appellee's favor; we weigh the reasons for delay moderately in Appellee's favor; and we weigh the demand for speedy trial very slightly in Appellee's favor. However, for the reasons stated above, we do not find prejudice resulting from the delay because (1) Appellee has failed to demonstrate TSgt KW and LB lost their memories during the period of facially unreasonable delay, and (2) Appellee has failed to demonstrate the lost memories of TSgt KW and LB have actually prejudiced his defense at trial, in light of the availability of their prior testimony and other testimony that remains available. Moreover, weighing the factors together, we consider the absence of prejudice to outweigh the remaining factors that, taken together, only moderately favor Appellee. Accordingly, we find the military judge erred in granting the defense motion to dismiss.

III. CONCLUSION

The appeal of the United States under Article 62, UCMJ, 10 U.S.C. § 862, is **GRANTED**. The military judge's ruling to grant the defense motion to dismiss for violation of Appellee's right to speedy trial is **REVERSED**.

The record is returned to The Judge Advocate General for remand to the military judge for action consistent with this opinion.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court