IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Captain (O-3)
ZACHARY R. BRAUM,
United States AIR FORCE,
Appellant

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

Crim.App. Dkt. No. ACM 40434

USCA Dkt. No. _____/AF

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

DANIEL CONWAY
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates
20079 Stone Oak Parkway,
Suite 1005-506
San Antonio, TX 78258
(210) 934-8265 (UCMJ)
conway@militaryattorney.com
www.militaryattorney.com
USCAAF Bar Number 34771

SAMANTHA M. CASTANIEN
Captain, United States Air Force
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
samantha.castanien.1@us.af.mil
USCAAF Bar No. 37280

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Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.[1] This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On October 21-28, 2022, Captain (Capt) Zachary R. Braum (Appellant) was tried by officer members at a general court-martial at McConnell Air Force Base, Kansas. Appellant was convicted, contrary to his pleas, of three specifications of rape, three specifications of sexual assault, and one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920; three specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b; and one specification of reckless operation of an aircraft in violation of Article 113, UCMJ, 10 U.S.C. § 913. (Entry of Judgment).

The military judge sentenced Appellant to nine years confinement, forfeiture of all pay and allowances, a reprimand, and a dismissal. (R. at 1283-84; Statement of Trial Results). The convening authority took no action on the findings or the

[1] All references to the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the Manual for Courts-Martial, United States (2019 ed.) (hereinafter 2019 MCM), unless otherwise noted.

sentence. (Convening Authority Action). The Air Force Court affirmed the findings and sentence. (Appendix A).

Statement of Facts

Appellant, an Air Force pilot, and BE met in November of 2019. (R. at 545-46). BE was a single mother with children from two different men. (R. at 546, 600). Over the course of the next several months, their relationship progressed, BE and Appellant got engaged, and – by all external appearances – BE was extremely happy with the relationship. That changed on 12 July 12, 2020 when Appellant broke off their engagement after an argument about BE's phone. (R. at 903-04). Thereafter, BE launched a barrage of accusations against Appellant, alleging that he had abused her in various ways in the months leading up to their engagement.

Large portions of BE's accusations focused on Appellant's supposedly unilateral introduction of various forms of "BDSM" sex into the relationship. BE portrayed herself as a passive – often non-consenting – participant in these activities. In pretrial interviews with the prosecution, apparently before she became aware that the defense had copies of her text messages with Appellant, BE denied requesting or purchasing "BDSM" items or sex toys in her relationship with Appellant. (R. at 861-62). On cross examination, however, the defense presented multiple explicit text messages BE had sent to Appellant, graphically depicting individuals engaged in "BDSM" behavior, and referencing "BDSM," sex toys, and related activities. (R.

at 850-53); (Def. Ex. A). BE did not provide these text messages to the prosecution, nor inform the prosecution of their existence. (R. at 855). Nor BE did provide these text messages to law enforcement, even when specifically told access to her text messages with Appellant would help the investigation. (R. at 855-57).

The defense also introduced evidence that several "BDSM" themed sex toys had been purchased on BE's Amazon.com account on May 22, 2020. (Def. Ex. B) (Amazon.com records from BE's account). These items included a "Miss Darcy" brand "steel anal hook," a "stuffed leather gag," a 3-pack of steel "butt plug[s]," and rope. (Def. Ex. B). The timing of these purchases (May 22, 2020) placed them directly after the beginning of supposedly nonconsensual "BDSM" activities. *See generally* (Charge Sheet) (listing dates of allegations); *see also* (R. at 893) (noting BE's testimony that ball gag purchased on Amazon.com was a few days after Appellant nonconsensually used a different ball gag on her).

Despite these purchases on her Amazon.com account, BE denied that she had ever used an "anal hook" (R. at 861) and, when asked if she was familiar with the "Miss Darcy anal hook," claimed that this item had only recently been brought to her attention. (R. at 864). When confronted about the Amazon.com purchase of this exact item, BE denied that she had made the purchase or received the item. (R. at 864) ("I do not know because I did not receive it because I did not purchase that."). BE directly stated that she did not realize until recently that these items were on her

Amazon.com account. (R. at 868). The Amazon.com records reflect that the purchase was made in the early morning hours of May 22, 2020 (0732 UTC which is 1:32am CST). Despite BE's claim at trial that she only recently learned of the existence of the item, or the purchases on her Amazon.com account, BE texted Appellant a screenshot of the Amazon.com listing for the anal hook the same morning as the purchase was made:

(Def. Ex. A, page 4).

In June of 2020, Appellant and BE traveled to Tuscaloosa, Alabama, where BE had breast augmentation surgery (the operation occurred on June 20, 2020). (R. at 574, 603). Many of the charged sexual assaults occurred in the immediate aftermath of BE's surgery. (R. at 626-668). BE testified that Appellant had pressured her into the breast augmentation surgery, and that it was exclusively his idea. *See* (R. at 570, 603-04, 606). BE specifically testified that she did not like the

idea of the breast augmentation but did it because she thought it would help the relationship. (R. at 604, 606); *see also* (R. at 809) ("So, you testified that basically he forced you, or made you feel pressured, to get a breast augmentation? A. Correct."). When asked on cross examination if she had talked about getting a breast augmentation prior to meeting Appellant, BE flatly denied it. (R. at 809). However, the defense called a longtime friend of BE's (Ms. JJ) who testified that BE told JJ she was "very excited" about getting breast augmentation and that "it was something she had wanted for a long time" – seven years in fact. (R. at 1001-02).

BE testified at length about her physical limitations after the surgery, when she alleged many of the charged assaults occurred, attributing her inability to resist to these limitations. *See*, *e.g.*, (R. 626). She testified that she was "severely limited" during this recovery period and that was why she was unable to fight off Appellant's assaults. (R. at 846). BE testified that she was not going to the gym during this period. (R. at 846). The defense then confronted BE with a text message where she told Appellant she had gone to the gym on June 30, 2020. (R. at 846; Def Ex. A, page 72). BE acknowledged sending the message but stated she had lied in the message and had not actually gone to the gym. (R. at 846). When confronted with similar messages from July 1st and 2nd 2020, BE again stated she had lied in those messages as well. (R. at 846-47). BE testified that the last incidence of nonconsensual sexual activity occurred on July 10, 2020 and involved Appellant

taping her breasts together and handling them roughly, resulting in the incision opening up, severe bleeding, and physical trauma. (R. at 660-68). On cross-examination, the defense confronted BE with a text message from the very next day where she referenced lifting a "very heavy :) :)" case. (R. at 847; Def. Ex. A, page 90). No medical evidence corroborated BE's alleged injuries.

Large portions of BE's allegations of post-surgery sexual abuse involved Appellant using the pretext of massaging BE's breasts to initiate nonconsensual sexual conduct. *See* (R. at 626-68). BE reported that the first nonconsensual incident in this timeframe began when Appellant had forcefully and nonconsensually "massage[d] [her] breasts" resulting in significant pain and trauma and leading up to a particularly violent sexual assault. (R. at 627-39). Thereafter, BE testified there were additional times when Appellant "would come up to me and start massaging my breasts very roughly, and forcefully again" and use the massaging as a pretext for initiating nonconsensual sex. (R. at 639-40). BE testified that she "caught on" that the massaging of the breasts was just an excuse Appellant would use. (R. at 640). In seemingly direct contradiction to her testimony about Appellant's forceful initiation of breast massaging in this period, the defense introduced evidence that BE texted Appellant on July 2, 2020: "Guess you will need to massage my big titties to help me recover ;)". (Def. Ex. A, page 78).

Reasons to Grant Review

I. Can the government properly refuse to disclose relevant, non-privileged data in its possession, custody, and control on the basis that the witness who provided the data gave limited consent with respect to its use? If not, is relief warranted?

This issue presents an important question of law that has not been but should be addressed by this Court. C.A.A.F. R. 21(b)(5)(A). When a witness gives partial consent to provide data from an electronic device to law enforcement, can the government copy and take possession of *all* the data, but only look at – and only disclose to the defense – certain portions of it? If the government takes a full forensic extraction into its possession, custody, and control under such circumstances, do the provisions of R.C.M. 701 apply to the data? Or is there, as the military judge held, an extra-textual exception? *See* (App. Ex. XXXVII, page 11) (military judge ruling that "though not stated" in R.C.M. 701, "physical possession, custody, or control" was not enough to trigger the rule's discovery provisions.). Given the proliferation of electronic evidence, this issue is likely to recur, and this Court should provide guidance to the field.

Additional Background

In a joint interview with OSI and the Newton Police Department (NPD), BE consented to law enforcement reviewing location-data from her phone and signed a consent form to that effect. (App. Ex. XXXVII, page 2). The NPD officer explained

that the *entire contents* of her phone would be downloaded but that the search would be limited to the location-related information, in accordance with BE's consent. (App. Ex. XXXVII, page 2). Another NPD officer downloaded information from BE's phone and returned the phone to BE. (App. Ex. XXXVII, page 2). The downloaded information was placed on a flash drive that NPD kept as evidence. (App. Ex. XXXVII, page 2). Subsequently, OSI took possession of the location *and* the full extraction data and, upon learning of the existence of the forensic extraction, the defense moved to compel its discovery (which was in the possession of OSI at that time). (App. Ex. XXXVI); *see also* (App. Ex. XXXIX) (Supplement to defense motion). The government opposed the motion. (App. Ex. XXXVII). The military judge ultimately denied the motion, finding that the data was not in the possession, custody, or control of military authorities, despite being directly held by OSI. (App. Ex. XXXVII).

Standard of Review

Questions of statutory interpretation to include the interpretation of provisions of the R.C.M. are questions of law this Court reviews de novo. *H.V.Z. v. United States*, __ M.J. __, 2024 WL 3491143 at *3-4 (C.A.A.F. July 18, 2024) (citations omitted). Issues of prejudice from erroneous evidentiary rulings are reviewed de novo. *United States v. Cano*, 61 M.J. 74, 75 (C.A.A.F. 2005) (citation omitted)

Law

R.C.M. 701(a)(2) provides:

> (A) After service of charges, upon request of the defense, the government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is *within the possession, custody, or control of military authorities* and—
>
> (i) the item is relevant to defense preparation;
>
> (ii) the government intends to use the item in the case-in-chief at trial;
>
> (iii) the government anticipates using the item in rebuttal; or
>
> (iv) the item was obtained from or belongs to the accused.

(emphasis added). R.C.M. 701(f), addresses "Information not subject to disclosure," and provides that: "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives."

"Where an Appellant demonstrates that the government failed to disclose discoverable evidence in response to a specific request the Appellant will be entitled to relief unless the government can show that nondisclosure was harmless beyond a reasonable doubt." *Cano*, 61 M.J. at 75 (citations omitted).

Two additional overarching principles are also relevant to this issue. First, discovery in the military justice system is broad by design. *See United States v.*

Stellato, 74 M.J. 473, 481 (C.A.A.F. 2015) (citing *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004)) (additional citations and quotation marks omitted). Second, "Because privileges 'run contrary to a court's truth-seeking function,' they are narrowly construed." *See United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)).

Argument

1. Under the Plain Meaning of R.C.M. 701, the Complete Phone Extraction was Within the Government's Possession, Custody, or Control.

Precedent is clear that military courts' interpretation of the R.C.M. "must be" rooted in their text and interpreted in accordance with the "plain meaning" thereof. *United States v. Vargas*, 83 M.J. 150, 154 (C.A.A.F. 2023) (interpreting R.C.M. 701 using its plain meaning); *see also United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) (interpreting R.C.M. 701: "This Court 'adhere[s] to the plain meaning of any text—statutory, regulatory, or otherwise."). "A fundamental rule of statutory interpretation is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Only in "very limited circumstances," in which the result is "so gross as to shock the general moral or common sense," may courts "refuse to apply the literal text of a statute [as] doing so would produce an absurd result." *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021).

Under the plain meaning of the rule, the data in question was "within the possession, custody, or control of military authorities." R.C.M. 701(a)(2)(A). The complete extraction of BE's phone was *in the OSI office*. The military judge acknowledged as much, stating that the data *was* within the "physical possession, custody, or control" of military authorities. (App. Ex. XXXVII, page 11). Nevertheless, as explored below, the military judge expressly went beyond the plain meaning of the rule to add in a nonexistent additional requirement.

2. <u>The Military Judge Expressly went Beyond Plain Meaning, adding a Nonexistent Requirement to the Rule.</u>

Despite the obvious conclusion that the data – which was in the OSI office – fell within the plain meaning of R.C.M. 701(a)(2)'s "possession, custody, or control" requirement, the military judge re-wrote the rule, to require "'legal' possession, custody, or control":

> The defense's primary argument in this regard is that the full version of the digital copy of BE's cell phone is within the possession, custody, or control of military authorities and is relevant to defense preparation. The issue turns on whether physical possession, custody, or control suffices or if "legal" possession, custody, or control, though not stated in RCM 701(a)(2)(A), is necessarily implied. I find that it is, that the evidence the defense seeks is not legally in the possession, custody, or control of military authorities, and, therefore, that the defense is not entitled to inspect this evidence pursuant to RCM 701.

(App. Ex. XXXVII, page 11). The military judge expressly noted that his newly invented "'legal' possession, custody, or control" requirement was "not stated" in

the R.C.M. (App. Ex. XXXVII, page 11). Military judges are not empowered to add language to the R.C.M. If the President wishes to add the "legal" caveat to the rule, along with appropriate definitions and other safeguards, the President is free to do so.

3. The President has Delineated Exceptions to the Rule, but None are Applicable.

What the President has done is delineate specific, clearly defined exceptions to the general rules on discoverability. R.C.M. 701(f), addresses, "Information not subject to disclosure," and provides that: "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." *Id.* (emphasis added). Relatedly, Section V of the Military Rules of Evidence delineates categories of evidence protected from disclosure or presentation at trial. *See* Manual for Courts-Martial, United States (2019 ed.) (MCM), pt. III, § V. None of the listed categories apply here.

4. This Court Should Find that Disclosure was Required.

This Court should find that, under the plain meaning of the rules, and consistent with the dual principles of broad discovery and narrow privileges, the government cannot take relevant non-privileged information into its possession, custody, and control, but nevertheless refuse to disclose it because the witness who

provided it gave limited consent with respect to its use. To hold otherwise would allow the government to re-write its own discovery obligations via ex-parte agreement with witnesses. *See generally Stellato*, 74 M.J. at 487 ("[A] trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness instead of the Government.").

While this appears to be an issue of first impression, the simplest answer here is correct: if the government takes relevant, non-privileged information into its possession, it cannot simultaneously shelter it from disclosure. While Appellant appreciates that there may be policy concerns with the framework of discovery provided by the R.C.M., particularly in the context of forensic extractions, it is not the role of military judges or appellate courts to engage in activism to achieve policy goals. If the policy making branches of government want to edit the rules, they are free to do so.

5. <u>The Air Force Court's Prejudice Analysis was Flawed.</u>

The Air Force Court avoided the merits of the issue, jumping straight to prejudice, but its prejudice analysis was flawed. (Appendix A at 9). The Court relied heavily on the fact that Appellant already had access to messages between him and BE – reasoning that an additional copy of the messages (from BE's phone) would be cumulative. (Appendix A at 9). This ignores, however, that BE repeatedly

accused the defense of altering / modifying the copy of the messages they presented at trial. *See* (R. at 858) (BE alleging the messages were "choppy and incomplete," "things are missing," and they were "misleading"); (R. at 589) ("I felt like there were a lot of deleted messages throughout the whole stack . . . ."); *see also* (R. at 887-88) (further allegations by BE that the messages provided by the defense were "incomplete and misleading"). The government cannot allow its primary witness to accuse the defense of presenting incomplete evidence, then demur that withheld evidence that would have established the truth of the matter would have been merely cumulative on the allegedly incomplete evidence presented at trial.

Furthermore, the limited electronic data the defense did have at trial proved highly contradictory to BE's allegations, demonstrating the importance of such evidence to the defense. Meanwhile the government possessed more electronic data that the defense was denied access to. Appellant had a vital interest in having access to information in government files that might undermine the credibility of his accuser. *See United States v. Warda*, 84 M.J. 83, 95 (C.A.A.F. 2023) ("[S]ervicemembers who are accused of domestic violence have a vital interest in ensuring that they have access to information in government files that may significantly undermine the credibility of the complaining witness in the eyes of the trier of fact.") (Ohlson, C.J., concurring).

Prejudice is increased by interplay with other aspects of this case. As noted above, BE alleged the text messages provided by Appellant were altered or incomplete. *See* (R. at 589, 858, 887-88). It is doubly prejudicial to allow a witness to accuse the defense of manipulating evidence, but then deny the defense the necessary discovery to confirm or contradict the accuracy of the evidence. Additionally, trial counsel criticized the defense in closing for asking BE to provide her phone data as evidence: "Having her entire public life exposed and then defense want to say, 'Oh we should have -- you should have exposed your life more. You should have given over your phone. You should've let us parading [sic] the entire contents of your phone in this courtroom.[']" (R. at 1144). It is triply prejudicial for the government to withhold relevant, non-privileged data from the defense, allow a government witness to accuse the defense of manipulating evidence, and then criticize the defense in front of the panel for seeking the withheld evidence.

The Air Force Court stated that the presence of other helpful information was "speculative." (Appendix A at 9). The reason it is speculative, however, is because the information was withheld and therefore is not in the record. It is the *government's burden* to prove harmlessness. *See*, *e.g.*, *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004) ("[T]he appellant will be entitled to relief unless *the government can show* that nondisclosure was harmless beyond a reasonable doubt.) (emphasis added).

To the extent the record is incomplete, it is because the government erroneously withheld the discovery. The government cannot turn around and meet its burden due to the gaps in the record attributable to the very error at issue. If the government can withhold discovery and then meet its prejudice burden by stating prejudice is "speculative," there would never be prejudice. It is almost tantamount to the government presenting no evidence at trial then stating reasonable doubt was speculative. This is not how the beyond a reasonable doubt burden works.

The Air Force Court acknowledged that questions remained as to the contents of the denied discovery, but instead of answering those questions, it simply resolved the matter in favor of the party that bore the burden of proof (the government). When faced with a post-trial dispute, including a discovery dispute, where extra-record facts may be relevant, the service courts have factfinding powers to gather such facts as are required to reach an informed decision. *See generally United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). At the very least, the proper course of action in this case was to order factfinding on the contents of the wrongfully withheld discovery so that a non-speculative prejudice analysis could be performed. *See, e.g.*, *United States v. Baldwin*, 54 MJ 308 (C.A.A.F. 2001) (where appellant's allegations were sufficient to raise a post-trial issue, a *DuBay*[2] hearing was required

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[2] *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

to develop a full record of material facts to determine appellant's entitlement to relief).

II. Whether trial counsel's arguments amounted to prosecutorial misconduct that warrants relief.

This Court should grant review because the litigation and resolution of this case revealed significant confusion as to the parameters of proper versus improper argument. This case presents a good opportunity to clarify this confusion, particularly because it involves so many different categories of improper argument and, therefore, could provide broad guidance on the subject. Additionally, it seems the Air Force Court decided portions of the issue in conflict with military and federal precedent by finding no error in arguments that closely mirror arguments found to constitute plain and obvious error in prior cases. C.A.A.F. R. 21(b)(5)(B)-(C).

Even in the categories of argument the Air Force Court found constituted plain and obvious error (expressing personal opinion and vouching, going beyond the evidence of record, injecting improper considerations), the *government* maintained there was no error.[3] The fact that experienced government appellate counsel

[3] The government maintained in its brief there was no error in *any* of the arguments, but conceded at oral argument that a single argument was improper: trial counsel's statement to the members that the Air Force could not "approve" of the charged conduct. *See* (R. at 1139).

adamantly defended these arguments further demonstrates the level of confusion surrounding this important topic.

The Air Force Court's prejudice analysis revealed additional confusion. The Air Force Court assumed error in multiple improper arguments of constitutional dimension, but then failed to conduct the corresponding harmless beyond a reasonable doubt prejudice analysis.

Standard of Review

This Court reviews prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, it reviews for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). Even under the plain error standard, after the first two prongs of the plain error test are established, "the burden shifts to the Government to convince [the Court] that this constitutional error was harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 33-35 (C.A.A.F. 2005) (citations omitted).

Law and Argument

This case involves several categories of improper argument to include expressing personal opinions and vouching (R. at 1097, 1099, 1111, 1116-18, 1120, 1128, 1131, 1138, 1142-45, 1212-13), comment on Appellant's exercise of constitutional rights (R. at 1095, 1144, 1209), burden shifting (R. at 1135, 1212),

going beyond the evidence of record (R. at 1092-93, 1095, 1107, 1111, 1142-43, 1210-11), and injecting improper considerations (1139, 1211-13). The categories of improper argument most relevant this Court's grant decision are further discussed below.

1. Comment on Appellant's Failure to Testify

"'It is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense.'" *Carter*, 61 M.J. at 33 (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A.1990)) (alteration in original). Use of words like "uncontradicted" or "uncontroverted" to characterize evidence that only the accused could rebut may constitute an improper comment on failure to testify. *United States v. Carter*, No. ACM 35027, 2003 WL 22495803, at *3 (A. F. Ct. Crim. App. 17 Oct. 2003) (unpub. op.), *aff'd by* 61 M.J. 30 (C.A.A.F. 2005) (reversing impacted conviction for plain error). This prohibition is also echoed in the discussion to R.C.M. 919(b): "Trial counsel may not comment on the accused's exercise of the right against self-incrimination or the right to counsel. *See* Mil. R. Evid. 512. Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused."

Despite these clear prohibitions, trial counsel in this case argued: "[Appellant] is a man who has some dark and frankly violent sexual appetites. BDSM. He likes

BDSM. That's clear -- *it's uncontroverted*." (R. at 1095) (emphasis added). Where, as here, the only rebuttal as to the dynamics of the couple's sex life could come from the accused[4] – who did not testify – such argument is plain and obvious error of constitutional dimensions. *See Carter*, 2003 WL 22495803, at *3; R.C.M. 919(b). Given that caselaw and the R.C.M. specifically prohibit such argument, the error is plain and obvious.

Despite the "black letter" prohibition on this type of argument from caselaw and the R.C.M., the Air Force Court found trial counsel's argument was not error. (Appendix A at 15). First, the Air Force Court reasoned that there was "a factual basis for trial counsel's argument" based on BE's testimony and the sex toys recovered by OSI. (Appendix A at 15). This, however, is a non sequitur. "Uncontroverted" arguments are not prohibited because they lack a factual basis – they are prohibited because the implication is that the silent accused has not denied them.

Second, the Air Force Court reasoned that:

> forms of evidence besides Appellant's testimony could have rebutted Government's characterization of his sexual proclivities. For example, testimony from Appellant's previous partners, any other findings related to these interests (*e.g.*, web searches, purchase histories from Appellant's

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[4] Trial counsel clearly understood this dynamic, asking in voir dire: "Would you all agree that sometimes the perpetrator and victim are the only two witnesses of a crime?" (R. at 244).

accounts) could have been presented by the Government or the Defense to undermine or support these assertions.

(Appendix A at 15). These rationalizations are easily dispatched. The Air Force Court's first example, testimony from previous sexual partners about Appellant's "sexual proclivities," would violate the rules of evidence, as evidence of past conduct is not admissible to prove "proclivity" and as, the government itself acknowledged in its brief, Appellant's generalized sexual proclivities were not a character trait at issue. *See* (Answer to Assignments of Error at 39 (May 16, 2024) at 39) ("the issue of whether Appellant liked or disliked BDSM was never an issue at trial"). The Court's other examples are even more tortured. Neither appellant's "web searches" nor "purchase histories" could *prove the negative* of trial counsel's argument: that appellant did *not* have "dark" and "violent" sexual appetites. Would the defense introduce all appellant's web searches and then argue none of them were dark of violent? This would not be a realistic, or even permissible, evidentiary presentation, especially as his "proclivities" were not relevant in the first place. Allowing such amorphous exceptions to the clear rule against "uncontroverted" arguments would essentially destroy the rule altogether. This Court should grant review and reject the lower court's labored rationalizations of a clearly improper argument.

2. Do the Right Thing by Convicting

In *United States v. Cruz*, the Ninth Circuit found plain error where the prosecutor concluded his rebuttal argument with: "[Cruz] is guilty of what he is charged with. Find him guilty and *do the right thing* and make him finally take responsibility for what he did." 592 Fed.Appx. 623, 624 (9th Cir. 2015) (emphasis added). This was the *only* comment the Ninth Circuit analyzed—and it reversed.

"By stating 'do the right thing' the prosecutor improperly expressed his personal opinion to the jury." *Id.* (citing *United States v. McKoy*, 771 F.2d 1207, 1210–11 (9th Cir. 1985)). "Without reference to the evidence or the burden of proof, the 'do the right thing' statement improperly urged the jury to convict on the basis of the prosecutor's subjective belief of what was 'right,' as opposed to the persuasive force of the evidence." *Id.* (citation omitted).

In the present case, trial counsel ended his rebuttal argument with a charge to the panel nearly identical to that the Ninth Circuit reversed for in *Cruz*:

Cruz:	This Case:
"[Cruz] is guilty of what he is charged with. Find him guilty and do the right thing and make him finally take responsibility for what he did."	"I ask that you do the right thing in finding Captain Braum accountable and finding him guilty of all charges and specifications."

(R. at 1213). Despite trial counsel mirroring nearly verbatim the argument federal case law held to constitute plain and obvious error, the Air Force Court rationalized that there was no error here because defense counsel had stated in closing that the panel was "going to want to do the right thing" and "get it right." (R. at 1205). As

such, the Air Force Court reasoned: "Trial counsel's comment about doing 'the right thing' seems to be in response to this argument by trial defense counsel and was not improper." (Appendix A at 16-17).

There is a substantial distinction between defense counsel's generic references to the panel's desire to do the right thing and trial counsel – as the representative of the government – telling the panel that the right thing to do was convict. Defense counsel's vanilla statements do not appear improper and any connection between defense counsel's off hand comments and trial counsel's forceful and apparently pre-scripted conclusion to his rebuttal argument is by no means clear. However, even accepting the Air Force Court's premise that trial counsel's argument was a response to defense counsel's, the Supreme Court has directly rejected this sort of "response-in-kind" justification, emphasizing that the prosecutor's recourse to improper defense arguments is to object "rather than respond in kind" – defense argument does not grant the prosecutor a "license to make otherwise improper arguments." *United States v. Young*, 470 U.S. 1, 12 (1985). The Air Force Court's excusal of trial counsel's argument as "a response to this argument by trial defense counsel" violates this binding precedent. This Court should grant review to clarify that otherwise improper government arguments cannot be excused as merely responding to improper defense arguments, and to correct the Air Force Court's error in so holding.

3. The Air Force Court Applied the Wrong Prejudice Standard for Improper Comment on Exercise of Constitutional Rights

After concluding various arguments were or were not erroneous, the lower court dealt with the remaining arguments by presuming error and jumping straight to prejudice. (Appendix A at 17) ("We presume, without deciding, that each of the remaining alleged improper statements were clear and obvious error and subsume those statements in our analysis below regarding whether the argument in its entirety resulted in prejudice to Appellant."). Within this category, were several arguments criticizing appellant's exercise of his constitutional rights by cross examining the named victim and attempting to seek relevant evidence. (R. at 1144, 1209). Most blatantly, the trial counsel criticized the defense for asking BE to provide her phone as evidence during cross examination: "Having her entire public life exposed and then defense want to say, 'Oh we should have -- you should have exposed your life more. You should have given over your phone. You should've let us parading [sic] the entire contents of your phone in this courtroom.[']". (R. at 1144).

The Air Force Court seemingly agreed this argument was erroneous – or at least presumed error for the sake of reaching a prejudice analysis. (Appendix A at 17). However, in the very next sentence after presuming error, the Air Force Court explicitly disclaimed constitutional error: "As we do not find that trial counsel's comments pertain to Appellant's constitutional rights, we need not determine

prejudice using the constitutional review standard of harmless beyond a reasonable doubt." (Appendix A at 17) (citation omitted).

Contrary to the Air Force Court's holding, such arguments *are* constitutional in nature for prejudice purposes. For example, in *United States v. Garcia*, the Army Court of Criminal Appeals (Army Court) found the government's argument blaming the accused for "his exercise of his Sixth Amendment right to confront witnesses against him" was "constitutionally impermissible" and applied the prejudice test for constitutional error. No. ARMY 20130660, 2015 WL 4940266, at *7-10 (A. Ct. Crim. App. Aug. 18, 2015) (mem. op.). Indeed, the heading in the Army Court's opinion discussing this subject was: "**Constitutionally Impermissible Argument**." *Id.* at *7 (bold in original).[5] This is consistent with the general rule that improper argument about the exercise of constitutional rights is constitutional error. *See United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (testing for prejudice under the constitutional "harmless beyond a reasonable doubt" standard for improper trial counsel comment on appellant's exercise of constitutional right). This Court should grant review to reinforce the prejudice standard applicable to such improper

[5] Trial counsel's argument in this case that the trial was "not a pleasant experience" for BE was quite similar to the "constitutionally improper argument" in *Garcia*, where the trial counsel argued it was "not fun" for the victim to be cross-examined. *Compare* (R. at 1144), *with Garcia*, No. ARMY 20130660, 2015 WL 4940266, at *7.

arguments and to cure the error in the Air Force Court's application of the incorrect standard.

III. Whether relief is warranted where the military judge gave an erroneous instruction regarding the permissible use of prior inconsistent statements and trial defense counsel failed to object or request the proper instruction.

There appears to be mass confusion within the military justice system that unobjected to inconsistent statements are admitted substantively.[6] *See generally Diaz v. United States*, 223 U.S. 442, 450 (1912) (holding hearsay admitted without objection can be considered without limitation). This Court should address the issue so that this error stops pervading the military justice system. C.A.A.F. R. 21(b)(5)(A)-(C).

Additionally, the Air Force Court's opinion creates a circuit split of sorts where it found waiver of the same instructional error the Army Court reversed for in *United States v. Powell*, ARMY 20200006, 2022 WL 702904, at *2 (A. Ct. Crim. App. Mar. 9, 2022) (mem. op.). *See* C.A.A.F. R. 21(b)(5)(B) (service court decided a question of law in a way that conflicts with another service court). In both *Powell* and this case, defense counsel failed to object to the same erroneous instruction, but the service courts reached exact opposite results. *Compare Powell*, No. ARMY

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[6] Though anecdotal, civilian appellate defense counsel has raised an essentially identical error in five of the last ten appeals, indicating a disturbingly systemic issue.

20200006, 2022 CCA LEXIS 144, at *6 (finding plain error based on the "completely erroneous instruction"), with (Appendix A at 3) (finding waiver even though the instruction was identical to that in *Powell*). This Court should intervene where the service courts are reaching contrary results with respect to the same underlying error.

Additional Background

A large volume of evidence regarding prior inconsistent statements was presented at trial. If the panel could have considered them substantively, BE's narrative would have been very different.

Of particular relevance, the following evidence was admitted, all without objection:

(1) Prior inconsistent statements to law enforcement to the effect that nothing BE was uncomfortable with had occurred prior to May 17, 2020, only after that date (R. at 719, 731-33, 787-88);

(2) Prior inconsistent statements in which BE expressed interest in "BDSM" and Appellant massaging her breasts – the very modes of sexual assault she later alleged (R. at 850-53, 875, Def. Ex. A);

(3) Prior inconsistent statements, made during litigation of a civilian protective order, in which BE stated no sexual abuse had taken place before June 24th,

right after her surgery[7] and a written narrative statement where she described some physical abuse but did not mention *any* sexual abuse (R. at 736-37, 746-49);

(4) Prior inconsistent statements by BE of telling people that she wanted to marry Appellant, that she was very in love with him, and that she was excited about a future with Appellant (R. at 740);

(5) Prior inconsistent statements by BE where she had not disclosed a supposedly life-threatening incident she testified to at trial in "18 hours" of interviews with law enforcement or in the FAA complaint she had filed against Appellant (R. at 801);

(6) Prior inconsistent statements where BE never told a friend (JJ) about any abuse prior to July 12, 2020, but conversely told JJ how amazing appellant was (R. at 745); and

(7) Prior inconsistent statements where (in *all* prior statements) BE had never alleged that Appellant had pinched her nose to cut off her air until the weekend before trial (R. at 871-72).

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[7] In addition to being admitted without objection, this prior statement was also sworn, an additional basis for its substantive admission. (R. at 736-37).

Despite the lack of objection to these prior inconsistent statements, the military judge instructed the panel that they could only be used to evaluate BE's credibility, and specifically forbade the panel from considering them substantively:

> You may have heard evidence that before this trial,
>
> [BE], [RE], and [KW], and [JJ] may have made statements that may be inconsistent with their testimony here in court.
>
> If you believe that inconsistent statements were made, you may consider the inconsistency in deciding whether to believe that witness' in-court testimony. You may not consider the earlier statements as evidence of the truth of the matters contained in the prior statements. In other words, you may only use them as one way of evaluating the witness' testimony here in court, you cannot use them as proof of anything else.

(R. at 1086). Defense counsel failed to object to this erroneous instruction. (R. at 1057-1058.)

Standard of Review

Whether a panel was properly instructed is a question of law reviewed de novo. *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019). Allegations of ineffective assistance of counsel are reviewed de novo. *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citation omitted).

Law

Prior inconsistent statements are generally only admissible for impeachment purposes but "may be considered [as substantive evidence] for any relevant purpose" when, inter alia, "made by the witness under oath subject to perjury" or "admitted

without objection . . . ." *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-11-1, n.2 (29 Feb. 2020) [Benchbook]; *see also Powell*, 2022 WL 702904, at *2 (finding plain error and setting aside findings where military judge erroneously instructed that prior inconsistent statements offered without objection could only be used for impeachment); *United States v. Cox*, 42 M.J. 647, 652 (A.F. Ct. Crim. App. 1995) ("Hearsay is inadmissible, but may be considered by the court if admitted without objection, unless there is plain error.") (citation omitted); *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (holding hearsay admitted without objection allows the factfinder to give full probative value to the testimony); *see also* Mil. R. Evid. 105 ("If the military judge admits evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - the military judge, on timely request, must restrict the evidence to its proper scope and instruct the members accordingly.") (emphasis added).

The Benchbook's treatment of this issue is consistent with over a century of Supreme Court precedent which holds, "When evidence of that character [hearsay] is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible." *Diaz*, 223 U.S. at 450. The Federal Circuit Courts of Appeals have consistently applied this holding to the Federal Rules of Evidence. *See, e.g.*, *United States v. Ariza-Ibarra*, 605 F.2d 1216, 1223 n.8 (1st Cir. 1979) ("Defendants' failure to object when this information came in initially left the

jury free to consider it. . . .") (citations omitted); *Gronowski v. Spencer*, 424 F.3d 285, 294 n.1 (2d Cir. 2005) (noting that certain statements "fall outside the hearsay rule" because "defendants did not object on this ground at trial . . . .") (citations omitted); *NLRB v. B.A. Mullican Lumber and Mfg. Co.*, 535 F.3d 271, 281 (4th Cir. 2008) (failure to object to hearsay evidence at trial meant it was admitted substantively); *United States v. Gresham*, 585 F.2d 103, 106 (5th Cir. 1978) ("Since this evidence, though hearsay, came in without objection, it is to be considered and given its natural probative effect as if it were in law admissible.") (quotation omitted); *Hayden v. Chalfant Press, Inc.*, 281 F.2d 543, 548 (9th Cir. 1960) ("It is well settled that hearsay evidence which is admitted without objection and without a motion to strike may be considered by the trier of fact.") (citations omitted).

Prior inconsistent statements may include directly contradictory statements, prior omissions of important facts, or other forms of inconsistency. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) ("[W]hether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position."); *see also United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (reaffirming inconsistent statements can include "diametrically opposed answers," an "inability to recall," and "equivocation").

Argument

In this case, many important inconsistent statements at issue were "admitted without objection," and, as such, it is black letter law that they could be considered substantively.[8] The military judge's instructions, however, erroneously forbade substantive use. (R. at 1086). The military judge simply did not recognize the distinction, despite the Benchbook's explicit explanation in para. 7-11-1, n.2. The instruction the military judge should have given reads:

> You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with his/her/their testimony here in court. I have admitted into evidence (testimony concerning) the prior statements(s) of (state the name of the witness(es)). You may consider (that statement) (these statements in deciding whether to believe (that witness's) (these witnesses') in-court testimony.
>
> You may also consider (that statement) (these statements) along with all the other evidence in this case.
>
> (For example if a witness testified in court that the traffic light was green and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider the prior statement as evidence that the light was, in fact, red, as well as to determine what weight to give the witness's in-court testimony.)

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[8] Some of the prior inconsistent statements, made in the course of the protective order hearing, were also "made by the witness under oath subject to perjury" and therefore there was a separate basis for their substantive consideration. *See* (R. at 736-37).

Id. The military judge not only omitted this correct instruction but also gave an entirely incorrect instruction, forbidding substantive use. (R. at 1086) ("You may not, however, use the prior statement as proof that the light was red.")

Appellant was prejudiced. The erroneous instructions left the panel without the "accurate, complete and intelligible statement of the law," and deprived Appellant of fair consideration of the evidence in this case. The error deprived Appellant of substantive evidence directly relevant to charges. For example, if the panel had substantively accepted BE's acknowledged September 14, 2020 statement, omitting any mention of sexual abuse, it would have eliminated all the Article 120 allegations. *See* (R. at 746-49). If the panel had substantively accepted BE's acknowledged September 22, 2020 statement that the first time Appellant had raped her was June 24, 2020, it would have eliminated the majority of the Article 120 allegations. *See* (R. at 736). Additionally, if the panel had substantively accepted BE's acknowledged inconsistent statements about being happy with Appellant and how amazing he was – during the period she now alleges he was repeatedly assaulting her – it would have eliminated all the charges, except for the final July 12, 2020 fight. If the panel had substantively accepted BE's prior inconsistent statements expressing interest in "BDSM" or Appellant "massag[ing] my big titties" – the very modalities of sexual assault she later alleged were violently

forced upon her – it clearly would have drastically impacted their deliberations. *See, e.g.*, (R. at 850-53); (Def. Ex. A).

Under substantively identical circumstances, the Army Court of Appeals recently found plain error and reversed in *Powell*: "[T]he military judge committed plain error by providing, in contrast to a correct legal instruction, a 360 degree completely erroneous instruction—that all the witnesses' prior inconsistent statements were limited in purpose to only determining witness credibility and 'could not be use[d] as proof of anything else.'" No. ARMY 20200006, 2022 WL 702904, at *2 (alteration in original). Here, the military judge equally gave an equally "completely erroneous instruction" on a critical issue. This was plain error.

Alternatively, to the extent this Court finds waiver, ineffective assistance of counsel is an alternate path to the prejudice analysis. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture . . ."); *Everett v. Beard*, 290 F.3d 500, 514 (3d Cir. 2002) (noting counsel may be ineffective for failing to object to or propose instructions.).[9] When the Military Judge failed to give the correct instruction, and

[9] Trial defense counsel provided affidavits about their failure to object which, respectfully, further reveal the extent of confusion amongst military practitioners on this issue. *See* (Dec. of BH, AN, and KM).

gave an objectively wrong instruction, defense counsel should have stepped in to correct the situation.

IV. Appellant could not be guilty of the elements of Specification 1 of Charge I without also being guilty of the elements of Specification 4 of Charge I. Nevertheless, the panel convicted him of the former specification but acquitted him of the latter. Can the finding of guilty as to Specification 1 of Charge I be affirmed under these circumstances?

This Court's precedent is clear that the service courts cannot find as fact any allegation on which the factfinder has acquitted. *United States v. Bennitt*, 74 M.J. 125, 129 (C.A.A.F. 2015); *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994). This case presents the question of how this principle applies to a situation where, due to the use of generic charging language, the elements of one specification are completely subsumed within the elements of another – and the panel acquits on the specification with the broader language.

This issue is especially pertinent following *United States v. Mendoza*, __ M.J. __, 2024 WL 4487558 (C.A.A.F. Oct. 7, 2024), and the pending case of *United States v. Casillas*, USCA Dkt. No. 24-0089/AF (C.A.A.F. 2024) (arguing the definition of consent produces a due process problem of fair notice in the charging scheme). Given the lack of differentiation between the overlapping charging language, it is not even completely clear which conduct the panel convicted of. Since *Mendoza*'s holding is relatively narrow, Appellant's case allows this Court to

refine its jurisprudence on the important issue of the definition of consent and the differentiation between the various theories of liability under Article 120, UCMJ.

Standard of Review

Whether a finding of not guilty precludes a reviewing military court from performing a factual sufficiency review is a question of law reviewed de novo. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010) (citation omitted).

Law

Under the version of Article 66(c), UCMJ, applicable to this case:

> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

10 U.S.C. § 866(c) (2018).

Under this structure, this Court may only affirm a finding of guilty after finding it "correct in . . . fact . . . ." *Id.* However, the service courts "cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." *Bennitt*, 74 M.J. at 129 (quoting *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003)); *see also Smith*, 39 M.J. at 451-52 ("[A CCA] may

not make findings of fact contradicting findings of not guilty reached by the factfinder.").

Similarly, the Double-Jeopardy Clause "'prohibit[s] a reviewing court from rehearing any incidents for which the accused was found not guilty.'" *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012) (quoting *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009)) (alteration in original). When the government's charging scheme results in findings of guilty and not guilty to specifications with overlapping elements, it can create a "framework for a potential double jeopardy violation." *Id.* If the factfinder acquits of one specification, but convicts on another with overlapping elements, it can become "impossible for the [CCA] to conduct a factual sufficiency review of [the relevant specification] without finding as fact the same facts the members" acquitted on. *Id.* at 43. While, as the CAAF recognized in *Stewart*, "generally consistency in a verdict is not necessary," this is distinguishable from the ability of the CCA to find convictions correct in fact when doing so would necessarily require finding as fact element(s) upon which the members acquitted. *Id.* at 43.

Argument

The specifications at issue contain the following elements:

Specification 1, Charge I	On divers occasions between on or about 17 May 2020 and on or about 25 May 2020	Appellant committed a sexual act upon BE by penetrating her vulva with his penis	Appellant did so by using unlawful force against	(Found Guilty)
Specification 4, Charge I	On divers occasions between on or about 17 April 2020 and on or about 4 July 2020	Appellant committed a sexual act upon BE by penetrating her vulva with his penis	Appellant did so without BE's consent	(Found Not Guilty)

See (R. at 1063-65) (findings instructions). Appellant *could not* be guilty of the elements of Specification 1 without also being guilty of the each and every element of Specification 4. The date-range charged in Specification 1 is a subset of the date-range alleged in Specification 4. The alleged sexual acts are identical. The modality alleged in Specification 4 (non-consent) is a subset-of the modality alleged in Specification 1 (unlawful force). As the factfinder affirmatively found Appellant not guilty of at least one element of Specification 4, the Air Force Court could not affirm any conviction that would require a finding of guilty an element the factfinder acquitted on.

It seems the government may have intended these specifications to deal with separate sub-sets of allegations. In closing, the government argued that

Specification 1 of Charge I addressed "the incidents with the bullwhip and the ball gags," even while acknowledging that "this happened a lot . . . occasions when he used unlawful force in having this vaginal penetration." (R. at 1113). Conversely, trial counsel argued that Specification 4 of Charge I was "specifically referring to the flying incidents." (R. at 1120). However, there is nothing in the charging language nor the military judges' instructions that would distinguish the elements at issue. (R. at 1072) (showing the military judge read the entire (g)(7) definition of consent for Charge I and instructed the definition relates to that Charge "even when it's not actually stated in those specifications."); (R. at 1078) (showing the military judge read that evidence that BE consented may be considered for all of Charge I).

Layered on top of the problem that, to affirm, the CCA had to find as fact at least one element on which the panel affirmatively acquitted, the broad definition of consent under Article 120(g)(7) further blurs the lines between the overlapping charging language. Specification 1 of Charge I charged the use of unlawful force while Specification 4 of Charge I charged without consent. However, the definition of nonconsent under Article 120(g)(7), relevant to Specification 4 of Charge I, includes "submission resulting from the use of force." And the evidence underlying all the factual allegations falling within the overlapping date ranges involved the use of some degree of force. While the Air Force Court presumed the conviction for Specification 1 of Charge I ("unlawful force") related to the "bullwhip and ball gag"

allegations, the "flying incidents" also explicitly involved testimony about physical resistance and the use of force. (Appendix A at 12; R. at 55-71). Because Article 120(g)(7)'s definition of nonconsent explicitly ties it to the use of force, there is little, if any, distinction between the factual underpinnings of a nonconsent theory resulting from the use of force and an unlawful force theory.

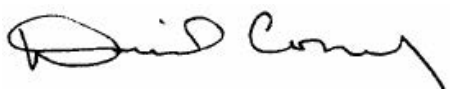
This is important both to the ambiguity of the result and, in light of *Mendoza* and similar to *Casillas*, the failure to sufficiently differentiate between various theories of liability under Article 120, UCMJ. The definition of consent allowed the panel members to convict as "rape" the "sexual-assault"-associated conduct. This is regardless of trial counsel's arguments because consent is defined to include the "use of force . . . does not constitute consent." Article 120(g)(7)(a), UCMJ. The law and instructions equated the theories of liability, such that it enabled the panel to convict Appellant under Specifications 1 and 4 for the same conduct, without fair notice. Following *Mendoza*, this is a due process violation. *See* 2024 WL 4487558 at *6 (holding the government cannot charge one theory and argue another without violating an accused's due process rights). If the panel followed the military judge's instructions, as they are presumed to do, the panel could have convicted on Specification 1 (rape) for conduct that was intended to be pursued under Specification 4 (sexual assault).

Where, as here, the definition of consent consumes other specifications or theories of liability, submitting both to the panel without clarity deprives an accused of fair notice and makes appellate review impossible.

The government controls the charging language and was free to use more specific language to differentiate between allegations. The government cannot, however, secure the benefits of using broad charging language, while simultaneously securing the advantages of more specific language merely by ex-parte decree in closing argument. If the panel followed the military judge's instructions, as they are presumed to do, the acquittal with respect to Specification 4 of Charge I necessarily means the panel acquitted on at least one element necessary to guilt for Specification 1 of Charge I. As the panel acquitted Appellant of at least one element of Specification 4, the Air Force Court could not re-animate that element to affirm the conviction on Specification 1. Built into this is the due process concern about the overlapping theories.

Conclusion

WHEREFORE, Appellant requests this Court grant review.



DANIEL CONWAY
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates
20079 Stone Oak Parkway,
Suite 1005-506
San Antonio, TX 78258
(210) 934-8265 (UCMJ)
conway@militaryattorney.com
www.militaryattorney.com
USCAAF Bar Number 34771

SAMANTHA M. CASTANIEN
Captain, United States Air Force
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
samantha.castanien.1@us.af.mil
USCAAF Bar No. 37280

Certificate of filing and service

I certify that an electronic copy of the forgoing was electronically sent to the Court and served on the Government Appellate Division on December 6, 2024.

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Suite 1005-506
Woodbridge, VA 22192
(586) 930-8359
hockenberry@militaryattorney.com
www.militaryattorney.com
USCAAF Bar Number 37385

Certificate of Compliance with Rule 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains brief contains 9665 words and complies with the typeface and type style requirements of Rule 37.

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Suite 1005-506
Woodbridge, VA 22192
(586) 930-8359
hockenberry@militaryattorney.com
www.militaryattorney.com
USCAAF Bar Number 37385

Appendix A (Air Force Court Opinion)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40434

UNITED STATES
Appellee

v.

Zachary R. BRAUM
Captain (O-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 10 October 2024[1]

Military Judge: Mark F. Rosenow (pretrial); Shad R. Kidd (trial).

Sentence: Sentence adjudged 28 October 2022 by GCM convened at McConnell Air Force Base, Kansas. Sentence entered by military judge on 6 December 2022: Dismissal, confinement for 9 years, forfeiture of all pay and allowances, and a reprimand.

For Appellant: Scott R. Hockenberry, Esquire (argued); Major Jenna M. Arroyo, USAF; Captain Samantha M. Castanien, USAF; Brian A. Pristera, Esquire.

For Appellee: Major Jocelyn Q. Wright, USAF (argued); Colonel Matthew D. Talcott, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, DOUGLAS, and MASON, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge DOUGLAS joined.

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[1] The court heard oral argument in this case on 2 July 2024.

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

MASON, Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of three specifications of rape, three specifications of sexual assault, and one specification of abusive sexual contact; three specifications of domestic violence; and one specification of reckless operation of an aircraft, in violation of Articles 120, 128, and 113, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 928, 913.[2,3] The military judge sentenced Appellant to a dismissal, confinement for nine years, forfeiture of all pay and allowances, and a reprimand. Appellant requested deferment of the automatic forfeitures for a period of four months. The convening authority denied Appellant's deferment request and took no action on the findings or sentence.

Appellant raises nine issues on appeal which we have reworded and reordered: (1) whether the military judge erred by denying a defense motion to compel disclosure of contents of BE's phone or dismiss all charges and specifications with prejudice; (2) whether Appellant's convictions are factually sufficient; (3) whether it was plain error for trial counsel to ask a witness whether the witness felt the victim had misled her about a collateral matter after the victim was cross-examined and denied lying about the collateral matter; (4) whether the military judge's instructions regarding prior inconsistent statements were erroneous; (5) whether trial defense counsel were ineffective when they failed to recognize the proper uses of prior statements; (6) whether Appellant's conviction for rape in Specification 1 of Charge I is ambiguous; (7) whether trial counsel's findings argument amounted to prosecutorial misconduct; (8) whether Appellant's sentence that includes consecutive confinement terms is unlawful; and (9) whether Appellant was denied his right to a unanimous verdict.[4] Additionally, we consider another issue, (10) whether Appellant is entitled to relief for delays in post-trial processing in accordance with *United*

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

[3] Appellant was acquitted of two specifications of sexual assault and two specifications of domestic violence. The language "on divers occasions" was excepted by the military judge pursuant to R.C.M. 917 for one of the sexual assault convictions. The members found Appellant guilty by excepting the language "on divers occasions" for one of the domestic violence convictions.

[4] Appellant raises issue (9) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), or in the alternative, *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

We have carefully considered Appellant's allegations of error as to issues (3), (5), and (9) above and find they do not require discussion or relief. *See United States v. Matias,* 25 M.J. 356, 361 (C.M.A. 1987). Regarding issue (4), we find that Appellant waived this issue. *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020). As to the remaining issues, we find no error materially prejudicial to Appellant's substantial rights and affirm the findings and sentence.

I. BACKGROUND[5]

Appellant met a woman, BE, around Thanksgiving 2019 through an online dating application. They began dating and their relationship quickly progressed. BE described the early stages of their sexual relationship as "sweet and romantic."

In mid-April 2020, Appellant was piloting a small aircraft with BE seated next to him as a passenger. Appellant wanted to join the "Mile High Club," which was described as an informal group of individuals who have engaged in sexual intercourse while flying. During one flight, the two engaged in sexual intercourse.[6] Later, Appellant bragged about finally joining the Mile High Club and presented BE with a Mile High Club pin. On a subsequent occasion, Appellant forced his penis to penetrate BE's mouth while the two were on the small aircraft. BE attempted to resist but eventually stopped because she felt that there was a danger of crashing the airplane. In his flight logbook, Appellant used stars to mark the dates and times when he and BE engaged in sexual acts while flying. BE identified those entries during her testimony.

On 16 May 2020, Appellant and BE were at a friend's house, visiting and drinking alcohol. Appellant asked BE if she would be willing to "spice up [their] life in the bedroom." Later that evening, while they were at Appellant's house, Appellant engaged in sexual intercourse with BE. The intercourse began consensually. However, unbeknownst to BE, Appellant retrieved a bullwhip.[7] While penetrating her, Appellant wrapped the bullwhip around BE's neck several times and applied pressure causing her to pass out. BE eventually

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[5] The following background is drawn primarily from BE's trial testimony, supplemented by other evidence from the record of trial.

[6] BE testified that this intercourse was nonconsensual. The members acquitted appellant of the offense encompassing this conduct.

[7] BE subsequently learned that Appellant kept a box under his bed with certain items that he occasionally used during sex. She was not allowed to see what was in the box.

regained consciousness and noticed semen on the inner part of her thigh and her vagina. The next day, Appellant commented that the bullwhip was "awesome," winked at BE, and walked away. In her testimony, BE explained she did not respond because she was scared. BE did not consent to Appellant strangling her with the bullwhip or continuing to penetrate her while she was passed out.

Around 20 May 2020, Appellant and BE engaged in sexual intercourse. It began consensually. Without discussion or permission, Appellant put a ball gag over her head and in her mouth. BE did not fight it because she thought that "it will get over faster" if she did not. She could breathe with the ball gag on as it had holes in it. A few days later, about 25 May 2020, while having sexual intercourse, Appellant again put the ball gag on BE. This time was different. BE attempted to breathe through the holes in the ball gag, but was unable to breathe. Appellant started pinching her nose and holding it closed. BE struggled, moving her head side-to-side, but Appellant held her nose and appeared to become more excited by her struggle. When Appellant finished having sexual intercourse with BE, he removed the ball gag. He asked BE, "[D]id you notice anything different this time?" BE said that she could not breathe. Appellant chuckled and said, "[Y]eah, I put Q-tips in here and I cut the ends off." The broken cotton swabs blocked the breathing holes. BE told Appellant that it was scary, to which Appellant replied, "You'll be fine."

Despite these incidents, BE remained with Appellant because she thought he was charming and sweet beyond these occurrences. Also, BE, a single mother, appreciated having Appellant as a father figure for her two children. BE perceived that when Appellant drank alcohol, he was a different person.

In the course of their relationship, the topic of breast augmentation arose in their conversations. They decided that BE would get a breast augmentation and scheduled the surgery for 24 June 2020. After the surgery and upon her return home, Appellant was responsible for helping BE recover. In the days following the surgery, Appellant sexually assaulted BE on multiple instances in a variety of different ways: orally, vaginally, and anally with his penis, finger and an enema injector.[8] BE was physically unable to resist because she was in post-surgical recovery. In one instance, Appellant unexpectedly placed a plastic bag over BE's head and began suffocating her. After he removed the bag, he immediately penetrated her mouth with his penis.

[8] BE's testimony provided details of the individual instances including how Appellant's penetration induced her vomiting, which was met with Appellant backhanding her to the face and saying later, "that was hot."

Following the days of sexual and physical assault and abuse, BE had decided that she needed to escape. She noted that Appellant had an upcoming deployment. Her plan was to leave with her children and cut off communications with him when he left, and at that point, she would never have to see him again.

Before the scheduled deployment, on 12 July 2020 Appellant and BE attended a family gathering. While there, Appellant was sprayed by a skunk. Appellant showered and attempted to remove the smell before going to bed. He and BE agreed that he would sleep in another room because he could not get rid of the skunk smell. Before Appellant went to the other room, he wanted a goodnight kiss from BE. BE reluctantly gave him a quick kiss. This was not enough for Appellant. He snatched BE's phone away from her and pushed her causing her to hit her shin on the bed frame. Hearing the commotion, BE's eight-year-old daughter came to the room. She began screaming and crying. She told Appellant to stop hurting her mother. Appellant said it was BE's fault but that he still loved her (the daughter). The daughter said, "[I]f you love me, you will stop hurting my mom." The daughter ran downstairs and called BE's mother, who lived close by. Meanwhile Appellant started filling a bag with items. During the exchange, Appellant said to BE, "[D]on't call 911, you'll ruin my career," and returned BE's phone. Within a few minutes, BE's mother and BE's brother arrived at the home. BE's mother took BE's daughter out of the home. BE's brother supervised as Appellant filled the bag and left the home.

The next day, BE talked to a family friend who worked for a local civilian law enforcement agency about what happened. An investigation ensued.

II. DISCUSSION

A. Defense Motion to Dismiss or Compel Disclosure or Production

Appellant alleges the military judge erred by denying his motion to dismiss or, in the alternative, ordering production or disclosure to trial defense counsel the full extraction of BE's cell phone.

1. Additional Background

Following BE's report to civilian law enforcement, the agency contacted the Air Force Office of Special Investigations (OSI). OSI became the lead agency for the investigation. OSI received information regarding BE's prior interview with the civilian law enforcement agency. On 29 July 2020, the two agencies conducted a joint interview of BE. BE referenced her phone multiple times in answering questions. They asked BE if she would consent to provide information from her phone. BE consented to the investigators downloading location-related information. They explained to BE that the entire contents of the phone would be downloaded but that the search would be limited to the

location-related information, in accordance with BE's consent. Investigators downloaded information from BE's phone and returned the phone to her. The information downloaded was placed on a flash drive that the civilian law enforcement agency kept as evidence.

Pretrial, the Defense repeatedly requested disclosure of BE's cellphone extraction. Trial counsel responded to these requests. Prior to 1 June 2022, trial counsel was apparently not aware BE's cell phone data had been extracted. On 1 June 2022, trial counsel advised trial defense counsel that the extraction contained more than location data, but BE's consent was limited to location data and thus the Government's review of the extraction was limited to location data. In response to the defense request, but limiting the response consistent with BE's consent parameters, trial counsel disclosed thousands of pages of location data to trial defense counsel.

Trial defense counsel moved to dismiss all charges and specifications with prejudice alleging discovery violations by trial counsel. Alternatively, trial defense counsel requested that the military judge order disclosure of the full contents of BE's cell phone or, if the military judge found that the contents were not in the custody and control of the Government, production of the evidence pursuant to Rule for Courts-Martial (R.C.M.) 703. The military judge found that the Government was negligent in not knowing about the cell phone data and informing the Defense of its existence. After having received evidence and hearing arguments on the motion, the military judge determined that the granted continuance of four months remedied the neglect and denied the motion to dismiss. The military judge also denied the motion to compel disclosure or production.

2. Law

In reviewing discovery matters, we conduct a two-step analysis: "first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (quoting *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004)). The Government shall, after service of charges, upon a defense request, permit inspection of items "relevant to defense preparation." R.C.M. 701(a)(2)(B)(i). *Roberts* is instructive on how to review a military judge's discovery decision:

> An appellate court reviews a military judge's decision on a request for discovery for abuse of discretion. *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999). A military judge abuses his discretion when his findings of fact are clearly erroneous, when

> he is incorrect about the applicable law, or when he improperly applies the law.

59 M.J. at 326.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "A military accused also has the right to obtain favorable evidence under Article 46, UCMJ, 10 U.S.C. § 846 (2006), as implemented by R.C.M. 701–703." *Coleman*, 72 M.J. at 186–87 (footnotes omitted). Accordingly, "Article 46[, UCMJ,] and its implementing rules provide greater statutory discovery rights" to a military accused than those afforded by the Constitution. *Id.* at 187 (citations omitted); *see also Roberts*, 59 M.J. at 327 (analyzing the "the broad nature of discovery rights granted the military accused under Article 46," UCMJ).

Article 46(a), UCMJ, states, "the trial counsel, the defense counsel, and the court-martial shall have *equal* opportunity to obtain witnesses and other evidence. . . ." (Emphasis added).

"Trial counsel must exercise due diligence in discovering [favorable evidence] not only in his possession but also in the possession . . . of other 'military authorities' and make them available for inspection." *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004) (alterations in original) (quoting *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993)). "[T]he parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). The scope of this due-diligence requirement is generally limited to:

> (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specific type of information within a specified entity.

Id. (internal quotation marks and citations omitted).

Where the defense makes a "specific [discovery] request for the undisclosed information . . . [,] we apply the heightened constitutional harmless beyond a reasonable doubt standard." *Coleman*, 72 M.J. at 187 (citations omitted).

In addition to the discovery rights described above, R.C.M. 703 provides that "[e]ach party is entitled to the production of evidence which is relevant

and necessary." R.C.M. 703(e)(1); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." Mil. R. Evid. 401. "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." *Rodriguez*, 60 M.J. at 246 (internal quotation marks and citation omitted). The moving party is required, as a threshold matter, "to show that the requested material existed." *Id*.

3. Analysis

a. Dismissal

The military judge did not abuse his discretion in denying the defense Motion to Dismiss with Prejudice all charges and specifications. As the military judge correctly noted, dismissal is a drastic remedy that is not appropriate where alternative remedies exist that can render an error harmless. *United States v. Stellato*, 74 M.J. 473, 488 (C.A.A.F. 2015) (citation omitted). Regarding trial counsel's failure to timely disclose the location data to trial defense counsel, the military judge granted a continuance for the length of time requested in the joint motion. He correctly concluded that the trial defense counsel failed to show prejudice in light of this continuance because they had "the same amount of time [as the trial counsel] to review the evidence, adjust its strategy if necessary, and perform additional investigation if necessary." He also found that the Defense failed to substantiate their claim that their defense was "irrevocably damaged." Rather, the military judge discussed the matters before the court regarding specific witnesses and counsel availability and found that "the [D]efense has failed to demonstrate that the continuance already granted does not suffice to remedy any prejudice caused by the [G]overnment's negligence."

Regarding the nondisclosure of the other contents of the extraction of BE's cell phone, for the reasons discussed below, the nondisclosure, if erroneous, did not result in any prejudice. Therefore, dismissal would not have been an appropriate remedy.

b. Disclosure or Production

The military judge found that disclosure of the entirety of the extraction of BE's phone was not required. In doing so, he concluded that only the location data, which BE consented to provide, was in the "'legal' possession, custody, or control" of the Government, noting that while such requirement was not stated in R.C.M. 701(a)(2)(A), it was "necessarily implied." Appellant argues that the military judge erred by concluding that there was a distinction in trial counsel's obligations to disclose items in the possession, custody, or control of the

Government versus items in the "legal" possession, custody, or control of the Government under the discovery rules. We need not decide whether a trial counsel has an obligation to disclose in one instance and not the other to resolve Appellant's claim of error. We can presume error and resolve the matter by evaluating prejudice.

Here, the nondisclosure of the contents of BE's phone was harmless beyond a reasonable doubt. Trial defense counsel sought and argued that they were entitled to the entirety of the extraction of BE's phone. However, they already had the text message conversation between BE and Appellant. This conversation included pictures included in the text message conversations about which they were seeking additional disclosure or production. The military judge noted that the Defense was already in possession of the text messages between BE and Appellant. At trial, BE was cross-examined with those 91 pages of text message exchanges, including the pictures. The military judge recognized,

> The [D]efense already has the evidence that BE had the pictures, sent them to [Appellant], and sent the messages to [Appellant]. Evidence that BE sent the pictures carries with it the logical inference, as the [D]efense suggests, that she had them on her phone, from which it can be argued that they were sent to her or sought out and downloaded by her.

Furthermore, the military judge found,

> [t]he [D]efense failed to demonstrate (1) that the evidence sought of how the pictures allegedly sent from BE got onto BE's phone exists [on the full extraction], (2) that any such evidence is necessary, particularly in light of the evidence already available to the [D]efense, or (3) that the possibility of the existence of such evidence which might be of any assistance to the [D]efense warrants the production of the [full extraction of the phone].

In other words, in addition to the disclosed location data, the Defense already had the evidence that was likely to be found on the phone that would be helpful to them in the form of the pictures and the 91 pages of text message exchanges. That there was any additional helpful information to the Defense on the remaining portions of the extraction was highly speculative. Our review of the record leaves us convinced that the nondisclosure of the full extraction of the phone sought by the Defense, if it was erroneous, was harmless beyond a reasonable doubt.

B. Factual Sufficiency

1. Law

We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [this] court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399). This court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted); *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

2. Analysis

Appellant challenges the factual sufficiency of each of his convictions.[9] He essentially argues that BE's testimony could not be believed beyond a reasonable doubt because it was uncorroborated, inconsistent, and undercut by a witness who opined that BE was untruthful.

Appellant argues first that the "crucial points of BE's allegations were uncorroborated." It is unremarkable that conclusive evidence related to the specific elements of some of the offenses outside of BE's testimony was not presented. In cases involving physical or sexual assault where only two people are typically present, it is often the case that such evidence is unavailable. However, to say that BE's testimony was uncorroborated is inaccurate. The Government presented evidence that the mechanisms used to complete offenses (e.g., bullwhip and ball gag) were found exactly where BE said they could be found and admitted pictures of those items. The Government presented evidence that supported pertinent parts of BE's testimony, specifically, a picture of the Mile High Club pin Appellant gave to BE as well as the logbook marked with stars on applicable dates, which matched the dates BE provided as the

[9] Appellant does not assert the military judge incorrectly instructed on the elements of each of the specifications at issue. As Appellant's challenge to the factual sufficiency of his convictions centers on BE's credibility, we address those arguments without identifying each element of each offense of which Appellant was convicted.

offense dates. The Government presented a picture of the bruising to BE's shin after being pushed into the bedframe. Additionally, the Government presented testimony from BE's mother, brother, and daughter who corroborated the 12 July 2020 incident. The evidence presented sufficiently corroborated BE's testimony to support a finding that the convictions were factually sufficient.

Appellant next argues that BE's testimony was inconsistent. Trial defense counsel was fully permitted to explore potential inconsistencies with BE on cross-examination at trial. BE provided reasonable explanations for the inconsistencies raised. Review of BE's testimony in full, and the examination related to inconsistencies in particular, does not raise reasonable doubt in our minds as to Appellant's guilt of the offenses.

Finally, Appellant points to BE's former friend's testimony that BE was untruthful. The members were also presented with testimony from this witness that at some point BE blocked the witness on social media, making the witness feel cast aside, and that the witness did not like that. The members were presented with this testimony and were able to assess the witness's credibility. This testimony alone or in conjunction with the remainder of the evidence in this case does not raise a reasonable doubt in our minds as to Appellant's guilt of the offenses.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41.

C. Ambiguous Conviction

1. Law

We review de novo whether a verdict is ambiguous such that it precludes us from performing a factual sufficiency review. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010) (citation omitted).

A Court of Criminal Appeals (CCA), in the course of its review process, cannot conduct "a factual sufficiency review of an [appellant's] conviction when 'the findings of guilty and not guilty do not disclose the conduct upon which each of them [were] based.'" *United States v. Trew*, 68 M.J. 364, 366 (C.A.A.F. 2010) (quoting *United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003)).

"With minor exceptions for capital cases, a 'court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit.'" *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) (quoting *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997)).

"A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence

supports at least one of the means beyond a reasonable doubt." *Id.* (citing *United States v. Griffin*, 502 U.S. 46, 49–51 (1991)) (additional citation omitted).

"It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members." *United States v. Rodriguez*, 66 M.J. 201, 205 (C.A.A.F. 2008) (quoting *Brown*, 65 M.J. at 359).

2. Analysis

Appellant argues that we cannot conduct our review of his conviction for rape by using unlawful force on divers occasions between 17 May 2020 and 25 May 2020 because he was charged and acquitted of sexual assault by committing a sexual act on divers occasions between 17 April 2020 and 4 July 2020. Appellant argues that he could not be guilty of the elements of the rape as alleged in Specification 1 of Charge I without also being guilty of each and every element of Specification 4 of Charge I. We disagree.

Review of the record makes it clear that the factual basis for the rape specification at issue was Appellant's conduct related to his use of the bullwhip and ball gag. BE's testimony closely matched the charged timeframe, indicating that the bullwhip incident happened on the evening of 16 May 2020 (into the early morning hours of 17 May 2020), that the first ball gag incident occurred about 20 May 2020 and the second about 25 May 2020. Further, trial counsel made it known to the members that this conduct was the basis for this rape specification.[10]

This clarity is emphasized by the fact that trial defense counsel did not request or move for a bill of particulars, request more specific findings instructions related to this issue, or object to trial counsel's findings argument asserting that they were not on notice of which conduct substantiated this offense. The conviction for Specification 1 of Charge I is not ambiguous and we are fully able to complete our review of this conviction.

D. Trial Counsel Argument

Appellant alleges that trial counsel made several improper arguments and as a result, requests the court to set aside the findings and sentence. His brief raises five categories of allegations of improper argument, including:

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[10] In his findings argument, trial counsel said, "The rape referred to those times were [sic] forcefully using the whip, forcefully using the ball gag. Now we[']re just talking about times of penetration of her vulva where she didn't consent, and those are specifically referring to the flying incidents."

comments on Appellant's exercise of his rights; burden shifting; expressing personal opinions, vouching, and bolstering; going beyond the evidence of record; and injecting improper considerations.

Trial defense counsel did not object to any portion of the trial counsel's arguments or request any additional instructions in light of any of the arguments presented.

1. Law

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citations omitted). A prosecutor's interest "in a criminal prosecution is not that [the Government] shall win a case, but that justice shall be done." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

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

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

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

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

If we find a prosecutor's argument "amounted to clear, obvious error," we then determine "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Voorhees*, 79 M.J. at 9 (internal quotation marks and citations omitted). "For constitutional errors, rather than the probability that the outcome would have been different, courts must be confident that there was *no reasonable probability* that the error *might have contributed* to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). That is, "where a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in *Chapman*." *Id.* at 460 (quoting *United States v. Jones*, 78 M.J. 37, 45 (C.A.A.F. 2018)). In analyzing prejudice from a prosecutor's improper argument, we consider: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184).

"Absent evidence to the contrary, [we] may presume that members follow a military judge's instructions." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

"[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

In a plain error analysis, the most straightforward way of resolving an allegation of prosecutorial misconduct may be to do so based on prejudice. *Palacios Cueto,* 82 M.J. at 335.

2. Analysis

Appellant urges us to find that trial counsel's arguments were, in part, comments on Appellant's constitutional rights. He points first to trial counsel's use of the word "uncontroverted" when referring to Appellant's sexual preferences as well as trial counsel's arguments regarding BE's refusal to turn over her cell phone. Specifically, trial counsel stated,

> He is a man who has some dark and frankly violent sexual appetites. BDSM. He likes BDSM. That's clear -- it's uncontroverted. OSI told you about how they went into his home. Right? They find the whips, the ball gags, the harnesses -- everything. Clearly Captain Braum likes BDSM.

Appellant relies on our decision in *United States v. Carter*, No. ACM 35027, 2003 CCA LEXIS 257 (A.F. Ct. Crim. App. 17 Oct. 2003) (unpub. op.), where we held that the trial counsel's repeated characterization of the evidence as

"uncontradicted" and "uncontroverted" was an improper comment upon Appellant's exercise of his right to remain silent. This case is significantly distinguishable from *Carter*. Here, trial counsel's singular use of the word "uncontroverted" was not a comment—directly, indirectly, or by innuendo—on the fact that Appellant did not testify. BE's testimony as well as the seizure by investigators of items associated with this type of sexual activity provided a factual basis for trial counsel's argument. Furthermore, forms of evidence besides Appellant's testimony could have rebutted Government's characterization of his sexual proclivities. For example, testimony from Appellant's previous partners, any other findings related to these interests (*e.g.*, web searches, purchase histories from Appellant's accounts) could have been presented by the Government or the Defense to undermine or support these assertions. Thus, we find trial counsel's comment on the state of the evidence in this particular case was not improper.[11]

Appellant next points to trial counsel's rebuttal argument inviting the trial defense counsel to "please explain in the host of lies that you claim there to be, why is she lying about what happened to her?" He argues that such an argument shifts the burden to the Defense to disprove his guilt. We are mindful that we must view argument by counsel "within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Baer*, 53 M.J. at 238. First, this comment asserts a deficiency in trial defense counsel's argument in that BE did not have a motive to lie. This comment urges the trial defense counsel to explain this motive, if any, to the members. Second, this comment was made in rebuttal minutes after trial defense counsel presented closing argument wherein he accused BE of lying, deceiving, and misleading trial counsel, the Defense, and the members. These assertions were made no fewer than 15 times. The record plainly demonstrates that trial counsel's rebuttal comment here was in direct response to trial defense counsel's argument that BE was lying. This was not a burden shift. It was a response to the highly emphasized theory that BE "lied to [the court members]. She lied to the prosecutors. She lied to [trial defense counsel] and she lied to law enforcement." We hold that trial counsel's invitation to trial defense counsel to refer to evidence in the record to substantiate

[11] We emphasize that the mere use of the words "uncontradicted" and "uncontroverted" do not raise *per se* error. However, we note that trial counsel who choose to utter them wade into dangerous waters.

his repeated (and mostly improper) assertions that BE was lying was a fair response.[12]

Beyond allegations that trial counsel improperly commented on Appellant's constitutional rights, Appellant alleges that trial counsel expressed his personal opinion, vouched, and bolstered BE's testimony; went beyond the evidence of record; and injected improper considerations. The first category of comments relates to trial counsel stating in different variations that BE was telling the truth. Our superior court has made clear that trial counsel assertions in this way are obvious error. *Voorhees*, 79 M.J. at 12.

The next category of comments relates to trial counsel's arguments essentially providing "expert-like" commentary about victimology in domestic violence cases, dynamics of "BDSM" sexual relationships, and alcoholism. The inferences trial counsel seems to make are not reasonably raised by the evidence and were, therefore, error.

Appellant also points to trial counsel comments that inject improper considerations. Trial counsel argued in relation to the reckless operation of an aircraft offense, "*This is not the kind of flying that can be approved of by the Air Force.* A pilot in the Air Force. That is reckless operation." (Emphasis added). This argument is obvious error.[13]

Appellant alleges impropriety in trial counsel's rebuttal argument, "And so again members *I ask that you do the right thing* in finding [Appellant] accountable and finding him guilty of all charges and specifications." (Emphasis added.)

We note that trial defense counsel had argued earlier in his closing argument,

> [Y]ou're going to become -- looking at all the other evidence that makes you have that uncomfortable feeling, and you're going to want to do the right thing. That's human nature you're going to want to do the right thing. But that burden is for you, so tomorrow when you wake up, you don't have to think, "Did I get it right?"

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[12] It is clear and obvious error for a counsel (trial or defense) to assert that a witness is telling the truth or is lying. *Voorhees*, 79 M.J. at 10. Counsel may discuss the evidence and emphasize what the evidence supports, but their personal opinions on the veracity of a witness have no proper place in a court-martial proceeding.

[13] During oral argument before this court, government appellate counsel conceded error with regards to this comment.

Trial counsel's comment about doing "the right thing" seems to be in response to this argument by trial defense counsel and was not improper.

Appellant points to other comments by trial counsel. We need not address each of those individually. We presume, without deciding, that each of the remaining alleged improper statements were clear and obvious error and subsume those statements in our analysis below regarding whether the argument in its entirety resulted in prejudice to Appellant. As we do not find that trial counsel's comments pertain to Appellant's constitutional rights, we need not determine prejudice using the constitutional review standard of harmless beyond a reasonable doubt. *Tovarchavez*, 78 M.J. at 460. Rather, we apply the plain error prejudice analysis to determine "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Voorhees*, 79 M.J. at 9 (internal quotations marks and citations omitted). To do so, we evaluate "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184). We find that there is not a reasonable probability that, but for the errors, the outcome of the proceeding would have been different.

The severity of the trial counsel misconduct was moderate. In making this determination, we note multiple erroneous assertions but also recognize that this case is not comparable to trial counsel's argument in *Voorhees*. The prosecutor in *Voorhees* made "a spectacle of himself" relaying and bolstering the government's case by touting his personal position and achievements. 79 M.J. at 13–14. This case does not involve such theatrics. While trial counsel's assertions that BE was telling the truth was improper, a review of this record illustrates that from the trial defense counsel's opening statement through the completion of counsel's closing arguments, the defense counsel's advocacy centered on assertions of BE's veracity. Trial counsel argued that BE was telling the truth and trial defense counsel argued that she was lying. Again, such assertions by trial counsel were improper, but are not viewed in a vacuum ignoring trial defense counsel's simultaneous impropriety. The additional erroneous comments were unpersuasive and seemingly unimpactful commentary, none warranting objection and many not even prompting a defense response by way of counter-argument.

There were no specific measures adopted to cure trial counsel's improper arguments. The military judge did instruct the members that each counsel's argument is not evidence and that it was the members' responsibility to judge the credibility of the witnesses. Trial defense counsel did not object to the arguments. The record does not reflect whether this was a tactical decision to not object in order to enable his continued expression of the theory that BE was

lying. Nevertheless, the lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comments. *Gilley*, 56 M.J. at 123.

As discussed above regarding the factual sufficiency challenges, the weight of the evidence well supported the convictions. We also are compelled to recognize that this officer-member panel, comprised of one O-6, two O-5s, two O-4s and two O-3s, returned mixed findings in this case. This fact is particularly germane to this prejudice analysis in that the members were obviously not led down the primrose path set forth by the O-3 trial counsel or the O-4 trial defense counsel in this case. The arguments were very lengthy, repetitive, and not particularly persuasive from either side. Our review of the record leads us to believe that the members endured counsel arguments, rather than having been aided or persuaded by them. We are convinced that the members decided this case based on the evidence alone, not by trial counsel's (or trial defense counsel's) improper arguments. *See United States v. Young*, 470 U.S. 1, 17–18 (1985). Therefore, Appellant was not prejudiced by trial counsel's erroneous arguments.

E. Lawfulness of Consecutive Confinement Terms

1. Law

R.C.M. 1002 sets forth the guidance for determination of a sentence. When an accused is sentenced by a military judge at a general or special court-martial, the military judge "shall determine an appropriate term of confinement . . . for each specification for which the accused was found guilty." R.C.M. 1002(d)(2)(A). The appropriate amount of confinement is determined for each specification separately. R.C.M. 1002(d)(2)(A), Discussion. The appropriate amount of confinement is left to the "discretion of the military judge subject to these rules." *Id.*

"If a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively." R.C.M. 1002(d)(2)(B).

> The terms of confinement for two or more specifications shall run concurrently—
> (i) when each specification involves the same victim and the same act or transaction;
> (ii) when provided for in a plea agreement;
> (iii) when the accused is found guilty of two or more specifications and the military judge finds that the charges and specifications are unreasonably multiplied; or
> (iv) when otherwise appropriate under subsection (f) . . . .

Id. "A military judge may exercise broad discretion in determining whether terms of confinement will run concurrently or consecutively consistent with R.C.M. 1002(f)." R.C.M. 1002(d)(2)(B), Discussion.

"In sentencing an accused under this rule, the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration [several factors]." R.C.M. 1002(f).

2. Analysis

Appellant challenges the military judge's sentence adjudging confinement to run consecutively for Specifications 3, 6, and 9 of Charge I. In Specification 3, Appellant was convicted of raping BE by penetrating her mouth with his penis using unlawful force on divers occasions between 17 April 2020 and 10 July 2020. In Specification 6, Appellant was convicted of committing a sexual act on BE by penetrating her anus with an enema injector without her consent on divers occasions on 5 July 2020. In Specification 9, Appellant was convicted of abusive sexual contact on BE by causing his penis to touch her breasts without her consent on divers occasions between 25 June 2020 and 10 July 2020.

We review a military judge's determination that a specification's confinement term should run concurrently or consecutively to another specification for abuse of discretion. *See* R.C.M. 1002(d)(2)(B), Discussion. The abuse of discretion standard is strict and involves "more than a mere difference of opinion." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). "The challenged action must be arbitrary, fanciful, clearly unreasonable or clearly erroneous." *Id.* (internal quotation marks omitted) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

Whether an act or transaction is "the same" is a factual determination. Here, the military judge's determination that these acts or transactions were not entirely the same is not clearly erroneous. Both parties acknowledge that on some of the instances, there may have been some overlap between these three specifications. They also acknowledge that there were incidents that did not overlap. For example, regarding Specification 3, there were incidents where Appellant committed this offense that were not within the same transaction as the acts committed in Specification 9. Appellant essentially argues that because there may have been some overlap in the transactions between some of the instances charged in the specifications, then the specifications should have been treated as if all the transactions were "the same" pursuant to R.C.M. 1002(d)(2)(B)(i). We decline to adopt this interpretation of this provision

A more appropriate way to read this provision is to merely give effect to the plain language, "when each specification involves the same victim and the

same act or transaction." R.C.M. 1002(d)(2)(B)(i).[14] The presence of the language "on divers occasions" may, when all of the occasions do not coincide with other transactions encompassed in other specifications, remove the obligation to adjudge concurrent confinement terms for these specifications.[15]

The military judge in Appellant's case exercised his broad discretion to determine whether terms of confinement will run concurrently or consecutively. The military judge evaluated the evidence and adjudged that several of the confinement terms would run concurrently, and several would run consecutively. This determination was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous and thus, not an abuse of discretion.

F. Timely Appellate Review

1. Additional Background

The military judge sentenced Appellant on 28 October 2022. Appellant's record of trial was docketed with this court on 13 March 2023. Over the Government's objection, this court granted Appellant's nine requests for enlargement of time to file his assignments of error brief. Appellant's brief was filed on 9 February 2024, 333 days after the case was docketed with the court. On 16 May 2024, the Government filed their answer to Appellant's brief. On 22 May 2024, Appellant filed his reply brief and requested to present oral argument. We granted the request and heard oral argument on 2 July 2024.

2. Law

This court recognizes "convicted servicemembers have a due process right to timely review and appeal of [their] courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). A presumption of unreasonable delay also arises when appellate review is not completed, and a decision not rendered within 18 months of a case being docketed. *Id.* at 142. If there is a presumptive or an otherwise facially unreasonable delay, we examine the matter under the four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the

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[14] *See also United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (holding in the absence of a statutory definition, the plain language of a statute will control unless it is ambiguous or leads to an absurd result).

[15] It is important to note that interpretation of the R.C.M. in this manner does not erase a military judge's ability to determine that a sentence should be adjudged utilizing concurrent confinement terms. It still permits him or her to do so after evaluating the factors set forth in R.C.M. 1002(f). Rather, it is consistent with this Rule's express intent that a military judge should have "broad discretion in determining whether terms of confinement will run concurrently or consecutively consistent with R.C.M. 1002(f)." R.C.M. 1002(d)(2)(B), Discussion.

reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Id.* at 135 (citing *Barker*, 407 U.S. at 530) (additional citations omitted). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id*. at 136 (citing *Barker*, 407 U.S. at 533). However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

3. Analysis

Decision in Appellant's case was not rendered within 18 months from date of docketing. However, Appellant has not raised any issue with this court concerning the post-trial processing of his case and likewise has not claimed any prejudice as a result of the delay.

In *Moreno*, the United States Court of Appeals for the Armed Forces identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of an appellant's grounds for appeal. *Moreno,* 63 M.J. at 138–39 (citations omitted). As to the first type of prejudice, where Appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. *Id.* at 139. Similarly, looking at the third type of prejudice, where Appellant's substantive appeal fails, his grounds for appeal is not impaired. *Id*. at 140. Finally, with regards to the second type of prejudice, anxiety and concern, "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has made no showing of such particularized anxiety or concern with respect to the delay in question, and we perceive none in his case.

Finally, recognizing our authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d), we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude no such relief is appropriate.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of the Appellant occurred.

Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court