APPENDIX

A

United States Court of Appeals for the Fifth Circuit

No. 19-40277
Summary Calendar

RAFAEL VERDEJO RUIZ,

Petitioner—Appellant,

versus

DEREK EDGE, *Warden, Federal Correctional Institution, Texarkana*,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:18-CV-22

Before DAVIS, STEWART, and DENNIS, *Circuit Judges.*

PER CURIAM:*

Rafael Verdejo Ruiz, federal prisoner # 17670-035, appeals the dismissal of his 28 U.S.C. § 2241 petition as procedurally barred. Ruiz filed the § 2241 petition to challenge his military court convictions and sentences for rape of a person between the ages of 12 and 16; carnal knowledge with a

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

person between the ages of 12 and 16; and sodomy of a person between the ages of 12 and 16. The district court dismissed the petition based on its determination that Ruiz failed to exhaust the following § 2241 claims in the military courts: (1) Ruiz's constitutional rights were violated by the trial court's failure to instruct the jurors on the Government's burden to disprove the affirmative defense of mistake as to the victim's age beyond a reasonable doubt; (2) Ruiz's adjudged sentence is not being honored thereby causing his approved sentence to be enhanced; (3) trial counsel rendered ineffective assistance by not objecting to the issues raised in claims one and two; (4) appellate counsel rendered ineffective assistance by not raising issues one and two on appeal; and (5) appellate counsel rendered ineffective assistance with respect to Ruiz's supplemental assignment of error with the Air Force Court of Criminal Appeals in which he sought to raise ineffective assistance of trial counsel claims. On appeal, Ruiz contends that he established cause and prejudice to excuse the procedural default of those claims. He further contends that the district court abused its discretion in dismissing his § 2241 petition without conducting an evidentiary hearing.

Federal courts have jurisdiction pursuant to § 2241 over petitions for habeas corpus filed by individuals challenging military convictions. *See Burns v. Wilson*, 346 U.S. 137, 139 (1953). Before a petitioner convicted in military court raises habeas claims before this court, he must exhaust his military remedies. *See Fletcher v. Outlaw*, 578 F.3d 274, 276-77 (5th Cir. 2009); *Wickham v. Hall*, 706 F.2d 713, 715 (5th Cir. 1983) (citing *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)). A district court's dismissal of a § 2241 petition for failure to satisfy the exhaustion requirement is reviewed for an abuse of discretion. *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994).

Based on our review of the record and submissions, we are unpersuaded that Ruiz demonstrated an excuse for the procedural default of his claims based on ineffectiveness of appellate counsel, *see Murray v. Carrier*,

477 U.S. 478, 488 (1986), the purported loss of his trial record, *see Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir. 1992), actual innocence, *see Reed v. Stephens*, 739 F.3d 753, 767 (5th Cir. 2014), or *Martinez v. Ryan*, 566 U.S. 1, 16-17 (2012). We are likewise unpersuaded by Ruiz's arguments regarding the forfeiture component of his sentence. *See* 10 U.S.C. § 858b. Accordingly, Ruiz has failed to show that the district court abused its discretion in dismissing his § 2241 petition for failure to exhaust his military remedies without conducting an evidentiary hearing. *See Fletcher*, 578 F.3d at 276-77; *Fuller*, 11 F.3d at 62; *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992).

We will not review the plethora of new claims Ruiz has raised for the first time in the many briefs and motions he has filed before this court. *See Fillingham v. United States*, 867 F.3d 531, 539 (5th Cir. 2017). Accordingly, the district court's dismissal of Ruiz's § 2241 petition is AFFIRMED. With the exception of Ruiz's motion to supplement his reply brief, which is GRANTED, all outstanding motions are DENIED.

APPENDIX B

UNITED STATES v. Technical Sergeant RAFAEL VERDEJO-RUIZ, United States Air Force
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS
2013 CCA LEXIS 680
ACM 37957
July 18, 2013, Decided

Notice:

THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Editorial Information: Subsequent History

Motion granted by United States v. **Verdejo**-Ruiz, 73 M.J. 45, 2013 CAAF LEXIS 1048 (C.A.A.F., Sept. 9, 2013)Review dismissed by, Without prejudice, Motion granted by, Motion denied by, As moot United States v. **Verdejo**-Ruiz, 2013 CAAF LEXIS 1335 (C.A.A.F., Nov. 12, 2013)Decision reached on appeal by, On reconsideration by United States v. **Verdejo**-Ruiz, 2014 CCA LEXIS 607 (A.F.C.C.A., Aug. 14, 2014)Review denied by United States v. **Verdejo**-Ruiz, 74 M.J. 328, 2015 CAAF LEXIS 902 (C.A.A.F., Mar. 26, 2015)Magistrate's recommendation at, Habeas corpus proceeding at Ruiz v. Warden Edge, 2018 U.S. Dist. LEXIS 222281 (E.D. Tex., Dec. 13, 2018)

Editorial Information: Prior History

Sentence adjudged 25 February 2011 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: W. Thomas Cumbie. Approved Sentence: Dishonorable discharge, confinement for 25 years, and reduction to E-1.

Counsel For the Appellant: Major Shane A. McCammon (argued); Major Scott W. Medlyn.

For the United States: Major Daniel J. Breen (argued); Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Judges: Before GREGORY, HARNEY, and SOYBEL, Appellate Military Judges.

CASE SUMMARY Servicemember's confession to sexual conduct with a child was voluntary and thus properly admitted since investigators' promises not to reveal the conduct to his wife were not promises to keep his statements in confidence, and a prohibition of visitation by the servicemember's children did not constitute cruel and unusual punishment.

OVERVIEW: HOLDINGS: [1]-A servicemember's confession to sexual conduct with a child was voluntary and thus properly admitted since investigators' promises not to reveal the conduct to his wife were not promises to keep his statements in confidence, the servicemember was advised that the statements could be used against him at trial, and there was no evidence of any coercion; [2]-A specification charging the servicemember with indecent acts upon a child under Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, failed to allege the terminal element that the conduct was prejudicial to good order and discipline or service discrediting, and nothing in the record provided any notice of the element; [3]-A prohibition of visitation by the servicemember's children did not constitute cruel and unusual punishment

since the partial restriction was in accordance with brig rules concerning child sex offenders.

OUTCOME: Findings set aside in part and affirmed in part, and sentence affirmed.

LexisNexis Headnotes

Military & Veterans Law > Military Justice > Motions > Suppression
Military & Veterans Law > Military Justice > Evidence > Admissions & Confessions
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

A military appellate court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. Whether a confession was voluntary is a question of law that the court reviews de novo. A military judge's findings of fact are reviewed for clear error.

Military & Veterans Law > Military Justice > Evidence > Admissions & Confessions

A servicemember's confession is involuntary, and thus inadmissible, if it was obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Unif. Code Mil. Justice art. 31, 10 U.S.C.S. § 831, or through the use of coercion, unlawful influence, or unlawful inducement. The prosecution bears the burden of establishing a voluntary confession by a preponderance of the evidence.

Military & Veterans Law > Military Justice > Evidence > Admissions & Confessions

To determine the lawfulness of a confession, a military appellate court must examine the totality of the surrounding circumstances. In assessing whether a servicemember's will was over-borne in a particular case, the court assesses the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation. Some factors taken into account in determining voluntariness have included the youth of the servicemember, his lack of education, his low intelligence, the lack of advice on his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. The court must determine the factual circumstances surrounding the confession, assess the psychological impact on the servicemember, and evaluate the legal significance of how the servicemember reacted.

Military & Veterans Law > Military Justice > Evidence > Admissions & Confessions
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

If a servicemember's confession is found involuntary, a military appellate court must set aside the conviction unless it is determined that the error in admitting the confession was harmless beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Evidence > Admissions & Confessions

Promises are considered only a factor in the equation; they are not of themselves determinative of involuntariness of a servicemember's confession.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

Under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), a military appellate court reviews issues of

legal and factual sufficiency de novo. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is itself convinced of a servicemember's guilt beyond a reasonable doubt. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. § 866(c).

Military & Veterans Law > Military Offenses > General Article > Categories of Offenses > General Overview
Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges

Notice of the terminal element of an offense under Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, i.e., that conduct is prejudicial to good order and discipline or service-discrediting, is an essential part of due process as a servicemember must know and fully understand the offenses against which he must defend.

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

The law requires a military appellate court to evaluate the fairness of a servicemember's trial using the cumulative error doctrine. The court is required to evaluate the errors against the background of the case as a whole, paying particular weight to factors such as: the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the trial court dealt with the errors as they arose (including the efficacy of any remedial efforts); and the strength of the government's case.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Military & Veterans Law > Military Justice > Sentencing > Cruel & Unusual Punishment
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

A military appellate court reviews de novo whether alleged facts constitute cruel and unusual punishment. The Eighth Amendment prohibits two types of punishments: (1) those incompatible with the evolving standards of decency that mark the progress of a maturing society; or (2) those which involve the unnecessary and wanton infliction of pain.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Military & Veterans Law > Military Justice > Sentencing > Cruel & Unusual Punishment

A violation of the Eighth Amendment is shown by demonstrating: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to a servicemember's health and safety; and (3) that the servicemember has exhausted the prisoner-grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, 10 U.S.C.S. § 938.

Military & Veterans Law > Military Justice > Sentencing > General Overview
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

Before reassessing a sentence, A military appellate court must be confident that, absent any error, the sentence adjudged would have been of at least a certain severity. Ultimately, a sentence can be reassessed only if the court confidently can discern the extent of the error's effect on the sentencing authority's decision. If the court cannot determine that the sentence would have been at least of a certain

magnitude, the court must order a rehearing.

Opinion

PER CURIAM:

At a general court-martial comprised of officer and enlisted members, the appellant was convicted, contrary to his pleas, of one specification each of: rape of a person between the ages of 12 and 16, carnal knowledge with a person between the ages of 12 and 16, sodomy of a person between the ages of 12 and 16, and indecent acts upon the body of a female under the age of 16, in violation of Articles 120, 125, 134, UCMJ, 10 U.S.C. 920, 925, 934. He was sentenced to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, the appellant raises eight issues:1 (1) The military judge erred by denying his motion to suppress involuntary statements made after law enforcement agents promised him confidentiality; (2) His convictions are factually insufficient; (3) The Article 134, UCMJ, specification fails to state an offense; (4) Trial counsel committed reversible error by making false assertions of material fact and prosecutorial misconduct; (5) His Fifth2 and Fourteenth Amendment3 rights were violated when the alleged victim committed perjury and fraud on the court during her testimony; (6) The findings and sentence should be set aside under the cumulative error doctrine; (7) The U.S. Disciplinary Barracks' refusal to allow him visitation with his children is illegal considering (a) he did not commit any offense against his own children, (b) he was issued a meritless no-contact order, and (c) the U.S. Disciplinary Barracks' administrative system improperly lists him as single with no dependents; and (8) His court-martial wrongfully included charges of carnal knowledge and indecent acts.

Background

In July 2004, CL was thirteen years old. During that time, she visited family in Oklahoma, including her step-father's cousin and cousin-in-law, Mrs. **Verdejo** and the appellant. CL became close with Mrs. **Verdejo** and spent a lot of time with her and the appellant watching movies, visiting, and going to the pool. CL claimed that, during this visit, the appellant committed the acts that led to the charges against him. These acts occurred in the house, either when Mrs. Vedejo was sleeping or not at home, and once in a car.

CL did not tell anyone about these acts until approximately six years later when she told a friend. The Air Force Office of Special Investigations (OSI) investigated and interviewed the appellant on 9 September 2010. The resulting confession is the subject of his first issue on appeal.

The interview was videotaped and transcribed. The agents read the appellant his Article 31, UCMJ, 10 U.S.C. § 831, rights from a printed card and allowed him to read along. The appellant acknowledged his rights, declined a lawyer, and agreed to answer questions. After a rapport building session, the agents confronted the appellant about an allegation that he sexually assaulted CL. The appellant initially maintained that he didn't remember doing anything sexual with CL because it was a long time ago, but eventually admitted that he "did commit a stupid action" in that he "was going to sleep with somebody." The appellant eventually stated that he cheated on his wife but couldn't remember with whom.

After more questioning, the appellant admitted that he had sex with someone in his Cadillac, and it was either CL or a Senior Airman named Amanda. Eventually, after some more prodding, the

appellant admitted that it was CL who he had sex with in his car. In his post-interview written statement, the appellant wrote that he "ran out in [his] car with [CL] and had brief intercourse inside the car." He also admitted that he was going to tell his wife about the incident until he learned of CL's age. The appellant only admitted to having sex with CL on the one occasion in his car. Other than that, he only admitted to kissing her a few times.

At trial, the defense motioned to suppress the confessions because they'd been given under a promise of confidentiality by the two OSI agents. The appellant points to five specific instances during the interview to exemplify where one or the other agent made the promises:

> "Like I said, what you say here stays with us. We don't go around telling everyone what you say and everything else."
>
> "You don't have to worry about anything you say with us. Like I said, we are not trying to throw you up by a stake or anything else."
>
> "Everything that stays in this room, stays in this room."
>
> "I am not going to tell your wife about it either, you know. . . . I am not going to tell anybody. . . ."
>
> "See, the thing about our office here is when we talk to people, we don't share information with other people."

On the motion to suppress, the appellant testified that he believed these comments convinced him that no matter what he said to the OSI agents, they would keep it to themselves. He further testified that he believed that the OSI agents would only submit a report to his commander indicating whether he was being honest or not, and nothing more. According to the appellant, he also believed that the agents promised him confidentiality, so he merely agreed with their allegations in order to leave the interview and get on with his life.

The military judge denied the motion and made findings of facts. Regarding the appellant's testimony, the military judge stated, "[t]he court finds this testimony to be totally, completely, and unequivocally without merit." The military judge went on to acknowledge the possibility that the agents' statements, standing alone and taken out of context, might have reasonably implied a promise of confidentiality, but not when taken in the context of the entire conversation and under the totality of the circumstances. Pointing out that three of the statements were made in response to the appellant's concern about his wife learning of the details of his infidelity with CL, the military judge did not construe from them a promise of confidentiality. Additionally, he viewed the other two statements as "tiny snippets of a lengthy discourse by the agents, which given the context of the conversation, could not reasonably be construed as a promise of confidentiality." Ultimately, the military judge concluded that "the defense [] cherry picked five very short innocuous statements . . . [which] . . . taken individually, or collectively, cannot reasonably be construed as a promise of confidentiality."

Appellant's Motion to Suppress Involuntary Statements

We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Whether a confession was voluntary is a question of law that we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005); *United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996); *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993). A military judge's findings of fact are reviewed for clear error. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002).

Freeman is instructive on the issue of whether a confession is voluntary. The *Freeman* Court stated that "a confession is involuntary, and thus inadmissible, if it was obtained 'in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.'" *Id.* at 453 (citing Mil. R. Evid. 304(a), (c)(3); Article 31(d), UCMJ). The prosecution bears the burden of establishing a voluntary confession by a preponderance of the evidence. *Id.* (citing *Bubonics*, 45 M.J. 93).

To determine the lawfulness of a confession, we must examine "the totality of the surrounding circumstances." *Freeman*, 65 M.J. at 453 (citing *Bubonics*, 45 M.J. at 95). In assessing whether a defendant's will was "over-borne in a particular case," the Court assesses "the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation." *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). Some factors taken into account in determining voluntariness have included the youth of the accused, his lack of education, his low intelligence, the lack of advice on his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Id.* (citations omitted). The Court must determine the factual circumstances surrounding the confession, assess the psychological impact on the accused, and evaluate the legal significance of how the accused reacted. *Id. See also Schneckloth*, 412 U.S. at 226.

If a confession is found involuntary, the Court must set aside the conviction unless it is determined that the error in admitting the confession was harmless beyond a reasonable doubt. *Freeman*, 65 M.J. at 453 (citing *Fulminante*, 499 U.S. at 285).

Further, the Court in *Freeman* stated that there has been considerable controversy over the treatment of threats and promises in assessing the voluntariness of a confession. *Id.* at 455. Before *Fulminante*, a confession "'obtained by any direct or implied promises, however slight,'" was not voluntary. *Id.* (quoting *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897)).

Since *Fulminante*, though, "promises are considered only a factor in the equation; they are not of themselves determinative of involuntariness." *Id.* (citing *United States v. Gaskin*, 190 Fed. Appx. 204, 206 (3d Cir. 2006); *United States v. Jacobs*, 431 F.3d 99, 109 (3d Cir. 2005)).

We have reviewed both the video recording of the confession and its transcript. These items as well as our review of the record convince us the military judge did not abuse his discretion when he denied the appellant's motion to suppress his confession.

It is clear that the OSI agents' statements were made in response to the appellant's express concerns about his wife finding out about his actions. In the context of the interview, it is obvious the OSI agents' comments were limited to that specific concern and were not general commitments that they would forever keep his statements in confidence, never to be revealed to anyone. The military judge also rejected, as do we, the appellant's stated belief that the OSI agents would only submit a report to his commander indicating whether the appellant was being honest or not and nothing more. Not only did the agents read the appellant his Article 31, UCMJ, rights at the beginning of the interview, they also had him read along. Moreover, they had him read and initial those same rights on the written statement form as well, and had him hold up his hand and swear that the written statements were the truth before he signed it. Both times he was advised that he could remain silent and any statement he made could be used against him in a trial or other disciplinary or administrative forum. He said he understood both warnings. Additionally, towards the end of the interview he asked if he

would be facing a court-martial because of what he confessed to. This question conflicts with his assertion at trial that he thought everything he said during the interview would be kept confidential.

Further, the appellant was a Technical Sergeant with 10 years of active duty experience and had an excellent performance record. The entire interview lasted approximately three and one half hours and the appellant was offered breaks, food, and water. He was never handcuffed and, in fact, was merely asked to come to the OSI office on his own. He was not escorted or told he could not leave. He was allowed to type his own written statement and was left alone while he did so. At the end of the interview he even complimented the OSI agents for not being rude or overbearing.4 These facts simply do not square with his assertions at trial and now on appeal that he thought anything he said during his OSI-conducted interview would remain confidential and his confession was involuntary. Given the context in which the OSI agents made the statements at issue, we are convinced they did not overcome the appellant's will or cause him to provide his statement involuntarily. They were limited in nature to assure the appellant that the agents would not tell his wife what he told them during the interview. Applying the standards cited above, we agree with the military judge's ruling. We find that the appellant's will was not overborne and his confession was voluntarily given.

Factual Sufficiency

The appellant also avers that his convictions for rape, carnal knowledge, forcible sodomy, and indecent acts with a child are factually insufficient.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and 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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 22 C.M.A. 223, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Having reviewed the entire record, including the appellant's confession and the victim's testimony, we are convinced the appellant's convictions are factually sufficient.5 The victim provided detailed testimony of the events that transpired. The defense tried to show these events were implausible, but in the end the members, who heard all of the witnesses, believed the victim's account. Her testimony, and the appellant's confession, provided sufficient facts to support the conviction.

Failure to State an Offense

Notice of the terminal element of an Article 134, UCMJ, offense is an essential part of due process as an accused must know and fully understand the offenses against which he must defend. *See United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

Charge III and its Specification alleged a violation of Article 134, UCMJ, in that the appellant committed indecent acts upon the victim, a female under the age of 16, not his wife, by committing certain acts upon her with the intent to gratify his sexual desires. The Specification did not allege one of the three possible terminal elements: prejudice to good order and discipline, service discrediting; or a crime or offense not capital. The appellant did not contest this specification at trial.

The only mention of any of the terminal elements during the trial was by the prosecutor during closing arguments when, after recounting the facts alleged in the Specification, he argued to the jury that, "It should take you about five seconds to realize that committing these horrible acts on an Air Force Installation on a 13-year-old child is prejudicial to good order and discipline in the United

States Air Force." The defense did not address this point during their argument.

The Government argues that the prosecution cited the terminal element during its closing argument, which "was simply understood to be necessarily inherent in an offense where a military member sexually assaults a 13-year-old civilian on base and against her will." It also argues that the appellant had notice because the Article 32, UCMJ, investigator spelled out the elements and the evidence used to support them. However, the Article 32, UCMJ, report states that the conduct involved "was to the prejudice of good order and discipline *or* of a service discrediting nature." (Emphasis added.). It never focused on one theory or the other. We do not believe this constitutes notice of the terminal element for an Article 134, UCMJ, offense as our superior court requires in *Humphries*, *Fosler*, and *Ballan*. Further, the Government does not explain why the "prejudicial to good order and discipline" element is any more "necessarily inherent" than the "service discrediting nature" element.

Under *Humphries*, notice of the missing element must be "somewhere extant in the trial record, or [ ] the element [must] be 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 215-216 (citing *United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002); *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)). Here, the appellant pled not guilty. This left the Government to prove all of the elements of the offense, including the terminal element. But the question left open was which terminal element should the appellant defend against? The Government relies on the prosecutor's mention of the terminal element in the closing argument to show that notice is "extant on the record." However, as this was addressed only after the close of evidence during closing argument, it is hard to see how this can constitute notice. Notice is a due process device that enables the preparation of a defense. As our superior court alluded to in *Humphries*, it is impossible to accept an argument that mentioning the terminal element for the first time after the evidence has been submitted to the members enabled the appellant to know which Clause he had to defend against. *Id.* at 216 n.9.

Under the guidance provided by our superior court, we hold it was plain and obvious error to omit the terminal element from the Specification alleging indecent acts under Article 134, UCMJ, and that error prejudiced the appellant's substantial right to notice. *See Id.* at 213-17 (citations omitted). Accordingly, we must dismiss the finding of guilty for Charge III and its Specification.

Prosecutorial Misconduct & Perjury

We have considered the appellant's fourth and fifth assigned errors, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982), and find them meritless.

We have reviewed the appellant's claim of prosecutorial misconduct under the standards of *United States v. Halpin*, 71 M.J. 477 (C.A.A.F. 2013), *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006), and *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). In doing so we have examined the fairness of the trial and not the culpability of the prosecutor. We have paid special attention to the "overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). Having examined the prosecutor's conduct as well as the fairness of this trial, we find the appellant's claim to be meritless.

Regarding the victim's testimony, the appellant claims she committed perjury by pointing to statements in the Article 32, UCMJ, investigation which he claims could be used to contradict her. He then relates this back to his argument that the evidence was insufficient to support a conviction. We have already addressed the issue of factual sufficiency above and there is no need to rehash it a second time. The members heard the testimony of all of the witnesses including any cross-examination by the opposing side. It was their duty to determine the facts and that is what they did. *See United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002); *United States v. Garwood*, 20 M.J.

148 (C.M.A. 1985), Rule for Courts-Martial 502(a)(2). The appellant's essentially argues that the victim should not be believed because she was lying. However, at trial the defense subjected her to a fierce and tough cross-examination. The members simply believed her. We find no merit to the appellant's claim.

Cumulative Error

The appellant avers that the cumulative errors that occurred at trial should compel us to set aside the findings and sentence. In this argument, the appellant raises eight errors, some with several subparts, which were made during the trial.

As our sister court observed, the law "requires us to evaluate the fairness of the appellant's trial using the cumulative error doctrine." *United States v. Parker* 71 M.J. 594, 630 (N.M. Ct. Crim. App. 2012) (citing *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996); *United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992)). As the *Parker* court stated, *Dollente* requires us to evaluate the errors "against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy-of any remedial efforts); and the strength of the government's case." *Id.*

Some of the errors alleged by the appellant include supposed errors by the military judge in his instructions, misstatements of the evidence by the prosecutor, the denial of the right to an educated jury due to the prosecutor's failure to present expert testimony on child behavior that would favor the appellant's case, and that a testifying OSI agent was allowed to give human lie detector testimony. We have reviewed the appellant's allegations and find no error, but merely rulings and decisions made well within the sound discretion of the military judge, which the appellant would have made differently had he been the judge. There was ample evidence of the appellant's guilt, and there were no errors that materially prejudiced his substantial rights. Under these circumstances and applying the law as discussed above, the appellant was not denied a fair trial and the cumulative error doctrine is not applicable. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011); *Dollente*, 45 M .J. at 242.

Visitation Rights

Citing *United States v. Ouimette*, 52 M.J. 691 (C.G. Ct. Crim. App. 2000), the appellant claims the Fort Leavenworth Disciplinary Barracks' (USDB) refusal to allow him visitation rights with his children was illegal as constituting a "harsher, excessive sentence and punishment" because (1) he did not commit any offense against his own children, (2) he was issued a meritless no-contact order, and (3) the USDB administrative system improperly lists him as single with no dependents. The appellant has submitted documents indicating he is under a blanket restriction from having any visitation and from making any contact with his own children (even indirectly through contact via his wife).6 He sent a request to the Commandant for an exception to this policy but was denied. He filed a complaint with the Inspector General, and although he states he has filed a complaint pursuant to Article 138, UCMJ, 10 USC § 938, the record lacked any other indication or evidence of this assertion.7

We review de novo whether alleged facts constitute cruel and unusual punishment. *United States v. Lovett*, 63 M.J. 211 (C.A.A.F. 2006). As our superior court in *Lovett* noted, "the Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.' We apply the Supreme Court's interpretation of the Eighth Amendment in the absence of any legislative intent to create greater protections in the UCMJ." *Id.* at 215 (citations

omitted). Except for specific situations not applicable to this case, Article 55, UCMJ, 10 U.S.C. § 855, is coterminous with the Eighth Amendment,8 and we will apply that standard to both provisions. *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983).

A violation of the Eighth Amendment is shown by demonstrating: "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ." *Lovett*, 63 M.J. at 215 (omission in original) (citations omitted).

Applying these standards, we find no violation of the Eighth Amendment or Article 55, UCMJ. The appellant's complaint does not amount to a serious act or omission resulting in a denial of necessities. Typically, these are things such as denial of needed medical attention, proper food, or sanitary living conditions. Physical abuse may also qualify. *See United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000). The appellant's deprivation is not of the caliber that triggers Eighth Amendment protection. It is more akin to routine conditions associated with punitive or administrative segregation such as restriction of contact with other prisoners, of exercise outside a cell, of visitation privileges, of telephone privileges, and/or of reading material. *Id.* at 102. We also note that not all visitation or outside contact was withheld from the appellant, just a certain segment of it. This partial, rather than full, restriction on the appellant's ability to communicate with friends and family also supports the [G]overnment's case. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Henderson v. Terhune*, 379 F.3d 709 (9th Cir. 2004). Also, the appellant has not shown the Commanding Officer acted with a culpable state of mind. The commander did not arbitrarily select the appellant and deny him contact with minors. He was acting pursuant to, and enforcing, the Brig rules.

We emphasize that the USDB rules about visitation with children are enforced for the protection of minors. That the appellant has to undergo a strict screening policy before being granted permission to visit his children is an administrative safeguard to protect minor juveniles from those convicted of child sex crimes. It is not an additional punishment or a method of enhancing the sentence already adjudged. Accordingly, we find no merit to the appellant's claim.

Propriety of Charges

The appellant argues that the offenses of carnal knowledge and indecent acts were improperly charged and should be dismissed because the legal actions to bring him to trial on these offenses occurred after 1 October 2007. According to the appellant, Executive Order 13447 and the 2006 National Defense Authorization Act amended the *Manual for Courts Martial* (*MCM*), *United States*, and eliminated these two offenses. He argues that because the Executive Order states that nothing in the amendments would invalidate certain legal actions, to include investigations and referral of charges, that began prior to 1 October 2007, and the legal actions that preceded the appellant's trial occurred after that date, they were rendered invalid by the Executive Order because they occurred too late.

This argument is without merit. Executive Order 13447 and the 2006 National Defense Authorization Act did not eliminate these two offenses in the sense that no one could be prosecuted for them if legal action began after 1 October 2007. The Executive Order merely incorporated the amendments to Article 120, UCMJ, and other provisions. It did not bar prosecution of violations of the law as it was written prior to the amendments and the Executive Order.

These offenses were all alleged as perpetrated against a child between the ages of 14 and 16 years

old. As such, each has a 25 year statute of limitation and may be prosecuted any time with in that period. *Cf. United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008). *See* Article 43, UCMJ, 10 U.S.C. § 843; Drafter's Analysis, *MCM*, A21-57, A27 (2012 ed.). The language cited by the appellant in the Executive Order does not bar the offense from being prosecuted.

Sentence Reassessment

Having dismissed the Specification under Charge III, we must determine whether we are able to reassess the sentence. Applying the analysis set forth in *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006), *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and carefully considering the entire record, we conclude that there has not been a "dramatic change in the 'penalty landscape.'" *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). At time of the appellant's conviction, the maximum sentence was life in confinement, forfeiture of all pay and allowances, and reduction to E-1. Our dismissal of the Charge and Specification does not change the maximum sentence.

Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we "cannot determine that the sentence would have been at least of a certain magnitude," we must order a rehearing. *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000); *see also United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988). Because the change to the appellant's charges or sentencing landscape is not dramatic, we are confident in our ability to reassess the sentence. The dismissed Charge and Specification carried the smallest maximum punishment of the four with which the appellant was charged: seven years. Even with the dismissed Charge and Specification the appellant is still guilty of rape, forcible sodomy, and carnal knowledge, all with a child between the ages of 12 and 16. These offenses carried the same maximum punishment even without the dismissed offense: a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to the grade of E-1.

We are confident that the convening authority would have approved the same sentence. Furthermore, we find, after considering the appellant's character, the nature and seriousness of his offenses, and the entire record, that the reassessed sentence is appropriate.

Conclusion

We set aside and dismiss Charge III and its Specification and affirm the remaining findings and the sentence as approved by the convening authority. The approved findings, as modified, and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant regarding the affirmed charges and specifications occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and the sentence, are

AFFIRMED.

Footnotes

1

Issues 4, 5, 6, and 8 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982).
2

U.S. Const. amend. V.
3

U.S. Const. amend. XIV.
4

These were not the exact words used by the appellant, but they convey his sentiment.
5

Though not specifically raised, we also find that the appellant's convictions are legally sufficient. *See United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).
6

The Fort Leavenworth Disciplinary Barracks' regulations prevent him from seeing any children without first obtaining an "exception to policy."
7

Even assuming he has submitted an Article 138, UCMJ, 10 U.S.C. § 938, complaint, our opinion addressing the other issues remain the same.
8

U.S. Const. amend. VIII.

APPENDIX C

UNITED STATES v. Technical Sergeant RAFAEL VERDEJO-RUIZ, United States Air Force
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS
2014 CCA LEXIS 607
ACM 37957 (recon)
August 14, 2014, Decided

Notice:

THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Editorial Information: Subsequent History

Motion granted by United States v. **Verdejo**-Ruiz, 74 M.J. 82, 2014 CAAF LEXIS 1118 (C.A.A.F., Nov. 18, 2014)Motion denied by United States v. **Verdejo**-Ruiz, 74 M.J. 327, 2015 CAAF LEXIS 758 (C.A.A.F., Mar. 25, 2015)Motion denied by United States v. **Verdejo**-Ruiz, 75 M.J. 3, 2015 CAAF LEXIS 533 (C.A.A.F., June 4, 2015)Review denied by **Verdejo**-Ruiz v. United States, 75 M.J. 375, 2016 CAAF LEXIS 547 (C.A.A.F., June 22, 2016)

Editorial Information: Prior History

Sentence adjudged 25 February 2011 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: W. Thomas Cumbie. Approved Sentence: Dishonorable discharge, confinement for 25 years, and reduction to E-1.United States v. **Verdejo**-Ruiz, 2013 CCA LEXIS 680 (A.F.C.C.A., July 18, 2013)

Counsel For the Appellant: Major Shane A. McCammon (argued); Major Scott W. Medlyn; and Captain Michael A. Schrama.

For the United States: Major Daniel J. Breen (argued); Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, MITCHELL, and WEBER, Appellate Military Judges.

CASE SUMMARY Military judge did not err when he denied appellant's motion to suppress his confession because there was no promise of confidentiality made by Air Force Office of Special Investigations agents; most if not all of the agents' statements were made in response to appellant's concerns about his wife finding out about his actions with 13-year-old girl.

OVERVIEW: HOLDINGS: [1]-The military judge did not err when he denied appellant's motion to suppress his confession because there was no promise of confidentiality made by the Air Force Office of Special Investigations agents; when taken in the context of the totality of the circumstances, most if not all of the agents' statements were made in response to appellant's concerns about his wife finding out about his actions; [2]-Appellant's convictions were factually sufficient because the victim provided detailed and believable testimony about the events that transpired, and appellant's confession corroborated some of her testimony; the defense was not able to establish any material contradictions or inaccuracies in her testimony; [3]-It was plain and obvious error to omit the terminal element from the specification alleging indecent acts under Unif. Code Mil. Justice art. 134, U.S.C.S. § 934.

OUTCOME: Dismissed in part and affirmed in part.

LexisNexis Headnotes

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
Military & Veterans Law > Military Justice > Motions > Suppression

A military judge's decision to deny a motion to suppress evidence is reviewed for an abuse of discretion. "Abuse of discretion" is a term of art applied to appellate review of the discretionary judgments of a trial court. An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law. Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.

Military & Veterans Law > Military Justice > Evidence > Admissions & Confessions
Military & Veterans Law > Military Justice > Pretrial Proceedings > Self-Incrimination Privilege

Generally, a confession is not admissible unless it has been made voluntarily, considering the totality of the circumstances surrounding the confession. Mil. R. Evid. 304(a), Manual Courts-Martial. Military justice jurisprudence holds that a statement made in response to a promise of confidentiality by law enforcement agents may be inadmissible, because the promise of confidentiality nullifies the rights advisement under Unif. Code Mil. Justice art. 31, 10 U.S.C.S. § 831. A rights advisement followed by a promise of confidentiality amounts to no warning, as the assurance could only be interpreted to mean that the statement would not be used in a subsequent trial. Statements made in response to a promise of confidentiality are inadmissible, despite the provision of a rights advisement, where the promise induces a belief in the mind of the accused that his disclosure will not be made the basis for a criminal prosecution. Even an implied promise of confidentiality may render a confession inadmissible if it is the causative factor for later confessions.

Military & Veterans Law > Military Justice > Pretrial Proceedings > Self-Incrimination Privilege
Military & Veterans Law > Military Justice > Evidence > Admissions & Confessions

Promises of confidentiality are substantially similar to promises of testimonial immunity. If an official with either express or apparent authority promises a suspect that no prosecution will result if the suspect confesses, courts will not hesitate to enforce that promise. Promises of confidentiality or immunity made without authority are forms of unlawful inducement. A confession is involuntary, and thus inadmissible, if it was obtained through the use of unlawful inducement. Mil. R. Evid. 304(a), (c)(3) Manual Courts-Martial. Unif. Code Mil. Justice art. 31(d), 10 U.S.C.S. § 831(d). Under Freeman, promises are considered only a factor in the equation; they are not of themselves determinative of involuntariness. In determining whether an accused's will was over-borne in a particular case, a court assesses the totality of all the surrounding circumstances, both the characteristics of the accused and the details of the interrogation. Factors taken into account in determining voluntariness include the accused's age, level of education, and intelligence, along with any advice provided to the accused concerning his constitutional rights, the length of detention, the nature of the questioning, and the use or absence of physical punishment such as the deprivation of food or sleep.

Military & Veterans Law > Military Justice > Evidence > Weight & Sufficiency
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

Under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), an appellate court reviews issues of legal and factual sufficiency de novo. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the appellate

court is convinced of the accused's guilt beyond a reasonable doubt. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination.

Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Notice of the terminal element of a Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, offense is an essential part of due process, as an accused must know and fully understand the offenses against which he must defend. Whether a charge and specification state an offense and the remedy for such error are questions of law that an appellate court reviews de novo. A specification states an offense if it alleges, either expressly or by necessary implication, every element of the offense, so as to give the accused notice and protection against double jeopardy. R.C.M. 307(c)(3), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

When an appellant does not object to a missing terminal element at trial, an appellate court analyzes the case for plain error. The failure to allege a terminal element is plain and obvious error that is forfeited rather than waived. In the context of a plain error analysis of defective indictments, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. In the plain error context, a defective specification alone is insufficient to constitute substantial prejudice to a material right. Therefore, reviewing courts look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is essentially uncontroverted. If this is the case, the charging error is considered cured and material prejudice is not demonstrated.

Military & Veterans Law > Military Justice > Pretrial Proceedings > Charges
Military & Veterans Law > Military Justice > Trials > Arguments on Findings

Identifying a theory of criminality during closing argument alone does not constitute sufficient notice to find a lack of prejudice from omission of the terminal element on the charge sheet.

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

An appellate court reviews an appellant's claim of prosecutorial misconduct under the standards of Halpin, Edmond, and Argo. The appellate court pays special attention to the overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness.

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

An appellate court evaluates the fairness of an appellant's trial using the cumulative error doctrine. Dollente requires the appellate court to evaluate the errors against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the trial court dealt with the errors as they arose; and the strength of the government's case.

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
Military & Veterans Law > Military Justice > Sentencing > Cruel & Unusual Punishment

An appellate court reviews allegations of cruel and unusual punishment de novo.

Military & Veterans Law > Military Justice > Sentencing > Cruel & Unusual Punishment
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment

The Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, prohibits two types of punishments: (1) those incompatible with the evolving standards of decency that mark the progress of a maturing society or (2) those which involve the unnecessary and wanton infliction of pain. An appellate court applies the United States Supreme Court's interpretation of the Eighth Amendment in the absence of any legislative intent to create greater protections in the Uniform Code of Military Justice. Unif. Code Mil. Justice art. 55, 10 U.S.C.S. § 855, is coterminous with the Eighth Amendment, and courts apply that standard to both provisions.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Military & Veterans Law > Military Justice > Sentencing > Cruel & Unusual Punishment

A violation of the Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, is shown by demonstrating: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to the appellant's health and safety; and (3) that he has exhausted the prisoner-grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, 10 U.S.C.S. § 938.

Military & Veterans Law > Military Justice > Sentencing > Cruel & Unusual Punishment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment

For the purpose of the Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, serious acts or omissions include matters such as denial of needed medical attention, proper food, sanitary living conditions, or even physical abuse.

Military & Veterans Law > Military Justice > Evidence > Privileges > Psychotherapist-Patient Privilege

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. Mil. R. Evid. 513(a), Manual Courts-Martial. However, no such privilege exists when the records are constitutionally required. To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence. Mil. R. Evid. 513(e)(4).

Military & Veterans Law > Military Justice > Evidence > Evidentiary Rulings
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

An appellate court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion.

Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review
Military & Veterans Law > Military Justice > Trials > Instructions > General Overview

Whether a military judge properly instructed the members is a question of law an appellate court reviews de novo. However, where there is no objection to an instruction at trial, the appellate court reviews for plain error.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Speedy Trial
Military & Veterans Law > Military Justice > Speedy Trial
Military & Veterans Law > Military Justice > Postconviction Proceedings > General Overview
Military & Veterans Law > Military Justice > Appeals & Reviews > Standards of Review

An appellate court reviews de novo whether an appellant has been denied his due process right to a speedy post-trial review and whether any constitutional error is harmless beyond a reasonable doubt. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before the appellate court. The Moreno standards continue to apply as a case remains in the appellate process. The Moreno standard is not violated when each period of time used for the resolution of legal issues between the appellate court and the superior court is within the 18-month standard. However, when a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors elucidated in Barker and Moreno. Those factors are (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant. When there is no showing of prejudice under the fourth factor, an appellate court will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.

Military & Veterans Law > Military Justice > Postconviction Proceedings > General Overview
Military & Veterans Law > Military Justice > Speedy Trial

The Moreno speedy-trial standards continue to apply as a case continues through the appellate process. The Moreno standard is not violated when each period of time used for the resolution of legal issues between the appellate court and the superior court is within the 18-month standard.

Military & Veterans Law > Military Justice > Speedy Trial
Military & Veterans Law > Military Justice > Postconviction Proceedings > General Overview

Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Unif. Code Mil. Justice art. 59(a), 10 U.S.C.S. § 859(a). A non-exhaustive list of factors is considered in evaluating whether art. 66(c) relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay; the length and complexity of the record; the offenses involved; and the evidence of bad faith or gross negligence in the post-trial process.

Opinion

Opinion by: WEBER

Opinion

OPINION OF THE COURT UPON RECONSIDERATION

WEBER, Judge:

At a general court-martial composed of officer and enlisted members, the appellant was convicted, contrary to his pleas, of one specification each of rape of a person between the ages of 12 and 16; carnal knowledge with a person between the ages of 12 and 16; forcible sodomy of a person between the ages of 12 and 16; and indecent acts upon the body of a female under the age of 16, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. 920, 925, 934. He was sentenced to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority did not approve the adjudged forfeitures, but otherwise approved the sentence as adjudged.1

On appeal, the appellant raises 11 issues: (1) the military judge erred by denying his motion to suppress involuntary statements made after law enforcement agents promised him confidentiality; (2) his convictions are factually insufficient; (3) the Article 134, UCMJ, specification fails to state an offense; (4) trial counsel committed reversible error by making false assertions of material fact and by prosecutorial misconduct; (5) his Fifth2 and Fourteenth3 Amendment rights were violated when the alleged victim committed perjury and fraud on the court during her testimony; (6) the findings and sentence should be set aside under the cumulative error doctrine; (7) the United States Disciplinary Barracks' (USDB) refusal to allow him visitation with his children is illegal considering (a) he did not commit any offense against his own children, (b) he was issued a meritless no-contact order, and (c) the USDB administrative system improperly lists him as single with no dependents; (8) his court-martial wrongfully included charges of carnal knowledge and indecent acts; (9) the Government and the military judge improperly denied the defense the ability to review the victim's mental health and medical records; (10) the military judge's findings instructions erroneously stated the burden of proof required to demonstrate force; and (11) he is entitled to relief for untimely appellate review.4

Procedural History

On 25 June 2013, the Secretary of Defense, "[p]ursuant to [his] authority under title 5, United States Code, section 3101 *et seq.*," issued a memorandum that "appoint[ed] Mr. Laurence M. Soybel, a civilian employee of the Department of the Air Force, to serve as appellate military judge on the Air Force Court of Criminal Appeals." Memorandum from Sec'y of Def. Chuck Hagel for Sec'y of the Air Force Eric Fanning (25 June 2013).

On 18 July 2013, we issued a decision in which we dismissed a charge and specification, but affirmed the remaining findings and the sentence as approved by the convening authority. *United States v.* ***Verdejo****-Ruiz*, ACM 37957, 2013 CCA LEXIS 680 (A.F. Ct. Crim. App. 18 July 2013) (unpub. op.). This Court issued its opinion after hearing oral argument on the appellant's first assigned issue, dealing with the defense's motion to suppress statements the appellant made after law enforcement agents purportedly promised him confidentiality. Pursuant to his appointment by the Secretary of Defense, Mr. Soybel was a member of that panel. The appellant then filed with this Court a motion to vacate and petitioned our superior court for review. On 12 November 2013, our superior court converted the appellant's motion to vacate into a motion for reconsideration. *See United States v.* ***Verdejo****-Ruiz*, 73 M.J. 109, No. 14-0010/AF (Daily Journal 12 November 2013). On 15 April 2014, our superior court issued its decision in *United States v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2013), holding that the Secretary of Defense did not have the legislative authority to appoint civilian employees as appellate military judges, and that his appointment of Mr. Soybel to

this Court was "invalid and of no effect."

In light of *Janssen*, we granted the motion for reconsideration on 29 April 2014 and permitted the appellant to file a supplemental assignment of errors. The appellant actually filed two supplemental errors, raising three issues not previously before this Court. We also granted the appellant's motion for oral argument on the same issue previously argued to this Court. On 24 June 2014, well after the deadline for supplemental briefs to be submitted in this case and after oral argument, the appellant moved for leave to file yet another supplemental assignment of errors, alleging he received ineffective assistance of counsel. Given that this Court had repeatedly allowed the appellant to raise additional issues out of time during the lengthy appellate processing of this matter, and given that the appellant made no attempt to explain why this latest issue could not have been raised earlier, we denied the appellant's motion to submit this latest supplemental assignment of errors.

With a properly constituted panel, we have reviewed the appellant's case, to include the appellant's previous and current filings, oral argument, and the previous opinion issued by this Court.

Background

The charged acts took place in or around July 2004. At that time, then 13-year-old CL visited with family members in Oklahoma. She resided with her grandparents, but she frequently visited her step-father's cousin, Mrs. LV, and Mrs. LV's husband, the appellant. She sometimes spent the night at the appellant's home and considered herself to have a close relationship with Mrs. LV. CL helped Mrs. LV and the appellant prepare for their wedding ceremony at the end of July, which would formally celebrate their marriage that took place two years earlier.

During the days leading up to the wedding ceremony, CL stated the appellant committed four sexual acts against her, all contrary to her will. Three such incidents took place in the house, either when Mrs. LV was sleeping or not home. The final such incident took place the night before the wedding ceremony, when the appellant took CL away from decorating for the reception and engaged in sexual intercourse with her in his car.

CL did not tell anyone about these acts until approximately six years later, when she confided in a friend and then a family member. The Air Force Office of Special Investigations (AFOSI) was notified of the allegation and investigated the matter.

Further facts relevant to each assignment of error are discussed below.

Appellant's Motion to Suppress Involuntary Statements

AFOSI agents interviewed the appellant. The interview was videotaped and transcribed. The agents read the appellant his Article 31, UCMJ, 10 U.S.C. § 831, rights from a printed card and allowed him to read along. The appellant acknowledged his rights, declined a lawyer, and agreed to answer questions. After a rapport-building session, the agents confronted the appellant about an allegation that he sexually assaulted CL. The appellant initially maintained that he did not remember doing anything sexual with CL because it was a long time ago, but eventually admitted that he "did commit a stupid action" in that he "was going to sleep with somebody." The appellant eventually stated that he cheated on his wife but could not remember with whom he did so.

After more questioning, the appellant admitted that he had sex with someone in his Cadillac, and it was either CL or a Senior Airman named Amanda. Eventually, after additional prodding, the appellant admitted that it was CL whom he had sex with in his car. In his post-interview written statement, the appellant wrote that he "ran out in [his] car with [CL] and had brief intercourse inside the car." He also stated that he was going to tell his wife about the incident until he learned of CL's age. The appellant only admitted to having sex with CL on the one occasion in his car and to kissing

her a few times after being "seduced." He denied any other sexual misconduct toward CL.

At trial, the defense motioned to suppress the confessions, asserting the appellant's statements were the result of a promise of confidentiality by the two AFOSI agents. The appellant pointed to five specific examples of such promises:

> - "Like I said, what you say here stays with us. We don't go around telling everyone what you say and everything else."
>
> - "You don't have to worry about anything you say with us. Like I said, we are not trying to throw you up by a stake or anything else."
>
> - "Everything that stays in this room, stays in this room."
>
> - "I am not going to tell your wife about it either, you know. . . . I am not going to tell anybody. . . ."
>
> - "See, the thing about our office here is when we talk to people, we don't share information with other people."

In support of the motion to suppress, the appellant testified that these comments convinced him that no matter what he said to the AFOSI agents, they would keep it to themselves. He further testified that he believed the AFOSI agents would only submit a report to his commander indicating whether he was being honest, and nothing more. According to the appellant, he believed the agents promised him confidentiality, so he merely agreed with the allegations in order to leave the interview and get on with his life.

The military judge denied the motion and issued findings of fact. Regarding the appellant's testimony, the military judge stated: "The court finds this testimony to be totally, completely, and unequivocally without merit." The military judge acknowledged the possibility that the agents' statements, standing alone and taken out of context, might have reasonably implied a promise of confidentiality. However, he found that when taken in the context of the entire conversation and under the totality of the circumstances, the agents' statements implied no such promise. The military judge noted that three of the statements were made in response to the appellant's concern about his wife learning of the details of his infidelity with CL and therefore amounted to assurances merely that the agents would not tell the appellant's wife what he said. Additionally, the military judge viewed the other two statements as "tiny snippets of a lengthy discourse by the agents, which given the context of the conversation, could not reasonably be construed as a promise of confidentiality." The military judge also noted that the appellant's own statements during the interview demonstrated his awareness that disciplinary action could result from his admissions, such as his question to agents about whether this matter was "a court-martial thing." Ultimately, the military judge concluded that "the defense . . . cherry picked five very short innocuous statements . . . . [which] taken individually, or collectively, cannot reasonably be construed as a promise of confidentiality." The appellant challenges this ruling on appeal.

A military judge's decision to deny a motion to suppress evidence is reviewed for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

> "Abuse of discretion" is a term of art applied to appellate review of the discretionary judgments of a trial court. An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law. Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. *Id.* (internal quotation marks and citations omitted).

Generally, a confession is not admissible unless it has been made voluntarily, considering the totality of the circumstances surrounding the confession. *Arizona v. Fulminante*, 499 U.S. 279, 285-86, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Mil. R. Evid. 304(a). Military justice jurisprudence has long held that a statement made in response to a promise of confidentiality by law enforcement agents may be inadmissible, because the promise of confidentiality nullifies the rights advisement under Article 31, UCMJ. *United States v. Cudd*, 6 C.M.A. 630, 20 C.M.R. 346, 352 (C.M.A. 1956). A rights advisement followed by a promise of confidentiality "amounts to no warning, as the assurance could only be interpreted to mean that the statement would not be used in a subsequent trial." *Id.* at 350. Statements made in response to a promise of confidentiality are inadmissible, despite the provision of a rights advisement, where the promise "induce[s] a belief in the mind of the accused that his disclosure will not be made the basis for a criminal prosecution." *United States v. Washington*, 9 C.M.A. 131, 25 C.M.R. 393, 395 (C.M.A. 1958). Even an implied promise of confidentiality may render a confession inadmissible if it is "the causative factor for . . . later confessions." *United States v. Green*, 15 C.M.A. 300, 35 C.M.R. 272, 276 (C.M.A. 1965).

Promises of confidentiality are substantially similar to promises of testimonial immunity. *See United States v. Lonetree*, 35 M.J. 396, 401-02 (C.M.A. 1992) (analyzing promises of confidentiality and immunity under the same framework). If an official with either express or apparent authority promises a suspect that no prosecution will result if the suspect confesses, courts will not hesitate to enforce that promise. *United States v. Churnovic*, 22 M.J. 401, 405 (C.M.A. 1986). Promises of confidentiality or immunity made without authority are forms of unlawful inducement. *Lonetree*, 35 M.J. at 402. "A confession is involuntary, and thus inadmissible, if it was obtained . . . through the use of unlawful inducement." *Freeman*, 65 M.J. at 453 (internal quotation marks omitted) (citing Mil. R. Evid. 304(a), (c)(3); Article 31(d), UCMJ).

Under *Freeman*, "promises are considered only a factor in the equation; they are not of themselves determinative of involuntariness." *Id.* at 455. "In determining whether a defendant's will was over-borne in a particular case," we assess "the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation." *Id.* at 453 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). Factors taken into account in determining voluntariness include the accused's age, level of education, and intelligence, along with any advice provided to the accused concerning his constitutional rights, the length of detention, the nature of the questioning, and the use or absence of physical punishment such as the deprivation of food or sleep. *Id.* (citations omitted).

We have reviewed the record of trial, including the written submissions on this issue at trial and on appeal, the video recording of the confession, the transcript of the interview, and the appellant's written confession. We have also considered oral argument on this issue. Our review leaves us firmly convinced that the military judge did not abuse his discretion when he denied the appellant's motion to suppress his confession.

We find no promise of confidentiality made by AFOSI agents. We acknowledge, as did the military judge, that some of the agents' comments, taken in isolation, could be read to constitute a promise of confidentiality or immunity.5 The individual statements the appellant cites should not be held up as a model for other agents to follow, and in a different setting, might constitute a promise of confidentiality or immunity. However, we agree with the military judge that when taken in the context of the totality of the circumstances, most if not all of the agents' statements were made in response to the appellant's concerns about his wife finding out about his actions.6 A fair reading of the entire transcript and an unbiased viewing of the video recording indicates that the agents' comments were not reasonably viewed as general commitments that the agents would forever keep the appellant's

statements in confidence, never to be revealed to anyone. Rather, they were poorly-worded assurances that they would not broadcast his statements to anyone without a need to know the information, including the appellant's wife.

The appellant's own statements indicate his awareness that his statements could be used against him. Toward the end of the interview, he asked agents if this matter could be treated as a court-martial, and he also said that he might need a break to smoke if he was "being handcuffed out of [the interview]." Throughout the interview, the appellant grudgingly disclosed more and more information as he was confronted with the absurdity of his statement that he had sexual intercourse with someone on the eve of his wedding, but could not remember who his partner was. Even when he admitted to having sexual intercourse with CL in the car, he denied other allegations of sexual misconduct. The appellant was well aware that any statements he made could be used against him. We agree with the military judge that the appellant lacked credibility in his contention that he believed agents would only submit a report to his commander indicating whether he was being honest and nothing more. Apart from the inherent improbability of such a belief by a noncommissioned officer who had been in the Air Force for more than 10 years at the time of the interview, the appellant's lack of credibility in his motions testimony clearly presents itself through the transcript.

We find agents made no promise of confidentiality and therefore the appellant's statements were voluntary under the totality of the circumstances. We find no abuse of discretion in the military judge's denial of the defense's motion to suppress the appellant's statements to AFOSI agents.

Factual Sufficiency

The appellant also avers that his convictions for rape, carnal knowledge, forcible sodomy, and indecent acts with a child are factually insufficient.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *See 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, [we are] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 22 C.M.A. 223, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Having reviewed the entire record, including the appellant's confession and the victim's testimony, we are convinced the appellant's convictions are factually sufficient.7 CL provided detailed and believable testimony about the events that transpired, and the appellant's confession corroborated some of her testimony. Despite attempts to do so, the defense was not able to establish any material contradictions or inaccuracies in her testimony. We agree with the members that the appellant is guilty of the charged offenses.

Failure to State an Offense

Notice of the terminal element of an Article 134, UCMJ, offense is an essential part of due process, as an accused must know and fully understand the offenses against which he must defend. *See United States v. Humphries*, 71 M.J. 209, 216 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). Whether a charge and specification state an offense and the remedy for such error are questions of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double

jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); Rule for Courts-Martial 307(c)(3).

Charge III and its Specification alleged a violation of Article 134, UCMJ, in that the appellant committed indecent acts upon the victim, a female under the age of 16, not his wife, by committing certain acts upon her with the intent to gratify his sexual desires. The Specification did not allege one of the three possible clauses of the terminal element: prejudice to good order and discipline, service discrediting, or a crime or offense not capital. The appellant did not contest the wording of the specification at trial.

Because the appellant did not object to the missing element at trial, we analyze this case for plain error and in doing so find that the failure to allege the terminal element was "plain and obvious error that was forfeited rather than waived." *See Humphries*, 71 M.J. at 215. In the context of a plain error analysis of defective indictments, the appellant has the burden of demonstrating that: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id.* at 214 (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)) (internal quotation marks omitted). "[I]n the plain error context[,] the defective specification alone is insufficient to constitute substantial prejudice to a material right." *Humphries*, 71 M.J. at 215 (citing *Puckett v. United States*, 556 U.S. 129, 142, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009); *United States v. Cotton*, 535 U.S. 625, 631-32, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)). Therefore, reviewing courts "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id.* at 215-16 (quoting *Cotton*, 535 U.S. at 633; *Johnson v. United States*, 520 U.S. 461, 470, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)). If this is the case, the charging error is considered cured and material prejudice is not demonstrated. *Id.* at 217.

The only mention of any of the clauses of the terminal element during the trial was by trial counsel during closing arguments when, after recounting the facts alleged in the Specification, he argued to the jury that, "It should take you about five seconds to realize that committing these horrible acts on an Air Force Installation on a 13-year-old child is prejudicial to good order and discipline in the United States Air Force." The defense did not address this point.

Our superior court has specified that identifying a theory of criminality during closing argument alone does not constitute sufficient notice to find a lack of prejudice from omission of the terminal element on the charge sheet. *United States v. Goings*, 72 M.J. 202, 208 (C.A.A.F. 2013). Because notice of the missing element is not "somewhere extant in the trial record," as required by *Humphries*, it was plain and obvious error to omit the terminal element from the Specification alleging indecent acts under Article 134, UCMJ. That error prejudiced the appellant's right to notice. Accordingly, we dismiss the finding of guilty for Charge III and its Specification.

Prosecutorial Misconduct and Perjury

We have considered the appellant's fourth and fifth assigned errors, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982), and find them meritless.

We have reviewed the appellant's claim of prosecutorial misconduct under the standards of *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013), *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006), and *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). We have paid special attention to the "overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). Having examined trial counsel's conduct as well as the fairness of this trial, we find no merit in the appellant's claim.

The appellant claims the victim committed perjury, pointing to statements in the Article 32, UCMJ, 10

U.S.C. § 832, investigation which he claims could be used to contradict her. He then relates this back to his argument that the evidence was insufficient to support a conviction. We have already addressed the issue of factual sufficiency and there is no need to rehash it. Trial defense counsel subjected CL to a vigorous cross-examination. The members believed her, and we are similarly convinced by her testimony and the other evidence in the record of trial, to include the appellant's confession. We find no merit to the appellant's claim

Cumulative Error

The appellant avers that cumulative errors occurred at trial that should compel us to set aside the findings and sentence. In this argument, the appellant raises eight errors he alleges transpired during trial, some with several subparts.

As our sister court observed, we "evaluate the fairness of the appellant's trial using the cumulative error doctrine." *United States v. Parker*, 71 M.J. 594, 630 (N.M. Ct. Crim. App. 2012) (citing *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996); *United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992)). As the *Parker* Court stated, *Dollente* requires us to evaluate the errors

> [a]gainst the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy-of any remedial efforts); and the strength of the government's case.71 M.J. at 603 (second alteration in original).

Some of the errors alleged by the appellant include supposed errors by the military judge in his instructions, misstatements of the evidence by the prosecutor, the denial of the right to an educated jury due to the prosecutor's failure to present expert testimony on child behavior that would favor the appellant's case, and that a testifying AFOSI agent was allowed to give human lie detector testimony. We have reviewed the appellant's allegations and find no error. Rather, we find rulings and decisions made well within the sound discretion of the military judge. There was ample evidence of the appellant's guilt and there were no errors that materially prejudiced his substantial rights. Under these circumstances, the appellant was not denied a fair trial, and the cumulative error doctrine is not applicable. *See United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011); *Dollente*, 45 M.J. at 242.

Visitation Rights

Citing *United States v. Ouimette*, 52 M.J. 691 (C.G. Ct. Crim. App. 2000), the appellant claims the USDB's refusal to allow him visitation rights with his children illegally constituted a "harsher [and] excessive sentence and punishment" because (1) he did not commit any offense against his own children, (2) he was issued a meritless no-contact order, and (3) the USDB administrative system improperly lists him as single with no dependents. The appellant submitted documents indicating he is under a blanket restriction from having any visitation and from making any contact with his own children (even indirectly through contact via his wife).8 He sent a request to the USDB Commandant for an exception to this policy but was denied. He filed a complaint with the Inspector General, and although he states he has filed a complaint pursuant to Article 138, UCMJ, 10 USC § 938, the record lacked any other indication or evidence of this assertion.9

We review allegations of cruel and unusual punishment de novo. *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006). As our superior court noted:

> [T]he Eighth Amendment prohibits two types of punishments: (1) those "incompatible with the evolving standards of decency that mark the progress of a maturing society" or (2) those "which involve the unnecessary and wanton infliction of pain." We apply the Supreme Court's

interpretation of the Eighth Amendment in the absence of any legislative intent to create greater protections in the UCMJ.*Id.* (citations omitted). Except for specific situations not applicable to this case, Article 55, UCMJ, 10 U.S.C. § 855, is coterminous with the Eighth Amendment,10 and we will apply that standard to both provisions. *See United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007); *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983).

A violation of the Eighth Amendment is shown by demonstrating:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ.*Lovett*, 63 M.J. at 215 (omission in original) (footnotes omitted).

Applying these standards, we find no violation of the Eighth Amendment or Article 55, UCMJ. The appellant's complaint does not amount to a serious act or omission resulting in a denial of necessities. Typically, such serious acts or omissions include matters such as denial of needed medical attention, proper food, sanitary living conditions, or even physical abuse. *See United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000). The appellant's deprivation is more akin to routine conditions associated with punitive or administrative segregation such as restriction of contact with other prisoners, of exercise outside a cell, of visitation privileges, of telephone privileges, and/or of reading material. *See Id.* at 102. We also note that not all visitation or outside contact was withheld from the appellant, just a certain segment of it. This partial, rather than full, restriction on the appellant's ability to communicate with friends and family also supports the Government's case. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Henderson v. Terhune*, 379 F.3d 709 (9th Cir. 2004). Also, the appellant has not shown the Commandant acted with a culpable state of mind. He did not arbitrarily select the appellant and deny him contact with minors. He was merely enforcing the USDB's rules.

We emphasize that the USDB rules about visitation with children are enforced for the protection of minors. That the appellant has to undergo a strict screening policy before being granted permission to visit his children is an administrative safeguard to protect minor juveniles from those convicted of child sex crimes. It is not an additional punishment or a method of enhancing the sentence already adjudged. Accordingly, we find no merit to the appellant's claim.

Propriety of Charges

The appellant argues that the offenses of carnal knowledge and indecent acts were improperly charged and should be dismissed because the legal actions to bring him to trial on these offenses occurred after 1 October 2007. According to the appellant, Executive Order 13447 and the 2006 National Defense Authorization Act amended the *Manual for Courts-Martial*, and eliminated these two offenses. He argues that because the Executive Order states that nothing in the amendments would invalidate certain legal actions, to include investigations and referral of charges, that began prior to 1 October 2007, and the legal actions that preceded the appellant's trial occurred after that date, they were rendered invalid by the Executive Order because they occurred too late.

This argument is without merit. Executive Order 13447 and the 2006 National Defense Authorization Act did not eliminate these two offenses in the sense that no one could be prosecuted for them if legal action began after 1 October 2007. The Executive Order merely incorporated the amendments to Article 120, UCMJ, and other provisions. It did not bar prosecution of violations of the law as it was written prior to the amendments and the Executive Order.

These offenses were all alleged as perpetrated against a child between the ages of 12 and 16 years

old. As such, each has a 25-year statute of limitations and may be prosecuted any time within that period. *See United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008). *See also* Article 43, UCMJ, 10 U.S.C. § 843; Drafter's Analysis, *Manual for Courts-Martial, United States*, A21-57, A27 (2012 ed.). The language cited by the appellant in the Executive Order does not bar the offense from being prosecuted.

Review of CL's Mental Health and Medical Records

The appellant next alleges that either the military judge or the Government denied him a fair trial by failing to provide him with relevant mental health and medical records of CL. The appellant alleges that the records he sought would have demonstrated that the charged acts occurred not in 2004 but in 2006, near the time she underwent a significant medical procedure.

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.Mil. R. Evid. 513(a). However, no such privilege exists when the records are "constitutionally required." Mil. R. Evid. 513(d)(8). "To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence." Mil. R. Evid. 513(e)(4).

"We review a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

At trial, the defense moved to compel production of CL's mental health records covered by Mil. R. Evid. 513. Trial counsel provided the appropriate records to the military judge; however after reviewing them *in camera*, he determined no records would be provided to the defense. The defense did not move to produce any of CL's medical records. While trial defense counsel did file a notice under Mil. R. Evid. 412 indicating a desire to cross-examine the victim about the alleged medical procedure, he abandoned the effort when he learned a Government witness would testify the procedure took place at a different time-a time trial defense counsel believed would be supported by the mental health records. Based on this, trial defense counsel twice told the military judge they no longer sought to pursue this matter.

We have reviewed the appellant's assignment of error, the defense's filings under Mil. R. Evid. 412 and 513, trial defense counsel's representations to the military judge, and the mental health records. We find no abuse of discretion in the military judge's decision not to release mental health records to the defense. We similarly find no basis for relief in trial defense counsel's decision not to pursue questioning about the alleged medical procedure. The decision of the defense to pursue this issue resulted from a lack of evidence to support the defense theory, not from any action of the military judge or the Government.

Military Judge's Instructions on Force Elements

The appellant alleges that the military judge's findings instructions concerning force in the forcible sodomy and rape specifications erred in three respects: (1) his instructions on the forcible sodomy specification erroneously lessened the Government's burden of proof by allowing the members to find force occurred simply on the basis of CL's age; (2) his instructions concerning the rape and forcible sodomy specifications improperly included the concept of constructive force; and (3) the military judge failed to give a "mistake of age" instruction.

Whether the military judge properly instructed the members is a question of law we review de novo. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010). However, "[w]here there is no objection to an instruction at trial, we review for plain error." *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014).

We find no error-plain or otherwise-in the military judge's instructions. The military judge's instructions concerning the forcible sodomy specifications did not allow the members to find force solely because of CL's age; rather they properly presented CL's age as one factor the members could consider in determining whether CL was incapable of giving consent. The military judge's constructive force instruction was proper, as constructive force has long been held to satisfy the requirement of force under the version of Article 120, UCMJ, applicable to the time of the appellant's misconduct.11 *See, e.g., United States v. Davis*, 52 M.J. 201, 203 (C.A.A.F. 1999). Finally, we find no plain error in the lack of a "mistake of age" instruction based on the lack of indication in the record of trial that the appellant was mistaken as to CL's age.

Appellate Review Time Standards

We review de novo "[w]hether an appellant has been denied [his] due process right to a speedy post-trial review . . . and whether [any] constitutional error is harmless beyond a reasonable doubt." *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed before this Court. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). The *Moreno* standards continue to apply as a case remains in the appellate process. *United States v. Mackie*, 72 M.J. 135, 135-36 (C.A.A.F. 2013). The *Moreno* standard is not violated when each period of time used for the resolution of legal issues between this Court and our superior court is within the 18-month standard. *Id.* at 136; *see also United States v. Roach*, 69 M.J. 17, 22 (C.A.A.F. 2010). However, when a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors elucidated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and *Moreno. See United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005); *see also Barker*, 407 U.S. at 530.

This case was originally docketed for appellate review on 11 July 2011 and this Court rendered a decision on 18 July 2013. This exceeded the 18-month standard established in *Moreno* and is therefore facially unreasonable. We have examined the factors identified in *Barker* to determine whether the appellant suffered from a due process violation as a result of the delay. We find that no such due process violation occurred in the delay leading up to this Court's 18 July 2013 decision. In particular, the appellant has made no showing of prejudice under the fourth *Barker* factor. When there is no showing of prejudice under the fourth factor, "we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, when we balance the other three factors, we find the post-trial delay in this case to not be so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system. We are convinced the error is harmless beyond a reasonable doubt.

As for the time that has elapsed since this Court's 18 July 2013 decision, we find no due process violation. The *Moreno* standards continue to apply as a case continues through the appellate process. *Mackie*, 72 M.J. at 135-36. The *Moreno* standard is not violated when each period of time

used for the resolution of legal issues between this Court and our superior court is within the 18-month standard. *Id.* at 136; *see also Roach*, 69 M.J. at 22. The time between our superior court's action to return the record of trial to our Court for our action and this decision did not exceed 18 months; therefore, the *Moreno* presumption of unreasonable delay is not triggered. *See Mackie*, 72 M.J. at 136. Assuming the total appellate processing of this case raises a presumption of unreasonable delay, we again conclude the delay was harmless under the *Barker* analysis.

While we find the post-trial delay was harmless, that does not end our analysis. Article 66(c), UCMJ, empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *see also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006). In *United States v. Brown*, 62 M.J. 602, 606-07 (N.M. Ct. Crim. App. 2005), our Navy and Marine Court colleagues identified a "non-exhaustive" list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay; the length and complexity of the record; the offenses involved; and the evidence of bad faith or gross negligence in the post-trial process. *Id.* at 607. We find there was no bad faith or gross negligence in the post-trial processing in any stage of the appellate review of this matter. The reason for the delay between 18 July 2013 and our opinion today was to allow this Court and our superior court to fully consider a constitutional issue of first impression: whether the Secretary of Defense has the authority under the Appointments Clause12 to appoint civilian employees to the service courts of criminal appeals. We conclude that sentence relief under Article 66, UCMJ, is not warranted.

Sentence Reassessment

Having dismissed Charge III and its Specification, we must determine whether we are able to reassess the sentence. Applying the analysis set forth in *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013), we are confident that we can reassess the appellant's sentence to cure any prejudicial effect of the error in the defective specification. Under the four factors identified in *Winckelmann*, and analyzing this matter under the totality of the circumstances, we are confident that absent the defective specification, the appellant's sentence would not change from that adjudged and approved. *See Id.* at 15-16. We base this conclusion on three findings: (1) there has not been a dramatic change in the penalty landscape and exposure because conviction for forcible sodomy carried with it a maximum sentence to confinement of life; (2) the nature of the remaining offenses captures the gravamen of criminal conduct included within the original offenses, and significant aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; and (3) the remaining offenses are of the type this Court has the experience and familiarity with to reliably determine what sentence would have been imposed at trial. We therefore reassess the appellant's sentence to the same sentence originally adjudged and approved.

Conclusion

We set aside and dismiss Charge III and its Specification and affirm the remaining findings and the sentence as approved by the convening authority. The approved findings, as modified, and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant regarding the affirmed charges and specifications occurred. Articles 59(a) and 66(c), UCMJ.

Accordingly, the findings, as modified, and the sentence, are

AFFIRMED.

Footnotes

1

The convening authority's action states, in relevant part:

In the case of [the appellant], only so much of the sentence as provides for a dishonorable discharge, confinement for 25 years, and reduction to the grade of Airman Basic (E-1) is approved and, except for the dishonorable discharge, will be executed, but the execution of the first six months of that part of the sentence extending to forfeiture of total pay and allowances is suspended for six months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action.The action then noted that the adjudged reduction in rank and forfeiture were deferred 14 days from the date the sentence was adjudged until the date of the action. The action also waived mandatory forfeitures under Article 58b, UCMJ, 10 U.S.C. § 858b. Therefore, the first part of the action's first sentence excludes the total forfeitures from approval, while the second half of the first sentence purports to suspend execution of the adjudged forfeitures. The appellant did not raise this as an issue, and both parties' appellate filings clearly indicate their understanding that the adjudged forfeiture was not approved. The court-martial order accurately reflects the language of the convening authority's action. For clarity's sake, we explicitly find that the convening authority's action unambiguously disapproved the adjudged forfeiture. *See United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007).

2

U.S. Const. amend. V.

3

U.S. Const. amend. XIV.

4

Issues 4, 5, 6, 8, 9 and 10 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982). This Court's original opinion addressed issues 1 through 8. In supplemental assignments of error submitted to this Court upon reconsideration, the appellant re-raised some but not all of the previously submitted issues and raised new issues 9 through 11. It is not clear why the appellant re-raised some but not all of the previously submitted issues. This Court has analyzed all 11 issues, regardless of whether the appellant elected to re-raise them.

5

In addition to the comments cited by the appellant, we also point out the following statement by one of the agents:

[R]ight now this is where the crossroad is. You need to make that decision of which way you are going. This is where you have the option to A), *go on and save your career and have a long living career*; or B), you can lie to me and you are going to watch your career flush down the toilet.(emphasis added).

6

The appellant's concern about his wife finding out about his extra-marital sexual conduct with an underage relative is reflected in the record of trial. When the appellant's wife testified in findings on his behalf, she admitted that she did not know that the appellant confessed to having sexual intercourse with CL until shortly before trial, when trial counsel informed her of the appellant's admissions.

7

Though not specifically raised, we also find that the appellant's convictions are legally sufficient. *See United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).
8

The United States Disciplinary Barracks' regulations prevent him from seeing any children without first obtaining an "exception to policy."
9

Our July 2013 decision noted the absence of any indication or evidence that the appellant filed a complaint under Article 138, UCMJ, 10 U.S.C. § 938. Despite submitting voluminous filings in this case, the appellant still has not provided any such proof that he filed such a complaint. Even assuming he has submitted such a complaint, our conclusion on this matter remains the same.
10

U.S. Const. amend. VIII.
11

The appellant was charged with raping CL on divers occasions between 1 July 2004 and 30 September 2004 in violation of Article 120, UCMJ, 10 U.S.C. § 920. *See Manual for Courts-Martial, United States*, A27-1 (2012 ed.).
12

U.S. Const. art II § 2, cl 2.

APPENDIX D

U.S. v. Rafael Verdejo-Ruiz.
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
74 M.J. 328; 2015 CAAF LEXIS 902
No. 14-0010/AF.
March 26, 2015, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

CCA 37957.United States v. **Verdejo**-Ruiz, 2013 CCA LEXIS 680 (A.F.C.C.A., July 18, 2013)

Opinion

Petition for Grant of Review Denied.

APPENDIX

E

RAFAEL VERDEJO RUIZ vs. WARDEN EDGE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION
2018 U.S. Dist. LEXIS 222281
CIVIL ACTION NO. 5:18-CV-22
December 13, 2018, Decided
December 13, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Writ of habeas corpus dismissed, Objection overruled by Ruiz v. Warden, Fed. Corr. Inst., 2019 U.S. Dist. LEXIS 35347 (E.D. Tex., Mar. 5, 2019)

Editorial Information: Prior History

United States v. **Verdejo**-Ruiz, 2013 CCA LEXIS 680 (A.F.C.C.A., July 18, 2013)

Counsel **{2018 U.S. Dist. LEXIS 1}**Rafael **Verdejo** Ruiz, Petitioner, Pro se, Texarkana, TX.

For FNU Edge, Respondent: Robert Austin Wells, LEAD ATTORNEY, U S Attorney's Office - Tyler, Tyler, TX.

Judges: CAROLINE M. CRAVEN, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: CAROLINE M. CRAVEN

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Rafael **Verdejo** Ruiz, a prisoner confined at the Federal Correctional Institution in Texarkana, Texas, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

The above-styled action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

In 2011, petitioner, a former active duty member of the United States Air Force, was tried by a general court-martial and found guilty of four specifications: (1) rape of a person between the ages of 12 and 16, (2) carnal knowledge with a person between the ages of 12 and 16; (3) sodomy of a person between the ages of 12 and 16; and (4) indecent acts upon the body of a female under the age of 16. He was sentenced to a dishonorable discharge, 25 years of**{2018 U.S. Dist. LEXIS 2}** confinement, reduction in grade from E-6 to E-1, and forfeiture of all pay and allowances.

In military cases, the appeal process begins with the defense submitting matters to the convening authority. RULE FOR COURTS-MARTIAL (R.C.M.) 11.05. Following that review, the convening authority approved the dishonorable discharge, confinement for 25 years, and reduction in grade to E-1. However, the convening authority granted petitioner clemency by disapproving the adjudged forfeitures of pay and allowance, and by waiving the imposition of automatic forfeitures for 6 months for the benefit of petitioner's wife and children.

The case was appealed to the Air Force Court of Criminal Appeals (AFCCA). The AFCCA set aside the specification alleging indecent acts. Because the remaining offenses carried the same maximum punishment, the AFCCA affirmed the sentence. Petitioner filed a motion for reconsideration. The AFCCA affirmed its prior decision. On March 26, 2015, the United States Court of Appeals for the Armed Forces (CAAF) denied petitioner's petition for review, and the CAAF subsequently denied an untimely motion for reconsideration.

After his discharge from the United States Air Force on April**{2018 U.S. Dist. LEXIS 3}** 14, 2015, petitioner sought habeas relief from the CAAF. The CAAF denied the petition on June 22, 2016.

The Petition

Petitioner contends he raised an affirmative defense that he mistakenly believed that the victim consented to sexual acts, but the trial judge failed to instruct the jurors that the government had the burden of disproving his affirmative defense beyond a reasonable doubt. Petitioner challenges the pay forfeiture portion of his sentence, asserting that he should either receive his pay or his sentence should be reduced by one day for each day of forfeited pay. Petitioner contends he received ineffective assistance of counsel because his attorneys failed to raise these issues, and also because his appellate attorney failed to file a timely brief.

Analysis

The military has its own criminal justice system, which is governed by the Uniform Code of Military Justice. *Burns v. Wilson*, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953). The UCMJ provides for courts-martial, direct appellate review, and post-conviction review through the military court system, and limited *certiorari* review by the United States Supreme Court. *Fletcher v. Outlaw*, 578 F.3d 274, 277 (5th Cir. 2009). Although federal courts have jurisdiction over habeas petitions filed by military prisoners, the scope of review is limited.**{2018 U.S. Dist. LEXIS 4}** *Burns*, 346 U.S. at 142. Federal habeas review of a court martial is limited to jurisdictional issues and determining whether the military gave full and fair consideration to the petitioner's claims. *Calley v. Callaway*, 519 F.2d 184, 198 (5th Cir. 1975). It is the petitioner's burden to show that the military review was not full and fair. *Burns*, 346 U.S. at 146.

Federal courts may not reevaluate and re-weigh the evidence presented in the military courts. *Burns*, 346 U.S. at 146. The United States Court of Appeals for the Fifth Circuit has held that review of a military conviction is only appropriate if the petitioner meets each of the following four factors: (1) the asserted error is of "substantial constitutional dimension," (2) the issue is a legal question rather than a disputed fact determined by the military court; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts gave adequate consideration to the issues involved and applied the proper legal standards. *Calley*, 519 F.2d at 199-203. With respect to the fourth factor, when an issue is briefed and argued before the miliary court, full and fair consideration has been given, even if the military court summarily disposes of the issue. *Fletcher*, 578 F.3d at 278.

Petitioner states that none of the claims raised in this petition were**{2018 U.S. Dist. LEXIS 5}**

litigated in the military courts.1 Because they were not litigated in the military courts, the claims are unexhausted. "Federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." *Schlesinger v. Councilman*, 420 U.S. 738, 758, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975); *see also Perguson v. Nicoli*, 694 F.2d 101, 104 (5th Cir. 1982) (holding that constitutional claims must be exhausted in military courts before federal habeas review). Where the issue was not raised before the miliary courts, the petitioner must show cause excusing the procedural default and actual prejudice as a result of the error. *Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808, 812 (10th Cir. 1993).

The accused in a military court has the right to raise any issues on appeal, and appellate counsel must bring those issues to the attention of the military court in addition to the issues that counsel finds worthy of appeal. *United States v. Grostefon*, 12 M.J. 431, 436-37 (1982). In this case, appellate counsel filed a brief, and then petitioner exercised his right to raise additional issues on appeal to the AFCCA. The AFCCA addressed each of the issues that petitioner raised, as well as the issues raised by counsel. The claims raised in this petition could have been addressed on direct appeal, but petitioner did not bring the issues to the attention of counsel or the AFCCA in a timely fashion.**{2018 U.S. Dist. LEXIS 6}** In this case, petitioner has not shown cause or prejudice for failing to present his claims on direct review in the military courts. Therefore, the claims are procedurally barred from consideration in a federal habeas proceeding.

Recommendation

This petition for writ of habeas corpus should be dismissed.

Objections

Within fourteen days after receipt of the Magistrate Judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 13th day of December, 2018.

/s/ Caroline M. Craven

CAROLINE M. CRAVEN

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

Citing *Watson v. McCotter*, 782 F.2d 143 (10th Cir. 1986), respondent contends the military courts gave full and fair consideration to petitioner's claims of ineffective assistance of counsel. In *Watson*, the Tenth Circuit held that an issue that was briefed received fair consideration, "even though its

opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion." *Watson*, 782 F.2d at 145. In this case, petitioner raised his claims of ineffective assistance of counsel in a motion for leave to file a supplemental assignment of error that the AFCCA denied, and then he raised them in a petition for review that the CAAF denied. There is no indication from either of these denials of procedural matters that the claims were reviewed and rejected on the merits.

he received ineffective assistance of counsel because his attorneys failed to raise these issues, and also because his appellate attorney failed to file a timely brief.

None of the petitioner's claims were litigated on the merits in the military courts. The claims concerning the jury instruction and salary forfeiture were never raised in the military courts. Thus, those claims are clearly unexhausted. The petitioner contends that he raised the ineffective assistance of counsel claims in a timely manner. This objection lacks merit. In the military courts, the accused has the right to raise any issues on appeal, in addition to the issues raised by**{2019 U.S. Dist. LEXIS 3}** counsel. *United States v. Grostefon*, 12 M.J. 431, 436-37 (1982). Although the petitioner exercised his right to raise additional issues, he did not raise the ineffective assistance of counsel claims in his *Grostefon* brief. The petitioner later raised the ineffective assistance of counsel claims in a motion for leave to file a supplemental assignment of error, but the Air Force Court of Criminal Appeals (AFCCA) denied the petitioner leave to file the supplemental assignment of error. The petitioner also raised the claims in a petition for review, but the United States Court of Appeal for the Armed Forces (CAAF) exercised its discretion to deny review. Because none of the claims raised in this petition were litigated on the merits in the military courts, the magistrate judge correctly concluded that the claims are unexhausted.

The petitioner contends that the district court should consider the unexhausted claims because the military courts will not review the claims in a habeas petition. However, claims that were not raised in the military courts are deemed to be waived. *Roberts v. Callahan*, 321 F.3d 994, 995 (10th Cir. 2003). In order for a federal district court to review the merits of unexhausted, waived claims, the petitioner must show cause for the procedural default and actual prejudice**{2019 U.S. Dist. LEXIS 4}** resulting from the alleged error. *Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808, 812 (10th Cir. 1993).

The petitioner objects to the magistrate judge's conclusion that the petitioner had not demonstrated cause for failing to exhaust his claims. The petitioner alleges that military authorities lost his copy of the trial record while his appeals were pending, and that he did not receive a new copy until he was working on this petition. The petitioner contends that the loss of his trial record is cause for the default, however, the petitioner has not demonstrated that the trial record was lost before the first *Grostefon* brief was filed, or that he could not have raised the issues without the trial record.

Next, the petitioner contends counsel's delay in filing the motion for leave to file a supplemental assignment of error caused the procedural default. The record shows that the AFCCA affirmed the petitioner's sentence on July 18, 2013. *United States v. **Verdejo**-Ruiz*, 2013 CCA LEXIS 680, 2013 WL 3972293 (A.F.C.C.A. July 18, 2013) (unpublished). On April 29, 2014, the AFCCA granted the petitioner's motion for reconsideration and allowed him to file a supplemental assignment of error. The petitioner actually filed two supplemental assignments of error, which raised a total of three new issues. The petitioner contends that he requested his attorney**{2019 U.S. Dist. LEXIS 5}** to raise the ineffective assistance of counsel claims in a third supplemental assignment of errorM on June 1, 2014, which the attorney filed on June 24, 2014. Although the AFCCA addressed the merits of the issues raised in the first two supplemental assignments of error, the AFCCA found that the third supplemental assignment of error was filed "well after the deadline for supplemental briefs to be submitted in this case and after oral argument." *United States v. **Verdejo**-Ruiz*, 2014 CCA LEXIS 607, 2014 WL 4803023, at *2 (A.F.C.C.A. Aug. 14, 2014) (unpublished). The AFCCA denied the motion to submit the third supplemental assignment of error because it was untimely and because the petitioner "made no attempt to explain why [the ineffective assistance of counsel claims] could not have been raised earlier." *Id.* The record reflects that the petitioner did not request his attorney to raise the ineffective assistance of counsel claims in a timely manner. Therefore, the short delay in filing is not the cause of the procedural default. The remainder of the petitioner's objections concern

the merits of his claims. Because he has not shown cause for the procedural default, it is not necessary for the Court to consider the merits of the claims, or whether the petitioner was prejudiced by the{**2019 U.S. Dist. LEXIS 6**} alleged errors. Further, the petitioner has not shown that failing to address the merits of his claims will result in a grave miscarriage of justice.

The Court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* Fed. R. Civ. P. 72(b). After careful consideration, the Court concludes the objections are without merit.

ORDER

Accordingly, the petitioner's objections (#25 and #28) are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge (#24) is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

So Ordered this

Mar 5, 2019

/s/ Rodney Gilstrap

RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

APPENDIX F

United States Court of Appeals for the Fifth Circuit

No. 19-40277

RAFAEL VERDEJO RUIZ,

Petitioner—Appellant,

versus

DEREK EDGE, WARDEN, FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:18-CV-22

ON PETITION FOR REHEARING

Before DAVIS, STEWART, and DENNIS, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX G

19 July 2017

AFLOA/JACE-LC
1500 W. Perimeter Road, Suite 1500
Joint Air Base Andrews, MD 20762

Technical Sergeant Rafael Verdejo
17670-035, A-3
Federal Correction Institution
Texarkana, TX, 75505-7000

Re: Court-Martial Documents Request Assistance

TSgt Verdejo:

Greetings. I hope this letter finds you well. I received your letter dated 24 June 2017, requesting assistance in attaining records associated with your court-martial and appellate process. I have enclosed the documents you requested. I made a request to TSgt Martin, the paralegal at Air Force Appellate Defense, to print a copy of your electronic file. In addition, I am enclosing my copy of your Record of Trial and my case file. Please note, that I do not have another copy of the record of trial or the case file.

If you have any questions or require additional information, please contact me at 240-612-4697 or michael.a.schrama.mil@mail.mil.

Sincerely,

MICHAEL A. SCHRAMA, Major, USAF
Environmental Litigation Attorney

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGENCY

10 May 2017

Lieutenant Colonel Nicholas W. McCue
Deputy Chief, Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, Maryland 20762

Mr. Rafael Verdejo
FCI
P.O. Box 7000
Texarkana, TX 75505

Dear Mr. Verdejo

My office has received your letter dated 19 April 2017, requesting our assistance with certain matters. It is my understanding that your former appellate defense counsel, Maj Shane McCammon, has already forwarded you a copy of your record of trial. Our office no longer retains a copy of your record of trial.

With regards to the other documents you are requesting, I have forwarded your letter to your other former appellate defense counsel, Maj Michael Schrama. I informed Maj Schrama about what happened to your personal items and advised him that I would be forwarding your contact information to him. Please contact him at the below address:

Major Michael A Schrama
Environment Litigation Attorney
Air Force Legal Operations Agency
Comm: (240) 612-4680
1500 W. Perimeter Road, Suite 1500
Joint Base Andrews, Maryland 20762

Be advised that my office does not maintain your DD214, nor your Office of Special Investigations (OSI) report of investigation (ROI). As for your legal documents, Maj Schrama might be able to help you with those.

Sincerely

NICHOLAS W. McCUE, Lt Col, USAF
Deputy Chief, Appellate Defense Division

S1

APPENDIX H

"NOTICE OF REQUEST"

To: Clerk U.S. District Court
Eastern District of Texas
Room 301 Federal Bldg
500 State Line Ave
Texarkana, TX 75501

From: Rafael Verdejo Ruiz #17670-035
FCI Texarkana
P.O. Box 7000
Texarkana, TX 75505

Re: Cease and Desist Request

PLEASE TAKE NOTICE, that I Rafael Verdejo Ruiz, sentient, moral being, request that actions by members of my unit team, specifically, Mr. Amos (counselor) cease and desist in his actions by limiting access to pertinent documents that I need to pursue legal redress. Specifically, my Record of Trial and support documents provided by my Appellate Attorney, Maj Schrama.

Upon arrival of my record of trial (ROT), it was opened, not in my precense, further, I am unable to be in possession of said documents. I am only able to view them in the precense of Mr. Amos which is limited due to his heavy work load or lack of presence in his office.

Due to my right to appeal, I am being hindered in presenting arguments to the Courts as I have to write-out any notes and copy (by hand) any documentation I need in order to then go to the Law library and do my research and write out any arguments. This has been extremely burdensome and unwarranted. This is a further concern as in appeals, it is normal for a 30-day time limit to reply to the courts. As the documentation is not readily available to me and when it is available, I cannot take any documents with me to write my arguments, I have to do too many unnecessary things in order to work on my case. This causes a IV, V, and VI Constitutional Amendment Violation.

I respectfully request intervention for these actions to cease and desist, that all ROT documentation be given to me immediately in order to pursue my legal actions in a fair, accurate and timely manner and that no repercussions by any staff member ensue due to my complaints. I have dealt with this process for aproximately six months now and I am not content with attempting to work on my legal issues while staff and inmates peruse the office or staff members watch football games and take phone calls on my alleged "legal time."

I, Rafael Verdejo Ruiz, declare under penalty of perjury that the above information is true and correct.

29 Dec 2017
Date

#17670-035

Cease and Desist Request
1 of 2

19-40277.394

APPENDIX

I

TRULINCS 17670035 - VERDEJO RUIZ, RAFAEL - Unit: BML-S-A

FROM: 17670035
TO: R&D Property
SUBJECT: ***Request to Staff*** VERDEJO RUIZ, RAFAEL, Reg# 17670035, BML-S-A
DATE: 07/07/2019 10:52:43 AM

To: R&D PROPERTY
Inmate Work Assignment: Unassigned

I have a pending case in the United States District Court, Eastern District of Texas, and in the United States Court of Appeals for the Fifth Circuit, Case No. 5:18-CV-22. I am in need of my property in order to respond and submit to the Courts.

I have been here since May from Texarkana FCI. Me and 2 other inmates travelled at the same time from Texarkana. They have received their property, however, I have not.

I am respectfully requesting your assistance and verify if my property has been set aside. Upon arrival I was temporarily placed in the SHU.

Thank You in Advance.

TRULINCS 17670035 - VERDEJO RUIZ, RAFAEL - Unit: BML-S-A

FROM: 17670035
TO: R&D Property
SUBJECT: ***Request to Staff*** VERDEJO RUIZ, RAFAEL, Reg# 17670035, BML-S-A
DATE: 07/24/2019 12:16:09 PM

To: R&D PROPERTY
Inmate Work Assignment: Unassigned

I am respectfully informing you that I am notifying the United States Court of Appeals for the Fifth Circuit that I STILL have not received my personal property which is essential to respond to said court regarding my pending issues in the case. Case No. 19-40277. My personal property has my legal documentation and research papers necessary which I have not received from your department. I have been in FCC Beaumont since May 9, 2019. I arrived here from Texarkana FCI. All inmates that arrived with me from Texarkana have received their property.

I wrote an electronic Cop-out to your department on 7/7/2019, (10:52:43 A.M.) regarding this same issue. Additionally, every Tuesday I have gone and personally spoken to staff about my property. No property has been found and have been told that I will be placed on call-out when my property arrives.

Very Respectfully Submitted.

-Rafael Verdejo Ruiz

TRULINCS 17670035 - VERDEJO RUIZ, RAFAEL - Unit: BML-S-A

FROM: 17670035
TO: R&D Property
SUBJECT: ***Request to Staff*** VERDEJO RUIZ, RAFAEL, Reg# 17670035, BML-S-A
DATE: 07/25/2019 02:52:26 PM

To: R&D Department
Inmate Work Assignment: Unassigned

I am submitting an Informal Resolution Attempt form.
See attachment.

Very Respectfully,

I/M Verdejo Ruiz
-----VERDEJO RUIZ, RAFAEL on 7/25/2019 2:50 PM wrote:

>

BMX1330.17A
September 12,2012
Attachment A

DOCUMENTATION OF INFORMAL RESOLUTION ATTEMPT

Bureau of Prisons Program Statement No. 1330.16, Administrative Remedy Program, (December 31, 2007), requires, in most cases, that inmates attempt informal resolution of grievances prior to filing a formal written complaint. This form shall be used to document your efforts towards informally resolving your grievance.

Inmate Name: Rafael Verdejo Ruiz Reg. No.: 17670-035 Unit: SA

Specific Complaint and Requested Relief: I respectfully request my inmate property as the relief requested. I have not received my inmate property. This is the 3rd time my property is lost or missing while in BOP custody. I arrived here from Texarkana FCI and all inmates that traveled here with me from there have received their property.

Efforts Made By Inmate To Informally Resolve Grievance (be specific): I have gone to the R&D Department every Tuesday on "Open House" hours seeking information as to my property. I have explained that I have an active case in the courts. I have been told that when my property arrives, I will be placed on "call-out." I have also written two electronic cop-outs to the R&D Department concerning this issue which have not been responded. First Electronic Cop-out sent 07/07/2019

Counselor's Comments: _____

_____

_____

_____

_____

_____

_____

_____

_____ _____

Correctional Counselor's Review / Date Unit Manager's Review / Date

Electronic Request to Staff, Page 3 of 3

APPENDIX

J

1 June 2014

INEFFECTIVE ASSISTANCE OF COUNSEL:
TRIAL DEFENSE COUNSEL (TDC) FAILED TO INTERVIEW AND PRESENT POTENTIAL WITNESSES THAT WOULD DISPROVE OR PRESENT REASONABLE DOUBT OF THE GOVERNMENT'S SUPPORTING EVIDENCE. TDC DID NOT PRESENT WITNESSES DURING SENTENCING. TDC DID NOT CONTRADICT OR PRESENT REASONABLE DOUBT AS TO THE TIMEFRAME OF THE ALLEGATIONS AND POSSIBLE RELATED CIRCUMSTANCES.

The government's supporting evidence was the 1168 and OSI video interrogation which was used by the government to support CML as telling the truth. As the government and TDC know, a "confession" requires evidence in addition to the confession as a test of reliability.

I filled out an 1168 form as directed by the agents and was not re-read my article 31 rights nor the advisement at the end of the form prior to signing it. TDC argued that the statements were extracted by the use of coercion and unlawful inducement. However, TDC did not present evidence or testimony to prove that the statements were not fact. TDC did not contradict or present witnesses that would have shown that my statements were not fact.

During the Motion to Suppress Evidence and to the jury members, TDC failed to show inconsistencies that show a false coerced "confession" or reasonable doubt. For example:

CML Testimony: Last act was in car during reception decoration at night prior to the wedding. (R at 345)

My statement: "we had the wedding and at sometime I ran out and had brief intercourse with her..." (R. at 473, Prosecution exhibit 5)

Looking at this, we can see that CML testified the act in car ocurred the night prior to the wedding, however my testimony is that sex in the car ocurred sometime after the wedding.

Then there is the issue regarding whom I had sex in the car with, to which I said it was Amanda, but the Agents stated it was CML.

Agent SA2 states: "Listen, Rafael, it was you and Caitlyn. Okay?" (Pros. Exh. 4, page 36)
Agent SA1 states: "--we've got information that you and Caitlyn did something in that vehicle at one time." (Pros. Exh. 4, page 25)

Note the ill description of the person I identify is not CML, who is taller than me at aprox. timehack of 17:10:23 of the OSI video. CML was 5' 7inches (Def. exh. C, at 389) and I am 5' 6 inches (Pros. Exh. 4 at 4). The individual I describe is aprox. 6 inches shorter than me in video.

TDC did not attempt to contradict the government's sole supporting evidence which was the 1168 and OSI video. Comparing the 1168 and video to CML's testimony would have shown a false coerced "confession" to the judge in the Motion to Suppress or to the jury to cause reasonable doubt.

TDC failed to present to the judge in the Motion to Suppress the fact that agents tried to "**guarantee**" to me when speaking of keeping things confidential (see p.35, pros exh 4) and that the agent read the article 31 rights once, which he minimized and did not read the warning at the bottom of the 1168 prior to me signing it. Also TDC failed to mention the fact that in my 10 years in the Air Force, I was always the junior enlisted until I arrived at my last base. I never was in a direct leadership role. At my first base I was the lowest ranking individual. At second base in Hawaii I was in a detached unit and was the lowest ranking individual of 3 enlisted members. At third base, Korea MSgt Settle became my mentor teaching me leadership roles, however I was not in a direct leadership position over anyone. Then I PCS'd to Tyndall where I was not in charge of any individual and was eventually given the NCOIC task of Standarization and Evaluations where I was the only enlisted. I never wrote preformance reports, Counseling statements, etc. on any individual except a statement requested regarding a senior individual during a TDY in where there were issues that required my details. This lack of me leading individuals and always being taken care of by my leadership for 10 years only made me more vulnerable to the Agents

coupled with the loss of my daughter, the complications in birth of my son, delicate state of my wife, threats on my career and promises given by the agents.

TDC did not interview potential witnesses. My mother, Dimaris Ruiz would have testified that in the alleged timeframe, she was in possession of the car and that I did not use this car while she had it. She would also have testified that I was not at the reception preparations. This is important because CML testified that I was at the reception preparation and that I took her in said vehicle to get headache pills and had sex with her in this car. The only admission available is me mentioning sex in my car, clarified with whom by the agents as mentioned above.

Aside from my mother, TDC did not interview witnesses that could contradict the 1168 statement and the government's witness. Other bridesmaids, groomsmen, people that assisted the reception decorations could have testified that CML remained with her grandparents and that I was not at the reception during decorations the night prior to the wedding. These same people could have testified of CML's demeanor and interactions with her.

TDC failed to inform me that Mrs.Delfina Rivero would not be available at trial and did not educate me on my option to request a delay of trial until Mrs. Delfina Rivero returned from Mexico. If I knew I could request this, I would not have agreed to the Stipulation of Fact submission since Mrs. Rivero could directly contradict Ricardo Rivero and CML. I was under the impression that there was no choice but to submit the stipulation of fact or else have no witness testimony whatsoever.

TDC did not discuss their defense strategy with me. TDC only spoke to me about testifying in Motion to Supress and did not prepare me to testify except allowing me to review the video once. I was unaware of TDC's lack of witnesses since I was ordered by my First Sergeant and OSI to not speak about the ongoing investigation and trial. I was only instructed by the Defense Paralegal to prepare an unsworn statement. TDC also instructed me not to speak to any potential witnesses regarding the case.

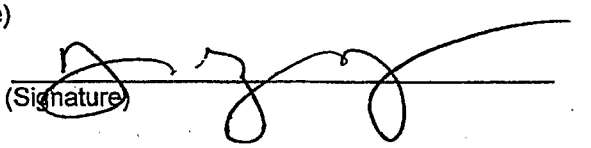
TDC failed to present to the jury the fact that CML changed her statements from Mexico 2004 to Oklahoma 2006 at the request of the government as testified by CML in article 32 which goes to test her reliability by the jury. TDC failed to present their available witness that would corroborate the timeframe in their defense motion (R. at 15). TDC failed to present to the jury that CML's allegations could be related to her "medical procedure" which the government did not want to disclose dates or documents. TDC had at their disposal a witness to contradict or cause reasonable doubt to the government's evidence and witness and did not act to present it to the jury.

TDC failed to present any witness during sentencing that would "humanize" me in front of the jury. TDC did not present me as a good person, rather a "good performer." TDC could have presented Mrs. Delfina Rivero who was CML's granmother and mother of Ricardo Rivero and Aunt of Lilliana Verdejo as testimony of good character if TDC would have requested a delay of trial until Mrs. Rivero returned from Mexico. TDC could have presented my brother, Miguel Verdejo, SSgt, USAF. My mother, Dimaris Ruiz. My wife, Lilliana Verdejo. My father. A friend. A co-worker. A neighbor. Anyone that knew me. Not presenting a "live" witness to the jury only portrayed me as an individual no one cared for that was a "good performer."

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares (or certifies, verifies, or states) under penalty of perjury that he is the petitioner/movant in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. s. 1746. 18 U.S.C. s. 1621.

Executed at Fort Leavenworth, Kansas on 1June, 2014.
(Location) (Date)



(Signature)

APPENDIX K

23 August 2013

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	APPELLANT'S MOTION FOR LEAVE TO FILE AND MOTION TO VACATE
v.	)	
Technical Sergeant (E-6) **RAFAEL VERDEJO-RUIZ,** USAF, *Appellant.*	)	Before Panel No. 1
	)	Case No. ACM 37957

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COMES NOW Appellant Technical Sergeant Rafael Verdejo-Ruiz, by and through his undersigned counsel, and pursuant to Rule 23 of this Honorable Court's Rules of Practice and Procedure moves for leave to file his motion to vacate the decision of this Court, dated 18 July 2013, for the reasons set forth below. Appellant also hereby moves to vacate said decision.

Facts

On 25 June 2013, the Secretary of Defense, Chuck Hagel, issued a memorandum directed to the Secretary of the Air Force that purported to appoint Mr. Laurence M. Soybel, a civilian employee of the Department of the Air Force, as an appellate military judge to the Air Force Court of Criminal Appeals (AFCCA). *See* Appendix. As authority of for this appointment, Secretary Hagel cited "Title 5, United States Code, section 3101 *et seq.*" Mr. Soybel served on the panel that decided and issued the opinion in Appellant's case.

Law

In *Ryder v. United States*, 515 U.S. 177, 188 (1995), the United States Supreme Court held that a military appellant "is entitled to a hearing before a properly appointed panel" of a

service court of criminal appeals. "[P]roperly appointed," *id.*, is a term of art and is a matter of constitutional significance. The Appointments Clause of the Constitution provides that

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointment are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II. § 2, cl. 2.

Under 10 U.S.C. § 866(a), each Judge Advocate General is to establish a court of criminal appeals, whose appellate military judges may be commissioned officers or civilians. Judge Advocates General are authorized to appoint officers as appellate judges; however, in *United States v. Carpenter*, 37 M.J. 291, 294 (C.M.A. 1993) (citing U.S. CONST. art. II. § 2, ¶ 2, cl. 2), *vacated on other grounds*, 515 U.S. 1138 (1995), the Court of Military Appeals held that a Judge Advocate General's appointment of a civilian judge to a service court was a violation of the Appointments Clause. *Carpenter* explained that the lowest-level official who can appoint a civilian to a military appellate court is the head of a department, if authorized by Congress. *Id.*

Consistent with *Carpenter*'s holding that only a department head can appoint civilian judges to military appellate courts, *Edmond v. United States*, 520 U.S. 651, 666 (1997) upheld the Transportation Secretary's appointment of a civilian to the Coast Guard Court of Criminal Appeals under 49 U.S.C. § 323(a).[1] The *Edmond* Court's decision was based on 49 U.S.C. § 323(a), which grants the Secretary authority to "appoint and fix the pay of officers and employees of the Department of Transportation and may *prescribe their duties and powers*." (Emphasis added). The Court reasoned that although the statute did not specifically mention

[1] Congress had at that time established the Coast Guard was a military service and branch of the Armed Forces only in times of war; otherwise, it was part of the Department of Transportation. *Id.* at 656 (citing 14 U.S.C. §§ 1-3).

Coast Guard judges, the plain language of § 323(a) gives the Transportation Secretary power to appoint them. *Id.* at 656. *Edmond* emphasized the need for a Congressional grant of authority for a department head to appoint inferior officers, noting that the Excepting Clause states that "the *Congress* may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of the Departments." *Id.* at 660 (emphasis added).

Analysis

Mr. Soybel's appointment under 5 U.S.C. § 3101 violated the Appointments Clause, as this statute does not authorize the Secretary of Defense to appoint "inferior officers." Such a congressional grant of authority, the Supreme Court and the Court of Military Appeals have emphasized, is necessary so that a department head can appoint a civilian as an appellate judge on a service court. *See Edmond*, 520 U.S. at 658; *Carpenter*, 37 M.J. at 294

The statute the Secretary relies upon, 5 U.S.C. § 3101, does not confer power to appoint Article 66 judges. Instead, it concerns only employee payment classifications, providing in its entirety as follows: "Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year." 5 U.S.C. § 3101. Chapter 51, in turn, concerns pay and allowances for employees.[2]

The language of 49 U.S.C. § 323(a) provided the Transportation Secretary with implied authority to appoint judges to the Coast Guard Court. 5 U.S.C. § 3101 does nothing of the kind. Absent from Chapter 51 is authority to define the "duties and powers" of officers as Congress

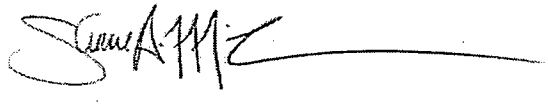
[2] Chapter 51 provides a plan for classification of positions where the basic pay rate is determined and so "individual positions will, in accordance with their duties, and qualification requirements, be so grouped and identified by classes and grades." *See* 5 U.S.C. § 5101, *et seq.*

provided the Transportation Secretary in 49 U.S.C. § 323(a).[3] Congressional authorization is a prerequisite for a department head to appoint civilians to the service courts of criminal appeals. And, unlike the Secretary of Transportation, Congress has not empowered the Secretary of Defense to make such appointments.

Because Secretary Hagel lacked the authority to appoint Mr. Soybel to the Air Force Court of Criminal Appeals, the panel was improperly constituted. And, as the Supreme Court held in *Ryder*, 515 U.S. at 188, a military appellant "is entitled to a hearing before a properly appointed panel" of a service court of criminal appeals. This Court should, therefore, vacate its decision and assemble a new panel of properly appointed appellate judges.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Very Respectfully Submitted,



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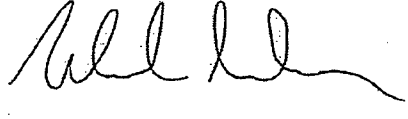

MICHAEL A. SCHRAMA, Captain, USAF
Appellate Defense Counsel
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United States Air Force
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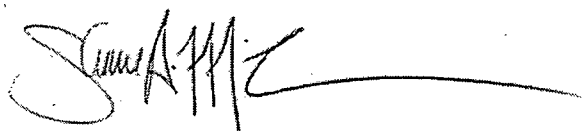
---

[3] Instead, 5 U.S.C. § 5103 vests this power in the Office of Personnel Management (OPM), rather than in the Secretary of Defense. *See also* 5 U.S.C. § 5103 (granting OPM authority over Department of Defense positions); 5 U.S.C. § 5105(a) (OPM is to create classification "standards for placing positions in their proper classes and grades").

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Appellate Government Division on 23 August 2013.



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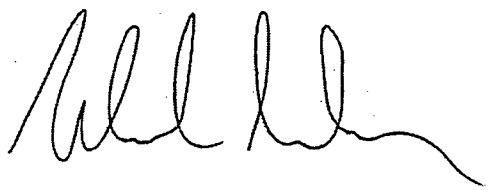

MICHAEL A. SCHRAMA, Captain, USAF
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6 September 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	**PETITION FOR GRANT OF REVIEW**
v.	)	Crim. App. Dkt. No. 37957
Technical Sergeant (E-6) **RAFAEL VERDEJO-RUIZ,** USAF, Appellant.	)	USCA Dkt. No. /AF

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

The undersigned counsel, on behalf of Technical Sergeant Rafael Verdejo-Ruiz, hereby petitions the United States Court of Appeals for the Armed Forces for a grant of review of the decision of the Air Force Court of Criminal Appeals, on appeal under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, pursuant to the provisions of Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3).

Respectfully Submitted,

SHANE A. MCCAMMON, Captain, USAF
Senior Defense Counsel
U.S.C.A.A.F. Bar No. 33983
Air Force Legal Operations Agency
United States Air Force
Unit 5275 Box 415
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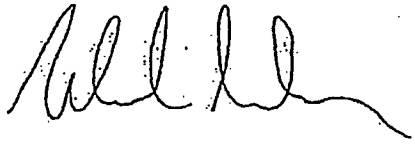

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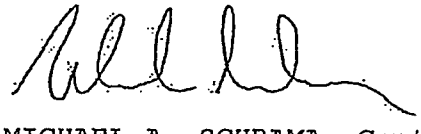
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on September 6, 2013.



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28 October 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	MOTION TO TREAT APPELLANT'S MOTION TO VACATE BEFORE THE AIR FORCE COURT OF CRIMINAL APPEALS AS A MOTION FOR RECONSIDERATION
v.	)	
Technical Sergeant, (E-6), RAFAEL VERDEJO-RUIZ, USAF, *Appellant.*	)	Crim. App. No. 37957 USCA Dkt. No. 14-0010/AF

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

Pursuant to Rule 30 of this Court's Rules of Practice and Procedure, the United States respectfully moves this Court to treat a motion to vacate before the Air Force Court of Criminal Appeals (AFCCA) as a motion to reconsider.

On 23 August 2013, Appellant filed a motion to vacate the ruling of AFCCA alleging that one of the appellate judges who decided his case was improperly appointed to AFCCA by the Secretary of Defense. (Appendix.) In the interests of justice and expediency, the United States requests this honorable Court to promptly consider this motion as a motion for reconsideration as a necessary initial step so that this case can be returned to AFCCA for consideration of this motion.[1]

[1] The United States also intends to file a Motion to Dismiss the petition in this case, without prejudice, in order to return jurisdiction to AFCCA to render a ruling on Appellant's Motion to Vacate.

Improperly Appointed Judge
3 of 3

19-402773393

U.S. v. Rafael VERDEJO-RUIZ.
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
2013 CAAF LEXIS 1335
No. 14-0010/AF.
November 12, 2013, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

CCA 37957.United States v. Verdejo-Ruiz, 2013 CCA LEXIS 680 (A.F.C.C.A., July 18, 2013)

Opinion

On consideration of Appellant's motion to attach documents and Appellee's motion to dismiss the petition for grant of review without prejudice and motion to treat Appellant's motion to vacate before the United States Air Force Court of Criminal Appeals as a motion for reconsideration, it is ordered that Appellee's motion to dismiss the petition for grant of review without prejudice and motion to treat Appellant's motion to vacate before the United States Air Force Court of Criminal Appeals as a motion for reconsideration are hereby granted, and Appellant's motion to attach documents is hereby denied as moot.

APPENDIX

L

11 December 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RAFAEL VERDEJO-RUIZ, USAF, *Appellant.*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH DOCUMENTS USCA Dkt. No. 14-0010/AF Crim. App. No. 37957

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

Pursuant to Rule 30 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's request for this Court engage in fact-finding contrary to this Court's rules and precedent. The United States specifically objects to Appellant's motions to attach declarations of fact attached to his motion filed pursuant to United States v. Grostefon.

The Air Force Court of Criminal appeals issued their final and pertinent decision in Appellant's case on 14 August 2014, and the reconsideration period before the lower court lasted 30 days past that date. So, Appellant had more than ample opportunity to submit his documents to the Air Force Court, if he deemed them actually relevant and necessary to his appeal, at a time when the lower Court still had jurisdiction to review his case and his new allegations.

Rule 30A of this Court's rules provides:

introduced the issues and the facts to the Court below. The fact that Appellant is filing this motion to add new facts pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982) is of no moment as even Grostefon appellants are bound by the substantive and procedural requirements of practice before this Court. Appellant's counsel commendably notes that "this information was not previously raised" to the Air Force Court of Criminal Appeals. (App. Mot. at 1.)

However, Appellant instead chose to wait to offer his new declarations to a Court that lacks authority to receive it. The United States respectfully notes that this Honorable Court lacks the fact-finding powers that a Court of Criminal Appeals possesses under Article 66, UCMJ. *See* Article 67(c)-(d), UCMJ; Loving v. United States, 64 M.J. 132, 159 (C.A.A.F. 2006); and Rule 30A(a) of this Court's Rules of Practice and Procedure. Appellant had ample opportunity and time to introduce any evidence and any issue he deemed necessary to the Air Force Court, and he elected not to take advantage of his opportunities. Such piecemeal appellate litigation that flaunts the rules is truly regrettable and should not be condoned or permitted.

Finally, there is a clear trend among far too many Air Force appellants who seek to improperly supplement the record before this Court. The Rules should be enforced -- even against Grostefon appellants, and this trend should be discontinued.

11 December 2014

CAAF

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RAFAEL VERDEJO-RUIZ, USAF, *Appellant.*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH DOCUMENTS USCA Dkt. No. 14-0010/AF Crim. App. No. 37957

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page 1 (page 2 not included)

(S11)

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However, Appellant instead chose to wait to offer his new declarations to a Court that lacks authority to receive it. The United States respectfully notes that this Honorable Court lacks the fact-finding powers that a Court of Criminal Appeals possesses under Article 66, UCMJ. *See* Article 67(c)-(d), UCMJ; Loving v. United States, 64 M.J. 132, 159 (C.A.A.F. 2006); and Rule 30A(a) of this Court's Rules of Practice and Procedure. Appellant had ample opportunity and time to introduce any evidence and any issue he deemed necessary to the Air Force Court, and he elected not to take advantage of his opportunities. Such piecemeal appellate litigation that flaunts the rules is truly regrettable and should not be condoned or permitted.

Finally, there is a clear trend among far too many Air Force appellants who seek to improperly supplement the record before this Court. The Rules should be enforced -- even against Grostefon appellants, and this trend should be discontinued.

11 July 2014

AFCCA

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	GOVERNMENT'S OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION
v.	)	
Technical Sergeant (E-6) RAFAEL VERDEJO-RUIZ, USAF, *Appellant.*	)	ACM 37957 Special Panel

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 19(c) of this Court's Rules of Practice and Procedure (Rules of Practice), the United States hereby enters its opposition to Appellant's Motion for Reconsideration.

As part of this Court's 7 July 2014 Order in this case, this Court articulated that "appellant's motion does not explain why this latest matter could not have been raised earlier during the lengthy appellate processing of this case." As part of his Motion for Reconsideration, Appellant still refuses to answer this basic question. As easy as it must seem for Appellant to disparage his trial defense counsel for the first time 3-1/2 years after his conviction, Appellant needs to provide a proper basis why it took so long to discover it was all his attorneys' fault and why he could not meet this Court's timelines.

WHEREFORE, the government respectfully requests that this Court deny Appellant's motion for reconsideration.

APPENDIX M

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) [404370]	2. SSN	3. GRADE OR RANK	4. PAY GRADE
VERDEJO RUIZ, RAFAEL	583-81-1958	Technical Sergeant	E-6

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
325th Operations Support Squadron (AETC) Tyndall AFB, FL 32403	a. INITIAL DATE 26 October 2009	b. TERM 6 Years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN	C.TOTAL		
$3,051.00	$0.00	$3,051.00	None	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: Violation of the UCMJ, Article 120

Specification: In that TECHNICAL SERGEANT RAFAEL VERDEJO RUIZ, United States Air Force, 325th Operations Support Squadron, Tyndall Air Force Base, Florida, did, within the continental United States, on divers occasions between on or about 1 August 2006 and on or about 30 September 2006, rape Caitlyn M. Larson, a person who had attained the age of 12 but was under the age of 16.

CHARGE II: Violation of the UCMJ, Article 125

Specification: In that TECHNICAL SERGEANT RAFAEL VERDEJO RUIZ, United States Air Force, 325th Operations Support Squadron, Tyndall Air Force Base, Florida, did, within the continental United States, between on or about 1 August 2006 and on or about 30 September 2006, commit sodomy with Caitlyn M. Larson, a child who had attained the age of 12 but was under the age of 16, by force and without the consent of the said Caitlyn M. Larson.

CHARGE III: Violation of the UCMJ, Article 134

Specification: In that TECHNICAL SERGEANT RAFAEL VERDEJO RUIZ, United States Air Force, 325th Operations Support Squadron, Tyndall Air Force Base, Florida, did, within the continental United States, between on or about 1 August 2006 and on or about 30 September 2006, commit ~~an~~ indecent act upon the body of Caitlyn M. Larson, a female under the age of 16, not the wife of TECHNICAL SERGEANT RAFAEL VERDEJO RUIZ, by placing his hands on her breasts and groin, with the intent to gratify the sexual desires of TECHNICAL SERGEANT RAFAEL VERDEJO RUIZ, and by inserting his finger(s) into her vagina,

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
ANDERSON, BRET D.	Lt Col	325th Operations Support Squadron

d. SIGNATURE OF ACCUSER	e. DATE
Bret D. Anderson	12 OCT 2010

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 12 day of Oct, 2010, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

MALCOLM L. LANGLOIS	325 FW/JA
Typed Name of Officer	*Organization of Officer*
Captain	Assistant Staff Judge Advocate
Grade	*Official Capacity to Administer Oath (See R.C.M. 307(b)(1) – must be commissioned officer)*

Malcolm L. Langlois
Signature

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE. PAGE 1

12. On 12 October, 20 10, the accused was informed of the charges against him/her and of the names(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

BRET D. ANDERSON — *Type Name of Immediate Commander*

325th Operations Support Squadron — *Organization of Immediate Commander*

Lieutenant Colonel — *Grade*

Bret D. Anderson — *Signature*

IV. RECEIPT BY SUMMARY COURT MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1030 hours, 12 October, 20 10, at 325th Fighter Wing (AETC) — *Designation of Command or*

Tyndall Air Force Base, Florida — *Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)*

FOR THE [1] COMMANDER

DANIEL J. HIGGINS — *Type Name of Officer*

STAFF JUDGE ADVOCATE — *Official Capacity of Officer Signing*

LIEUTENANT COLONEL — *Grade*

Daniel J. Higgins — *Signature*

V. REFERRAL, SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
HEADQUARTERS NINETEENTH AIR FORCE (AETC)	Randolph AFB, Texas	9 December 2010

Referred for trial to the general court-martial board convened by Special Order A-2

dated 9 December 20 10, subject to the following instructions: [2] To be tried as a noncapital case.

By FOR THE COMMANDER ~~or~~
Command or Order

STEVEN B. THOMPSON — *Typed Name of Officer*

Staff Judge Advocate — *Official Capacity of Officer Signing*

Colonel — *Grade*

Signature

15. On 14 December, 20 10, I (caused to be) served a copy hereof on ~~(each)~~ the above named accused.

MALCOLM L. LANGLOIS — *Typed Name of Trial Counsel*

CAPTAIN — *Grade or Rank of Trial Counsel*

Signature

FOOTNOTES: 1 – When an appropriate commander signs personally, inapplicable words are stricken.
2 – See R.C.M. 601(e) concerning instructions. If none, so state.

APPENDIX N

ENLISTED PERFORMANCE REPORT (AB thru TSGT)

I. RATEE IDENTIFICATION DATA *(Read AFI 36-2406 carefully before completing any item.)*

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	SRA	1C052

5. ORGANIZATION, COMMAND, AND LOCATION	6a. PAS CODE	6b. SRID
ACC Air Operations Squadron, Detachment 2, Hickam AFB HI	HL1CFTS7	1C11C

7. PERIOD OF REPORT	8. NO. DAYS SUPERVISION	9. REASON FOR REPORT
From: 18 Jun 2004 Thru: 17 Jun 2005	291	Annual

II. JOB DESCRIPTION

1. DUTY TITLE

Aircraft Delivery Coordinator

2. KEY DUTIES, TASKS, AND RESPONSIBILITIES

Coordinates movements of aircraft with HQ ACC, HQ PACAF Operations Support Center, ACC Air Operations Squadron (AOS) detachments and Delivery Control Center, as well as fighter wings operating in the Pacific AOR. Organizes all HHQ message traffic and builds pilot mission packages for each aircraft movement. Coordinates air refueling requirements and altitude publications. Coordinates arrival and departure times with transient maintenance, billeting, customs, weather forecasters, base operations and transportation. Orders computer flight plans and assists in the preparation of domestic and international flight plans. Processes and approves all travel authorizations. ADDITIONAL DUTIES: Functional Systems Administrator, Workgroup Manager, Security Manager, Supply/Equipment Custodian, Urinalysis Trusted Agent, Unit Leave Manager, Information Assurance/COMPUSEC Manager, Vehicle NCO, Telephone Control Officer and Fitness Assessment Monitor.

III. EVALUATION OF PERFORMANCE

1. HOW WELL DOES RATEE PERFORM ASSIGNED DUTIES? *(Consider quality, quantity, and timeliness of duties performed)*

☐ Inefficient. An unprofessional performer.	☐ Good performer. Performs routine duties satisfactorily.	☐ Excellent performer. Consistently produces high quality work.	☒ The exception. Absolutely superior in all areas.

2. HOW MUCH DOES RATEE KNOW ABOUT PRIMARY DUTIES? *(Consider whether ratee has technical expertise and is able to apply the knowledge)*

☐ Does not have the basic knowledge necessary to perform duties.	☐ Has adequate technical knowledge to satisfactorily perform duties.	☐ Extensive knowledge of all primary duties and related positions.	☒ Excels in knowledge of all related positions. Masters all duties.

3. HOW WELL DOES RATEE COMPLY WITH STANDARDS? *(Consider dress and appearance, weight and fitness, customs, and courtesies)*

☐ Fails to meet minimum standards.	☐ Meets Air Force standards.	☐ Sets the example for others to follow.	☒ Exemplifies top military standards

4. HOW IS RATEE'S CONDUCT ON/OFF DUTY? *(Consider financial responsibility, respect for authority, support for organizational activities, and maintenance of government facilities)*

☐ Unacceptable.	☐ Acceptable.	☐ Sets the example for others	☒ Exemplifies the standard of conduct.

5. HOW WELL DOES RATEE SUPERVISE/LEAD? *(Consider how well member sets and enforces standards, displays initiative and self-confidence, provides guidance and feedback, and fosters teamwork)*

☐ Ineffective	☐ Effective. Obtains satisfactory results.	☐ Highly effective.	☒ Exceptionally effective leader.

6. HOW WELL DOES RATEE COMPLY WITH INDIVIDUAL TRAINING REQUIREMENTS? *(Consider upgrade training, professional military education, proficiency/qualification, and contingency)*

☐ Does not comply with minimum training requirements.	☐ Complies with most training requirements.	☐ Complies with all training requirements.	☒ Consistently exceeds all training requirements.

7. HOW WELL DOES RATEE COMMUNICATE WITH OTHERS? *(Consider ratee's verbal and written skills)*

☐ Unable to express thoughts clearly. Lacks organization.	☐ Organizes and expresses thoughts satisfactorily.	☐ Consistently able to organize and express ideas clearly and concisely.	☒ Highly skilled writer and communicator.

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IV. PROMOTION RECOMMENDATION (Compare this ratee with others of the same grade and AFS)			RATEE NAME: VERDEJO RUIZ, RAFAEL		
RECOMMENDATION	NOT RECOMMENDED	NOT RECOMMENDED THIS TIME	CONSIDER	READY	IMMEDIATE PROMOTION
RATER'S RECOMMENDATION	1	2	3	4	5 X
ADDITIONAL RATER'S RECOMMENDATION	1	2	3	4	5 X

V. RATER'S COMMENTS

- Outstanding professional who displays craftsman-level knowledge; performs at the level of a seasoned NCO
- Ensured compliance of flight go/no-go items for over 3,000 student aircrew members/four sq; accident free ops
- Audited 1.1 million gallons of jet fuel worth 990 thousand dollars; ensured 100% accountability of resources
- Systemized 800+ Coronet Mission Packages--supported fighter/bomber aircraft on JCS and PACAF combined exercises RED FLAG, COBRA GOLD and COPE TIGER--aircrew lauded his efforts--perfect every time
- Constantly strives to ensure information is securely provided to necessary authorities using DMS program
- Provided crucial last minute clearance requests for Det 2 missions to proceed through foreign airspace
- Self starter! Currently in final course of Airport Resource Management through CCAF--maintains 3.4 GPA
- Diplomat! Liaised with Air Force, Navy, USMC and Defense Accounting and Finance Services to address a critical flaw in base Defense Travel System resulting in 75% faster processing times in voucher settlements
- Orchestrated and returned $8,000 of office computer equipment; facilitated upgrade of det computer systems
- Singled-handily removed and installed ground-to-air radio; saved squadron $1,000 in installation charges
- Ambitious airman whose professional attitude is evident in every job he tackles--Promote ahead of peers!

Supplemental performance feedback was accomplished on: 01 Apr 2005 *(Consistent with the direction in AFI 36-2406. If not accomplished, state the reason.)*

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
LASHANDA D. BROWN, TSgt, USAF Detachment 2, ACC Air Operations Squadron Hickam AFB HI	NCOIC, Aircraft Delivery	20 Jun 2005
	SSN: 9808	SIGNATURE: [signature]

VI. ADDITIONAL RATER'S COMMENTS X CONCUR NONCONCUR

- Dynamic, imaginative and motivated individual who takes charge to assure efficiency and mission success
  -- Meticulous ADPE manager; ensured 100% accountability of $30,000 of computer enterprise equipment
  -- Active and involved unit ISSO; maintained computer systems security integrity; error-free inspections
- Dedicated professional; graduated from Airman Leadership School with an overall 89% academic average
- Achievement oriented; attained highest rating of "No Discrepancies" on annual SAV as Security Manager
- Best young talent I've seen in 24 years--towers above his peers--definitely promote at the earliest opportunity!

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
ROBERT M. VALEK, Lt Col, USAF Detachment 2, ACC Air Operations Squadron Hickam AFB HI	Commander	20 Jun 2005
	SSN: 4336	SIGNATURE: [signature]

INSTRUCTIONS

Reports written by a senior rater or the Chief Master Sergeant of the Air Force (CMSAF) will not be endorsed.
Reports written by colonels or civilians (GS-15 or higher) do not require an additional rater; however, endorsement is permitted unless prohibited by the instruction above.
When the rater's rator is not at least a MSgt or civilian (GS-07 or higher), the additional rator is the next official in the rating chain serving in the grade of MSgt or higher, or a civilian in the grade of GS-07 or higher.
When the final evaluator (rater or additional rater) is not an Air Force officer, enlisted, or DAF civilian, an Air Force advisor review is required.
All evaluators enter only last four numbers of SSN.

VII. COMMANDER'S REVIEW

X CONCUR NONCONCUR *(Attach AF Form 77)* SIGNATURE: [signature]

AF IMT 910, 20000601, V2 *(REVERSE)* FOR OFFICIAL USE ONLY *(When filled in)*

I certify this is a true copy of the original document.
Supporting Official Signature

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19-40277.223

ENLISTED PERFORMANCE REPORT (AB thru TSGT)

I. RATEE IDENTIFICATION DATA (Read AFI 36-2406 carefully before completing any item.)

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	AIC	1C052

5. ORGANIZATION, COMMAND, AND LOCATION	6a. PAS CODE	6b. SRID
56th Airlift Squadron (AETC), Altus AFB OK	AM0JFCWC	0J1AM

7. PERIOD OF REPORT	8. NO. DAYS SUPERVISION	9. REASON FOR REPORT
From: 17 Oct 2000 Thru: 17 Jun 2002	155	Initial

II. JOB DESCRIPTION

1. DUTY TITLE
Aviation Resource Management Specialist

2. KEY DUTIES, TASKS, AND RESPONSIBILITIES
Posts and maintains aircrew flying time and currency requirements. Maintains flight publications. Generates flight orders and related records. Processes incoming and outgoing students. Manages student aircrew standardization records in selectively manned C-5 transition training unit. Maintains and updates support publications and forms in local and mission trip kits. Coordinates funding through finance for MAJCOM O&M travel and Department of Defense Transportation Working Capital Fund travel. Inputs aircrew member currency requirements and flying hours into Aviation Resource Management System (ARMS). ADDITIONAL DUTIES: Passport Clerk, Alternate Security Manager, Assistant Unit Control Center monitor, Alternate AVPOL Monitor, Search and Rescue Member, Alternate Land Mobile Radio Monitor, Alternate Ancillary Training Manager, Honor Guard Trainer, Security Forces Ready Augmentee.

III. EVALUATION OF PERFORMANCE

1. HOW WELL DOES RATEE PERFORM ASSIGNED DUTIES? *(Consider quality, quantity, and timeliness of duties performed)*

☐ Inefficient. An unprofessional performer.	☐ Good performer. Performs routine duties satisfactorily.	☐ Excellent performer. Consistently produces high quality work.	☒ The exception. Absolutely superior in all areas.

2. HOW MUCH DOES RATEE KNOW ABOUT PRIMARY DUTIES? *(Consider whether ratee has technical expertise and is able to apply the knowledge)*

☐ Does not have the basic knowledge necessary to perform duties.	☐ Has adequate technical knowledge to satisfactorily perform duties.	☐ Extensive knowledge of all primary duties and related positions.	☒ Excels in knowledge of all related positions. Mastered all duties.

3. HOW WELL DOES RATEE COMPLY WITH STANDARDS? *(Consider dress and appearance, weight and fitness, customs, and courtesies)*

☐ Fails to meet minimum standards.	☒ Meets Air Force standards.	☐ Sets the example for others to follow.	☐ Exemplifies top military standards.

4. HOW IS RATEE'S CONDUCT ON/OFF DUTY? *(Consider financial responsibility, respect for authority, support for organizational activities, and maintenance of government facilities)*

☐ Unacceptable.	☒ Acceptable.	☐ Sets the example for others.	☐ Exemplifies the standard of conduct.

5. HOW WELL DOES RATEE SUPERVISE/LEAD? *(Consider how well member sets and enforces standards, displays initiative and self-confidence, provides guidance and feedback, and fosters teamwork)*

☐ Ineffective.	☐ Effective. Obtains satisfactory results.	☒ Highly effective.	☐ Exceptionally effective leader.

6. HOW WELL DOES RATEE COMPLY WITH INDIVIDUAL TRAINING REQUIREMENTS? *(Consider upgrade training, professional military education, proficiency/qualification, and contingency)*

☐ Does not comply with minimum training requirements.	☐ Complies with most training requirements.	☐ Complies with all training requirements.	☒ Consistently exceeds all training requirements.

7. HOW WELL DOES RATEE COMMUNICATE WITH OTHERS? *(Consider ratee's verbal and written skills)*

☐ Unable to express thoughts clearly. Lacks organization.	☐ Organizes and expresses thoughts satisfactorily.	☒ Consistently able to organize and express ideas clearly and concisely.	☐ Highly skilled writer and communicator.

I certify this is a true copy of the original document

Certifying Official's Signature

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ENLISTED PERFORMANCE REPORT (AB thru TSgt)

I. RATEE IDENTIFICATION DATA (Refer to AFI 36-2406 for instructions on completing this form)

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	TSgt	1C052

5. ORGANIZATION, COMMAND, LOCATION, AND COMPONENT	6. PAS CODE	7. SRID
325th Operations Group (AETC), Tyndall AFB FL (AD)	TX0JFHLS	0J1TX

8. PERIOD OF REPORT	9. NO DAYS SUPERVISION	10. REASON FOR REPORT
From: 18 Jun 2009 Thru: 17 Jun 2010	249	Annual

II. JOB DESCRIPTION

1. DUTY TITLE	2. SIGNIFICANT ADDITIONAL DUTY(S)
NCOIC, OG Standardization & Evaluation	Vehicle Control Officer, Supervisor of Flying Resource Manager

3. KEY DUTIES, TASKS, AND RESPONSIBILITIES (Limit text to 4 lines)

- Inspects and evaluates squadron Aviation Resource Management Systems (ARMS), analyzes use of resources
- Reviews and updates applicable AETC, 19 AF, 325 FW, and OG operating instructions IAW HHQ guidance
- Generates and manages all stan/eval administrative files, recall rosters, and mission essential flight documents
- Prepares flight authorizations and monitors individual flight, training requirements, and allocated flying hours

III. PERFORMANCE ASSESSMENT

1. PRIMARY/ADDITIONAL DUTIES (For SSgt/TSgt also consider Supervisory, Leadership and Technical Abilities)

Consider Adapting, Learning, Quality, Timeliness, Professional Growth and Communication Skills (Limit text to 4 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

Tracked required test training for 40 pilots...led to 100% end of year closeout with 80+ complete checkrides
Maintained 30-volume pubs library for F-15C, F-22 and Air Battle Managers...0 findings ID'd during SAV
Managed Flight Crew Info File/Tech Order Pubs prgms and flight safety instructions checklist...100% accurate
In-processed 25 new student pilots...confirmed aviation orders/physicals/chamber rqmts...0 training delays

2. STANDARDS, CONDUCT, CHARACTER & MILITARY BEARING (For SSgt/TSgt also consider Enforcement of Standards and Customs & Courtesies)

Consider Dress & Appearance, Personal/Professional Conduct On/Off Duty (Limit text to 2 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

Led 4 sqdn inspections...executed Go/NoGo/standardization for 12 1C0s...ensured AF standards/compliance
Synchronized precise electronic files migration process...provided 100% critical documentation accountability

3. FITNESS (Maintains Air Force Physical Fitness Standards) (For referrals, limit text to 1 line)

Does Not Meet | ✓ Meets | Exempt

4. TRAINING REQUIREMENTS (For SSgt/TSgt also consider PME, Off-duty Education, Technical Growth, Upgrade Training)

Consider Upgrade, Ancillary, OJT and Readiness (Limit text to 2 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

- First-rate sys knowledge...completed Patriot Excalibur training...enabled accurate real-time crew trng updates
- Exemplary scholar; accomplished jump & flt pay re-certification training...enhanced professional development

5. TEAMWORK/FOLLOWERSHIP (For SSgt/TSgt also consider Leadership, Team Accomplishments, Recognition/Reward Others)

Consider Team Building, Support of Team, Followership (Limit text to 2 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

- Engaged leader, trained additional personnel on stan/eval procedures...increased work center efficiency 30%
- Advanced RED FLAG cadre team mbr...scheduled 732 sorties and 1,307 hrs...executed the mission w/ 0 errors

6. OTHER COMMENTS

Consider Promotion, Future Duty/Assignment/Education Recommendations and Safety, Security & Human Relations (Limit text to 2 lines)

- Submitted three Case Management System flight/jump pay modifications to finance...100% review completed
- Superior aviation mgmt professional...skillfully managed diverse and complex taskings with admirable results

IV. RATER INFORMATION

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
MATTHEW M. THOMAS, Maj, USAF 325th Operations Group (AETC) Tyndall AFB FL	Chief of Standards and Evaluations	29 Jun 2010
	SSN: 3323	SIGNATURE: THOMAS.MATTHEW.M.1232413499

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I certify this is a true copy of the original sheet. Certifying Official's Signature

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V. OVERALL PERFORMANCE ASSESSMENT Overall Performance During Reporting Period			RATEE NAME: VERDEJO RUIZ, RAFAEL		
ASSESSMENT	POOR (1)	NEEDS IMPROVEMENT (2)	AVERAGE (3)	ABOVE AVERAGE (4)	TRULY AMONG THE BEST (5)
RATER'S ASSESSMENT					✓
ADDITIONAL RATER'S ASSESSMENT					✓

Last feedback was performed on: 15 Dec 2009 If feedback was not accomplished in accordance with AFI 36-2406, state the reason

VI. ADDITIONAL RATER'S COMMENTS (Limit text to 3 lines) ✓ CONCUR NON-CONCUR

- Exceptional oversight of pre-flight documentation...ensured 100% compliance of mission flt trng requirements
- Revamped duty section's continuity books...streamlined complex office procedures...reduced position trng 30%
- Dynamic manager/leader; committed to job accomplishment and excellence...promotion to TSgt well deserved

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
WESLEY P. HALLMAN, Colonel, USAF 325th Operations Group (AETC) Tyndall AFB FL	Commander	29 Jun 2010
	SSN: 2099	SIGNATURE: HALLMAN.WESLEY.P.1178647780.

VII. FUNCTIONAL EXAMINER/AIR FORCE ADVISOR (Indicate applicable review by marking the appropriate box.) FUNCTIONAL EXAMINER AIR FORCE ADVISOR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
	SSN	SIGNATURE

VIII. UNIT COMMANDER/CIVILIAN DIRECTOR/OTHER AUTHORIZED REVIEWER ✓ CONCUR NON-CONCUR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
WESLEY P. HALLMAN, Colonel, USAF 325th Operations Group (AETC) Tyndall AFB FL	Commander	29 Jun 2010
	SSN: 2099	SIGNATURE: HALLMAN.WESLEY.P.1178647780.

IX. RATEE'S ACKNOWLEDGEMENT

I understand my signature does not constitute agreement or disagreement. I acknowledge all required feedback was accomplished during the reporting period and upon receipt of this report. ✓ Yes No

SIGNATURE	DATE
VERDEJO RUIZ.RAFAEL.1243270894.	30 Jun 2010

INSTRUCTIONS

Complete this report IAW AFI 36-2406. Reports written by Colonels or civilians (GS-15 or higher, or Supervisory Pay Band 3), do not require an additional rater; however, endorsement by the rater's rater is permitted unless the report is written by a senior rater or the Chief Master Sergeant of the Air Force. When the rater's rater is not at least a MSgt or civilian (GS-07 or higher, or Supervisory Pay Band 1), the additional rater is the next official in the rating chain meeting grade requirements. An overall rating of 2 or negative comments require the EPR to be referred IAW AFI 36-2406. Rationale for any additional evaluator nonconcurring with an overall rating must be included. Section VIII Reviewer nonconcurrence must be included on an AF Form 77, Letter of Evaluation. If ratee is deployed, provide copy and feedback via e-mail/telecon.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 United States Code, Section 8013 and Executive Order 9397, 22 November 1943

PURPOSE: Information is needed for verification of the individual's name and Social Security Number (SSN) as captured on this form at the time of rating

ROUTINE USES: May specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3)

DISCLOSURE: Disclosure is mandatory; SSN is used for positive identification.

AF FORM 910, 20080618 PREVIOUS EDITIONS ARE OBSOLETE PRIVACY ACT INFORMATION: The information in this form is FOR OFFICIAL USE ONLY. Protect IAW the Privacy Act of 1974.

I certify this is a true copy of the original document. Certified Optical Signature

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19-40277.213

ENLISTED PERFORMANCE REPORT (AB thru TSgt)

I. RATEE IDENTIFICATION DATA (Refer to AFI 36-2406 for instructions on completing this form)

1 NAME (Last, First, Middle Initial)	2 SSN	3 GRADE	4 CAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	SSgt	1C052

5 ORGANIZATION, COMMAND, LOCATION AND COMPONENT	6 PAS CODE	7 SRID
325th Operations Support Squadron (AETC), Tyndall AFB FL (AD)	TX0JFHQ8	0J1TX

8. PERIOD OF REPORT	9 NO DAYS SUPERVISION	10 REASON FOR REPORT
From: 18 Jun 2008 Thru: 17 Jun 2009	233	Annual

II. JOB DESCRIPTION

1. DUTY TITLE	2. SIGNIFICANT ADDITIONAL DUTY(S)
Aviation Resource Management, Journeyman	Flight/Aircrew Training Monitor

3. KEY DUTIES, TASKS, AND RESPONSIBILITIES (Limit text to 4 lines)
- In/out-processes aircrew members into ARM data system ensuring members meet all AFI & DoD requirements
- Monitors physiological requirements, flight physical status currencies, and conducts flight/jump record reviews
- Audits and maintains aviation career actions and services upkeep on 450+ aircrew members and parachutists
- Assists in creating & interpreting policies/procedures related to aviation resource management system (ARMS)

III. PERFORMANCE ASSESSMENT

1. PRIMARY/ADDITIONAL DUTIES (For SSgt/TSgt also consider Supervisory, Leadership and Technical Abilities)

Consider Adapting, Learning, Quality, Timeliness, Professional Growth and Communication Skills (Limit text to 4 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

- Published 75 aeronautical orders...awarded advanced ratings/badges...accurately documented aviation status
- Performed 40 flt records reviews...instructed aircrews of individual requirements...100% flight status ready
- Audited 80+ flt record folders...fixed 65+ minor discrepancies...100% error-free aviation svc documentation
- Astute performer w/ responsibility exceeding rank...validated quarterly flight pay entitlements worth $2 million

2. STANDARDS, CONDUCT, CHARACTER & MILITARY BEARING (For SSgt/TSgt also consider Enforcement of Standards and Customs & Courtesies)

Consider Dress & Appearance, Personal/Professional Conduct On/Off Duty (Limit text to 2 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

- Administered critical SABC procedures on seizure victim...briefed medic team upon arrival...youth's life saved
- Volunteered at General Tommy Franks museum opening...manned info/refreshment stand...epitome of AF image

3. FITNESS (Maintains Air Force Physical Fitness Standards) (For referrals, limit text to 1 line)

Does Not Meet | ✓ Meets | Exempt

4. TRAINING REQUIREMENTS (For SSgt/TSgt also consider PME, Off-duty Education, Technical Growth, Upgrade Training)

Consider Upgrade, Ancillary, OJT and Readiness (Limit text to 2 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

- Completed 28 hrs Auto Svc Experience tech...one test away from mechanic cert...enhanced personal knowledge
- Mastered 12 OJT HARM office requirements...expanded overall knowledge...reduced office workload by 30%

5. TEAMWORK/FOLLOWERSHIP (For SSgt/TSgt also consider Leadership, Team Accomplishments, Recognition/Reward Others)

Consider Team Building, Support of Team, Followership (Limit text to 2 lines)

Does Not Meet | Meets | Above Average | ✓ Clearly Exceeds

- Assisted 2FS...managed msn employment ops at Nellis AFB...tracked 81 sorties/126.2 hours with zero errors
- Filled Stan-Eval position during manning shortfall; flawlessly ensured aircrew safety of flight...zero trng delays

6. OTHER COMMENTS

Consider Promotion, Future Duty/Assignment/Education Recommendations and Safety, Security & Human Relations (Limit text to 2 lines)

- Developed student roster tracking tool...updated data/removed obsolete info...increased office efficiency 25%
- Talented NCO with keen understanding of command objectives...ready for increased responsibility...promote

IV. RATER INFORMATION

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
VIRGINIA K. BOAK, MSgt, ANG 325th Operations Support Squadron (AETC) Tyndall AFB Fl	NCOIC, HARM Office	16 Jul 2009
	SSN: 7849	SIGNATURE: BOAK.VIRGINIA.K.1101103753

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19-40277.214

V. OVERALL PERFORMANCE ASSESSMENT *Overall Performance During Reporting Period*			RATEE NAME VERDEJO RUIZ, RAFAEL		
ASSESSMENT	POOR (1)	NEEDS IMPROVEMENT (2)	AVERAGE (3)	ABOVE AVERAGE (4)	TRULY AMONG THE BEST (5)
RATER'S ASSESSMENT					✓
ADDITIONAL RATER'S ASSESSMENT					✓

Last feedback was performed on: 9 Jan 2009 *If feedback was not accomplished in accordance with AFI 36-2406 state the reason.*

VI. ADDITIONAL RATER'S COMMENTS *(Limit text to 3 lines)* ✓ CONCUR NON-CONCUR

- Assisted in 1C0's bowl-a-thon...efforts raised $175 in contributions...donated funds to 1C0 Heritage Ceremony
- Participated in Black History Month Ceremony...performed 5 songs for 120 spectators...event lauded success
- Highly motivated NCO w/infinite potential....exceptional leader & mentor....promotion to TSgt well deserved!

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
NICHOLAS H. REGISTER, Maj, USAF 325th Operations Support Squadron (AETC) Tyndall AFB, Fl	Current Ops Flt/CC/F-15C IP	16 Jul 2009
	SSN: 2763	SIGNATURE: REGISTER.NICHOLAS.H.1052971680

VII. FUNCTIONAL EXAMINER/AIR FORCE ADVISOR *(Indicate applicable review by marking the appropriate box.)* FUNCTIONAL EXAMINER : AIR FORCE ADVISOR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
	SSN	SIGNATURE

VIII. UNIT COMMANDER/CIVILIAN DIRECTOR/OTHER AUTHORIZED REVIEWER ✓ CONCUR NON-CONCUR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
BRYAN E. SHORTER, Capt, USAF 325th Operations Support Squadron (AETC) Tyndall AFB Fl	Executive Officer	20 Jul 2009
	SSN: 2073	SIGNATURE: SHORTER.BRYAN.E.1045886693

IX. RATEE'S ACKNOWLEDGEMENT

I understand my signature does not constitute agreement or disagreement. I acknowledge all required feedback was accomplished during the reporting period and upon receipt of this report. ✓ Yes No

SIGNATURE	DATE
Member unable to sign BOAK.VIRGINIA.K.1101103753	20 Jul 2009

INSTRUCTIONS

Complete this report IAW AFI 36-2406. Reports written by Colonels or civilians (GS-15 or higher, or Supervisory Pay Band 3), do not require an additional rater; however, endorsement by the rater's rater is permitted unless the report is written by a senior rater or the Chief Master Sergeant of the Air Force. When the rater's rater is not at least a MSgt or civilian (GS-07 or higher, or Supervisory Pay Band 1), the additional rater is the next official in the rating chain meeting grade requirements. An overall rating of 2 or negative comments require the EPR to be referred IAW AFI 36-2406. Rationale for any additional evaluator nonconcurring with an overall rating must be included. Section VIII Reviewer nonconcurrence must be included on an AF Form 77, Letter of Evaluation. If ratee is deployed, provide copy and feedback via e-mail/telecon

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 United States Code, Section 8013 and Executive Order 9397, 22 November 1943

PURPOSE: Information is needed for verification of the individual's name and Social Security Number (SSN) as captured on the form at the time of rating

ROUTINE USES: May specifically be disclosed outside the DoD as a routine use pursuant to 5 U S C 552a(b)(3)

DISCLOSURE: Disclosure is mandatory; SSN is used for positive identification

AF FORM 910, 20080618 PREVIOUS EDITIONS ARE OBSOLETE PRIVACY ACT INFORMATION: The information in this form is FOR OFFICIAL USE ONLY. Protect IAW the Privacy Act of 1974.

This is a true copy of the original

Courtesy Official Signature

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19-40277.215

ENLISTED PERFORMANCE REPORT (AB thru TSgt)

I. RATEE IDENTIFICATION DATA (Refer to AFI 36-2406 for instructions on completing this form)

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO, RUIZ R.	583-81-1958	SSgt	1C052

5. ORGANIZATION, COMMAND, LOCATION, AND COMPONENT	6. PAS CODE	7. SRID
25th Fighter Squadron (PACAF), Osan Air Base, Republic of Korea	OPORFC50	0R173

8. PERIOD OF REPORT	9. NO. DAYS SUPERVISION	10. REASON FOR REPORT
From: 18 Jun 2007 Thru: 17 Jun 2008	200	Annual

II. JOB DESCRIPTION

1. DUTY TITLE	2. SIGNIFICANT ADDITIONAL DUTY(IS)
Assistant NCOIC, Squadron Aviation Resource Management (SARM)	COMSEC Manager, IMPAC Card Holder, and Equipment Custodian

3. KEY DUTIES, TASKS, AND RESPONSIBILITIES (Limit text to 4 lines)

- Maintains accurate records of 50+ pilots, ensuring completion of all HHQ required flight and ground training
- Maintains Aviation Resource Management System (ARMS), vital to tracking requisites for flight authorization
- Performs Go/No-Go procedures critical to ensure all pilots meet required training necessary for safety of flight
- Manages Ready Aircrew Program (RAP); all CMR/BMC wartime mission readiness capabilities documented

III. PERFORMANCE ASSESSMENT

1. PRIMARY/ADDITIONAL DUTIES (For SSgt/TSgt also consider Supervisory, Leadership and Technical Abilities)

Consider Adapting, Learning, Quality, Timeliness, Professional Growth and Communication Skills (Limit text to 4 lines)

Does Not Meet ___ Meets ___ Above Average ___ ✓ Clearly Exceeds

Created software Go/No-Go tracker--ensured pilots met all medical, safety, and training requirements for flight
Meticulous training expert--tracked 1,000+ A-10 sorties along Demilitarized Zone; ensured combat proficiency
Impeccably managed/maintained two $115K equipment accounts--increased accountability from 40% to 100%
Flawlessly audited 4,000 sorties & 6,000 hours; zero errors--crucial to maintaining squadron combat readiness

2. STANDARDS, CONDUCT, CHARACTER & MILITARY BEARING (For SSgt/TSgt also consider Enforcement of Standards and Customs & Courtesies)

Consider Dress & Appearance, Personal/Professional Conduct On/Off Duty (Limit text to 2 lines)

Does Not Meet ___ Meets ___ Above Average ___ ✓ Clearly Exceeds

- ARMS Advisory Group President--organized quarterly training; boosted morale & camaraderie between 1C0s
- Trained new Airman in SQ ARM duties; achieved 5-level cert 6 months ahead of schedule; 87% on EOC exam

3. FITNESS (Maintains Air Force Physical Fitness Standards) (For referrals, limit text to 1 line)

Does Not Meet ___ ✓ Meets ___ Exempt

4. TRAINING REQUIREMENTS (For SSgt/TSgt also consider PME, Off-duty Education, Technical Growth, Upgrade Training) Consider Upgrade, Ancillary, OJT and Readiness (Limit text to 2 lines)

Does Not Meet ___ Meets ___ Above Average ___ ✓ Clearly Exceeds

- Improved knowledge of JCS system used to evaluate readiness; completed Status of Resources Training Course
- Keen on career development; attended EPR writing seminar--sharpened supervisory writing skills/productivity

5. TEAMWORK/FOLLOWERSHIP (For SSgt/TSgt also consider Leadership, Team Accomplishments, Recognition/Reward Others) Consider Team Building, Support of Team, Followership (Limit text to 2 lines)

Does Not Meet ___ Meets ___ Above Average ___ ✓ Clearly Exceeds

- Superb knowledge; trained 2 new 1C0s during 50% shop turnover--100% of various office & ARMS tasks met
- Stalwart volunteer! Base patrol member/dorm reviews; contributed to safety/quality of life for all 7AF Airmen

6. OTHER COMMENTS (Consider Promotion, Future Duty/Assignment/Education Recommendations and Safety, Security & Human Relations) (Limit text to 2 lines)

- Diligent COMSEC manager; oversaw and ensured 100% accountability of 180 daily/wartime classified items
- Dynamic leader who is heads above the rest; Det 2 NCO of the Quarter, Jul-Sep '07--promote ahead of peers

IV. RATER INFORMATION

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
JOSEPH H. SETTLE III, MSgt, USAF 25th Fighter Squadron (PACAF) Osan Air Base, Republic of Korea	Squadron Superintendent	17 Jun 2008
	SSN: 3226	SIGNATURE: SETTLEJOSEPH.H.III.1152875173

AF FORM 910, 20070625 PREVIOUS EDITIONS ARE OBSOLETE

PRIVACY ACT INFORMATION: The information in this form is FOR OFFICIAL USE ONLY. Protect IAW the Privacy Act of 1974.

I certify this is a true copy of the original Rater Official Signature

Clemency Packet

V. OVERALL PERFORMANCE ASSESSMENT — RATEE NAME: VERDEJO, RUIZ R.
Overall Performance During Reporting Period

ASSESSMENT	POOR (1)	NEEDS IMPROVEMENT (2)	AVERAGE (3)	ABOVE AVERAGE (4)	TRULY AMONG THE BEST (5)
RATER'S ASSESSMENT					✓
ADDITIONAL RATER'S ASSESSMENT					✓

Last feedback was performed on: 15 Apr 2008 — If feedback was not accomplished in accordance with AFI 36-2406, state the reason

VI. ADDITIONAL RATER'S COMMENTS (Limit text to 3 lines) — ✓ CONCUR — NON-CONCUR

Unique expertise; only SARMS expert deployed to Ex COPE TIGER '08; flawlessly tracked 65 sorties/120 hrs
Assisted in reconstruction of ARMS trng events/profiles--completed implementation of new PACAF guidance
Highly motivated self starter with great leadership skills; definitely ready for shop chief duties--promote now!

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
RODNEY J. STOKES, Lt Col, USAF 25th Fighter Squadron (PACAF) Osan Air Base, Republic of Korea	Commander	17 Jun 2008
	SSN: 0113	SIGNATURE: STOKES.RODNEY.J.1152870562,

VII. FUNCTIONAL EXAMINER/AIR FORCE ADVISOR (Indicate applicable review by marking the appropriate box.) — FUNCTIONAL EXAMINER — AIR FORCE ADVISOR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
	SSN	SIGNATURE

VIII. UNIT COMMANDER/CIVILIAN DIRECTOR/OTHER AUTHORIZED REVIEWER — ✓ CONCUR — NON-CONCUR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
RODNEY J. STOKES, Lt Col, USAF 25th Fighter Squadron (PACAF) Osan Air Base, Republic of Korea	Commander	18 Jun 2008
	SSN: 0113	SIGNATURE: STOKES.RODNEY.J.1152870562,

IX. RATEE'S ACKNOWLEDGEMENT

I understand my signature does not constitute agreement or disagreement. I acknowledge all required feedback was accomplished during the reporting period and upon receipt of this report.

SIGNATURE	DATE
VERDEJO.RUIZ.RAFAEL.RAFAEL.1243270894,	18 Jun 2008

INSTRUCTIONS

Complete this report IAW AFI 36-2406. Reports written by Colonels or civilians (GS-15 or higher, or Supervisory Pay Band 3), do not require an additional rater, however, endorsement by the rater's rater is permitted unless the report is written by a senior rater or the Chief Master Sergeant of the Air Force. When the rater's rater is not at least a MSgt or civilian (GS-07 or higher, or Supervisory Pay Band 1), the additional rater is the next official in the rating chain meeting grade requirements. An overall rating of 2 or negative comments require the EPR to be referred IAW AFI 36-2406. Rationale for any additional evaluator nonconcurring with an overall rating must be included. Section VIII Reviewer nonconcurrence must be included on an AF Form 77, Letter of Evaluation. If ratee is deployed, provide copy and feedback via e-mail/telecon.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 United States Code, Section 8013 and Secretary of the Air Force and Executive Order 9397, 22 November 1943.

PURPOSE: Information is needed for verification of the individual's name and Social Security Number (SSN) as captured on the form at the time of rating.

ROUTINE USES: None. RATIONALE: This information will not be disclosed outside DoD channels.

DISCLOSURE: Disclosure is mandatory; SSN is used for positive identification.

AF FORM 910, 20070625 — PREVIOUS EDITIONS ARE OBSOLETE — PRIVACY ACT INFORMATION: The information in this form is FOR OFFICIAL USE ONLY. Protect IAW the Privacy Act of 1974.

I certify this is a true copy of the original document.

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Clemency Packet

19-40277.217

ENLISTED PERFORMANCE REPORT (AB thru TSGT)

I. RATEE IDENTIFICATION DATA (Read AFI 36-2406 carefully before completing any item)

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	SSGT	1C052

5. ORGANIZATION, COMMAND, AND LOCATION	6a. PAS CODE	6b. SRID
ACC Air Operations Squadron, Detachment 2, Hickam AFB HI	HL1CETS7	1C11C

7. PERIOD OF REPORT	8. NO. DAYS SUPERVISION	9. REASON FOR REPORT
From: 18 Jun 2006 Thru: 17 Jun 2007	365	Annual

II. JOB DESCRIPTION

1. DUTY TITLE

Aircraft Delivery Coordinator

2. KEY DUTIES, TASKS, AND RESPONSIBILITIES

Coordinates movements of aircraft with HQ ACC, HQ PACAF Operations Support Center, ACC Air Operations Squadron (AOS) detachments and Delivery Control Center, as well as fighter wings operating in the Pacific AOR. Organizes all HHQ message traffic and builds pilot mission packages for each aircraft movement. Coordinates air refueling requirements and altitude publications. Coordinates arrival and departure times with transient maintenance, billeting, customs, weather forecasters, base operations and transportation. Orders computer flight plans and assists in the preparation of domestic and international flight plans. Processes and approves all travel authorizations. ADDITIONAL DUTIES: Functional Systems Administrator, Workgroup Manager, Security Manager, Supply/Equipment Custodian, Urinalysis Trusted Agent, Unit Leave Manager, Information Assurance/COMPUSEC Manager, Vehicle NCO, Telephone Control Officer and Fitness Assessment Monitor.

III. EVALUATION OF PERFORMANCE

1. HOW WELL DOES RATEE PERFORM ASSIGNED DUTIES? (Consider quality, quantity, and timeliness of duties performed)

☐ Inefficient. An unprofessional performer	☐ Good performer. Performs routine duties satisfactorily.	☐ Excellent performer. Consistently produces high quality work.	☒ The exception. Absolutely superior in all areas

2. HOW MUCH DOES RATEE KNOW ABOUT PRIMARY DUTIES? (Consider whether ratee has technical expertise and is able to apply the knowledge)

☐ Does not have the basic knowledge necessary to perform duties.	☐ Has adequate technical knowledge to satisfactorily perform duties	☐ Extensive knowledge of all primary duties and related positions.	☒ Excels in knowledge of all related positions. Masters all duties.

3. HOW WELL DOES RATEE COMPLY WITH STANDARDS? (Consider dress and appearance, weight and fitness, customs, and courtesies)

☐ Fails to meet minimum standards.	☐ Meets Air Force standards.	☐ Sets the example for others to follow.	☒ Exemplifies top military standards.

4. HOW IS RATEE'S CONDUCT ON/OFF DUTY? (Consider financial responsibility, respect for authority, support for organizational activities, and maintenance of government facilities)

☐ Unacceptable	☐ Acceptable	☐ Sets the example for others.	☒ Exemplifies the standard of conduct

5. HOW WELL DOES RATEE SUPERVISE/LEAD? (Consider how well member sets and enforces standards, displays initiative and self-confidence, provides guidance and feedback, and fosters teamwork)

☐ Ineffective	☐ Effective. Obtains satisfactory results.	☐ Highly effective.	☒ Exceptionally effective leader.

6. HOW WELL DOES RATEE COMPLY WITH INDIVIDUAL TRAINING REQUIREMENTS? (Consider upgrade training, professional military education, proficiency/qualification, and contingency)

☐ Does not comply with minimum training requirements.	☐ Complies with most training requirements	☐ Complies with all training requirements.	☒ Consistently exceeds all training requirements.

7. HOW WELL DOES RATEE COMMUNICATE WITH OTHERS? (Consider ratee's verbal and written skills)

☐ Unable to express thoughts clearly. Lacks organization	☐ Organizes and expresses thoughts satisfactorily.	☐ Consistently able to organize and express ideas clearly and concisely	☒ Highly skilled writer and communicator

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Clemency Packet

IV. PROMOTION RECOMMENDATION (Compare this ratee with others of the same grade and AFS)			RATEE NAME: VERDEJO RUIZ, RAFAEL		
RECOMMENDATION	NOT RECOMMENDED	NOT RECOMMENDED THIS TIME	CONSIDER	READY	IMMEDIATE PROMOTION
RATER'S RECOMMENDATION	1 ☐	2 ☐	3 ☐	4 ☐	5 ☒
ADDITIONAL RATER'S RECOMMENDATION	1 ☐	2 ☐	3 ☐	4 ☐	5 ☒

V. RATER'S COMMENTS

- Highly dedicated NCO with extensive job knowledge and leadership skills--continuously exceeds expectations
- Ensured COMPACT objectives met thru excellent support of acft movement in RED FLAG & COPE TIGER
- Superb VCO-- discovered multiple injury-causing discrepancies to GOV--ensured 100% operation and safety
  -- Maintains vehicle $2,500 ground-to-air equipment--keeps fleet 100% operational--critical for flightline ops
- Flawlessly assembled/programmed new SIPRNet computer--accelerated classified data transfer by over 75%
- Outstanding ADPE Manager--assessed/replaced six DCO laptops--prevented multiple mission show-stoppers
- Incomparable PTL--provided fitness guidance--oversight of program led to 100% pass, 62% rated "Excellent"
- Repaired 150+ system issues/upgrades--no task too big--maintains proficiency in rapidly changing career field
- Razor-sharp NCO--maintains 20 additional duties w/100% compliance--received outstanding on 15ABW SAV
- Natural teacher--saved 20 hours by locally training geographically separated personnel in ARMS workarounds
- AF Sergeants Association car wash volunteer--earned over $650 for first term Airmen graduation ceremonies
- Member of Pacific Revival Center Music Ministry--volunteered 18 hours per week--community faith enhanced
- A proven leader to his peers and supervisor--well worthy of STEP promotion to the rank of technical sergeant

Last performance feedback was accomplished on: 19 Jan 2007 (Consistent with the direction in AFI 36-2406. If not accomplished, state the reason.)

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
ASHANDA D. BROWN, TSgt, USAF Detachment 2, ACC Air Operations Squadron Hickam AFB HI	NCOIC, Aircraft Delivery	19 Jun 2007
	SSN 9808	SIGNATURE

VI. ADDITIONAL RATER'S COMMENTS ☒ CONCUR ☐ NONCONCUR

- Exemplary NCO! Exceptional judgment/communication skills place him above peers--generates stellar results
- History maker--built mission packages & flight plans for first-ever F-22 AEF deployment--100% msn success
- Analyzed, researched and repaired critical brake system malfunction on unit's GOV used for mission launches
  -- Prevented over 70 hours in mission delays and saved the Air Force from paying significant repair costs
- Managed unit $15,000 ADPE equipment--100% control and accountability of resources--ceased loss of assets
- Driven to success by self-motivation and strong sense of purpose; impeccable character--promote immediately!

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
THOMAS E. CHESLEY, Lt Col, USAF Detachment 2, ACC Air Operations Squadron Hickam AFB HI	Commander	19 Jun 2007
	SSN 3697	SIGNATURE

INSTRUCTIONS

Reports written by a senior rater or the Chief Master Sergeant of the Air Force (CMSAF) will not be endorsed.
Reports written by colonels or civilians (GS-15 or higher) do not require an additional rater, however, endorsement is permitted unless prohibited by the instruction above
When the rater's rater is not at least a MSgt or civilian (GS-07 or higher), the additional rater is the next official in the rating chain serving in the grade of MSgt or higher, or a civilian in the grade of GS-07 or higher.
When the final evaluator (rater or additional rater) is not an Air Force officer, enlisted, or DAF civilian, an Air Force advisor review is required.
All evaluators enter only last four numbers of SSN.

VII. COMMANDER'S REVIEW

☒ CONCUR	☐ NONCONCUR (Attach AF Form 77)	SIGNATURE

AF IMT 910, 20000601, V2 (REVERSE) FOR OFFICIAL USE ONLY (When filled in)

I certify this is a true copy of the original document.
Certifying Official Signature

page 37 of 48
Clemency Packet

19-40277.219

ENLISTED PERFORMANCE REPORT (AB thru TSGT)

I. RATEE IDENTIFICATION DATA (Read AFI 36-2406 carefully before completing any item.)

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	SSGT	1C052

5. ORGANIZATION, COMMAND, AND LOCATION	6a. PAS CODE	6b. SRID
ACC Air Operations Squadron, Detachment 2, Hickam AFB HI	HLICFTS7	1C11C

7. PERIOD OF REPORT	8. NO. DAYS SUPERVISION	9. REASON FOR REPORT
From: 18 Jun 2005 Thru: 17 Jun 2006	365	Annual

II. JOB DESCRIPTION

1. DUTY TITLE

Aircraft Delivery Coordinator

2. KEY DUTIES, TASKS, AND RESPONSIBILITIES

Coordinates movements of aircraft with HQ ACC, HQ PACAF Operations Support Center, ACC Air Operations Squadron (AOS) detachments and Delivery Control Center, as well as fighter wings operating in the Pacific AOR. Organizes all HHQ message traffic and builds pilot mission packages for each aircraft movement. Coordinates air refueling requirements and altitude publications. Coordinates arrival and departure times with transient maintenance, billeting, customs, weather forecasters, base operations and transportation. Orders computer flight plans and assists in the preparation of domestic and international flight plans. Processes and approves all travel authorizations. ADDITIONAL DUTIES: Functional Systems Administrator, Workgroup Manager, Security Manager, Supply/Equipment Custodian, Urinalysis Trusted Agent, Unit Leave Manager, Information Assurance/COMPUSEC Manager, Vehicle NCO, Telephone Control Officer and Fitness Assessment Monitor.

III. EVALUATION OF PERFORMANCE

1. HOW WELL DOES RATEE PERFORM ASSIGNED DUTIES? (Consider quality, quantity, and timeliness of duties performed)

☐ Inefficient. An unprofessional performer.	☐ Good performer. Performs routine duties satisfactorily.	☐ Excellent performer. Consistently produces high quality work.	☒ The exception. Absolutely superior in all areas.

2. HOW MUCH DOES RATEE KNOW ABOUT PRIMARY DUTIES? (Consider whether ratee has technical expertise and is able to apply the knowledge)

☐ Does not have the basic knowledge necessary to perform duties.	☐ Has adequate technical knowledge to satisfactorily perform duties.	☐ Extensive knowledge of all primary duties and related positions.	☒ Excels in knowledge of all related positions. Masters all duties.

3. HOW WELL DOES RATEE COMPLY WITH STANDARDS? (Consider dress and appearance, weight and fitness, customs, and courtesies)

☐ Fails to meet minimum standards.	☐ Meets Air Force standards.	☐ Sets the example for others to follow.	☒ Exemplifies top military standards.

4. HOW IS RATEE'S CONDUCT ON/OFF DUTY? (Consider financial responsibility, respect for authority, support for organizational activities, and maintenance of government facilities)

☐ Unacceptable.	☐ Acceptable.	☐ Sets the example for others.	☒ Exemplifies the standard of conduct.

5. HOW WELL DOES RATEE SUPERVISE/LEAD? (Consider how well member sets and enforces standards, displays initiative and self-confidence, provides guidance and feedback, and fosters teamwork)

☐ Ineffective.	☐ Effective. Obtains satisfactory results.	☐ Highly effective.	☒ Exceptionally effective leader.

6. HOW WELL DOES RATEE COMPLY WITH INDIVIDUAL TRAINING REQUIREMENTS? (Consider upgrade training, professional military education, proficiency/qualification, and contingency)

☐ Does not comply with minimum training requirements.	☐ Complies with most training requirements.	☐ Complies with all training requirements.	☒ Consistently exceeds all training requirements.

7. HOW WELL DOES RATEE COMMUNICATE WITH OTHERS? (Consider ratee's verbal and written skills)

☐ Unable to express thoughts clearly. Lacks organization.	☐ Organizes and expresses thoughts satisfactorily.	☐ Consistently able to organize and express ideas clearly and concisely.	☒ Highly skilled writer and communicator

I certify this is a true copy of th... Certifying Official's Signature

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Clemency Packet

19-40277.220

IV. PROMOTION RECOMMENDATION (Compare this ratee with others of the same grade and AFS)			RATEE NAME: VERDEJO RUIZ, RAFAEL		
RECOMMENDATION	NOT RECOMMENDED	NOT RECOMMENDED THIS TIME	CONSIDER	READY	IMMEDIATE PROMOTION
RATER'S RECOMMENDATION	1 ☐	2 ☐	3 ☐	4 ☐	5 ☒
ADDITIONAL RATER'S RECOMMENDATION	1 ☐	2 ☐	3 ☐	4 ☐	5 ☒

V. RATER'S COMMENTS

- A multi-talented NCO whose remarkable skills and endless dedication to mission reflect unlimited potential
- Outstanding mission accomplishment--integrated 900+ Coronet msn packages--directly supported DoD/foreign aircraft sorties in Exercise COPE TIGER/COBRA GOLD/Operations ENDURING and IRAQI FREEDOM
- Augmented 535th Trng Office--revamped outdated aviation resource management database; automated periodic updating, auditing and posting of training process; corrected essential safety information--saved 40+ man-hours
- Superior speaker! Briefed post mission procedures at PACAF ICO workshop--increased 30+ ICOs awareness
- Quarterbacked self-help project to secure office after incident--restricted entry to Det personnel--saved $2K
- Superintended Det 2 GOV program--verified over 65 inspections--maintained a 100% vehicle operation rate
- Exceptionally effective leader--supervised unparalleled fitness program--100% passed, 30% rated "Excellent"
- Flawlessly controlled Det's $10,000 equipment account--ensured positive control of over 25 high-theft items
- Ambassador in blue! Active member of community band--voluntarily performed 550+ hrs--troops recognized
- Dedicated to self-improvement--earned 18 credit hrs towards bachelor of science degree--maintained 3.5 GPA
- Stellar duty performance & positive attitude--fosters pride, teamwork and camaraderie--promote immediately!

Last performance feedback was accomplished on: 09 Jan 2006 (Consistent with the direction in AFI 36-2406. If not accomplished, state the reason.)

I certify this is a true copy of the original

Civilian Official Signature

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
RASHANDA D. BROWN, TSgt, USAF Detachment 2, ACC Air Operations Squadron Hickam AFB HI	NCOIC, Aircraft Delivery	19 Jun 2006
	SSN 9808	SIGNATURE Rashanda D Brown

VI. ADDITIONAL RATER'S COMMENTS ☒ CONCUR ☐ NONCONCUR

- Top-notch NCO! Performs every function with the highest degree of integrity, professionalism and excellence
- Managed $30K+ in Det 2 computer systems--upgraded 11 Office Automation Systems/Computer Enterprise Systems in record time; coord w/PACAF to update security patches--boosted network system connectivity 75%
- Take-charge! Minimized repair/down-time of SIPRNET/FALCON VIEW computer systems--vital for msn ops
- Spearheaded Det Security prgm--0 discrepancies during 15AW COMPUSEC inspection--lauded "Outstanding"
- First class performer; consistently exceeds requirements; winner ACC AOS NCO of the Quarter--promote now

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
THOMAS E. CHESLEY, Lt Col, USAF Detachment 2, ACC Air Operations Squadron Hickam AFB HI	Commander	19 Jun 2006
	SSN 3697	SIGNATURE Thomas E Chesley

INSTRUCTIONS

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When the rater's rater is not at least a MSgt or civilian (GS-07 or higher), the additional rater is the next official in the rating chain serving in the grade of MSgt or higher, or a civilian in the grade of GS-07 or higher.
When the final evaluator (rater or additional rater) is not an Air Force officer, enlisted, or DAF civilian, an Air Force advisor review is required.
All evaluators enter only last four numbers of SSN

VII. COMMANDER'S REVIEW

☒ CONCUR	☐ NONCONCUR (Attach AF Form 77)	SIGNATURE

AF IMT 910, 20000601, V2 (REVERSE) FOR OFFICIAL USE ONLY (When filled in)

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I certify this is a true copy of the original document.
Certifying Official Signature

ENLISTED PERFORMANCE REPORT (AB thru TSGT)

I. RATEE IDENTIFICATION DATA (Read AFI 36-2406 carefully before completing any item.)

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	SRA	1C052

5. ORGANIZATION, COMMAND, AND LOCATION	6a. PAS CODE	6b. SRID
97th Operations Support Squadron (AETC), Altus AFB OK	AM0JFHR4	0J1AM

7. PERIOD OF REPORT	8. NO. DAYS SUPERVISION	9. REASON FOR REPORT
From: 18 Jun 2003 Thru: 17 Jun 2004	312	Annual

II. JOB DESCRIPTION

1. DUTY TITLE

Aviation Resource Management Journeyman

2. KEY DUTIES, TASKS, AND RESPONSIBILITIES

Responsible for the collection, input, update and audit of aviation service data for the Aviation Resource Mgmt System. Initiates actions to support flt management policy/procedures including interviews w/aircrew members to obtain flying-related data. Maintains control/accountability of flt record folders for 437 permanent party and 3,000 student pilots, navigators, loadmasters, boom operators and engineers. Performs in-processing and out-processing functions. Reviews medical recommendations for flying, Duty Not Involving Flying (DNIF) status reports, aeronautical orders, physiological training, flying attachment letters and aviation service data. Prepares/processes aeronautical and military pay orders. Audits flight mgmt reports and source documents to ensure accuracy of information. Distributes reports and lists for Host Aviation Resource Management (HARM) office. ADDITIONAL DUTIES: Environmental Safety Representative, Physical Training Leader

III. EVALUATION OF PERFORMANCE

1. HOW WELL DOES RATEE PERFORM ASSIGNED DUTIES? (Consider quality, quantity, and timeliness of duties performed)

☐ Inefficient. An unprofessional performer	☐ Good performer Performs routine duties satisfactorily.	☐ Excellent performer. Consistently produces high quality work.	☒ The exception Absolutely superior in all areas.

2. HOW MUCH DOES RATEE KNOW ABOUT PRIMARY DUTIES? (Consider whether ratee has technical expertise and is able to apply the knowledge)

☐ Does not have the basic knowledge necessary to perform duties.	☐ Has adequate technical knowledge to satisfactorily perform duties	☐ Extensive knowledge of all primary duties and related positions.	☒ Excels in knowledge of all related positions. Masters all duties.

3. HOW WELL DOES RATEE COMPLY WITH STANDARDS? (Consider dress and appearance, weight and fitness, customs, and courtesies)

☐ Fails to meet minimum standards.	☐ Meets Air Force standards.	☐ Sets the example for others to follow.	☒ Exemplifies top military standards.

4. HOW IS RATEE'S CONDUCT ON/OFF DUTY? (Consider financial responsibility, respect for authority, support for organizational activities, and maintenance of government facilities)

☐ Unacceptable.	☐ Acceptable.	☐ Sets the example for others	☒ Exemplifies the standard of conduct

5. HOW WELL DOES RATEE SUPERVISE/LEAD? (Consider how well member sets and enforces standards, displays initiative and self-confidence, provides guidance and feedback, and fosters teamwork)

☐ Ineffective.	☐ Effective. Obtains satisfactory results	☐ Highly effective.	☒ Exceptionally effective leader

6. HOW WELL DOES RATEE COMPLY WITH INDIVIDUAL TRAINING REQUIREMENTS? (Consider upgrade training, professional military education, proficiency/qualification, and contingency)

☐ Does not comply with minimum training requirements	☐ Complies with most training requirements.	☐ Complies with all training requirements.	☒ Consistently exceeds all training requirements

7. HOW WELL DOES RATEE COMMUNICATE WITH OTHERS? (Consider ratee's verbal and written skills)

☐ Unable to express thoughts clearly. Lacks organization	☐ Organizes and expresses thoughts satisfactorily	☐ Consistently able to organize and express ideas clearly and concisely	☒ Highly skilled writer and communicator

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clemency packet

IV. PROMOTION RECOMMENDATION (Compare this ratee with others of the same grade and AFS)			RATEE NAME: VERDEJO RUIZ, RAFAEL		
RECOMMENDATION	NOT RECOMMENDED	NOT RECOMMENDED THIS TIME	CONSIDER	READY	IMMEDIATE PROMOTION
RATER'S RECOMMENDATION	1	2	3	4	5 X
ADDITIONAL RATER'S RECOMMENDATION	1	2	3	4	5 X

V. RATER'S COMMENTS

- Unparalleled work ethic, acute attention to detail and dedication vital to 97 OSS and HARM office successes
- Zero discrepancies in HARM office during '04 HQ AETC ORI--absolutely superb; key to sq "Excellent" rating
- Critical to mission success; monitored/maintained grounding go-no-go currencies for 3,000 student aircrew
  -- Meticulously tracked and posted requirements--ensured only current and qualified aircrew flew at all times
- Extremely well organized and mission oriented, selected to instruct two Airmen on HARM office procedures
  -- Flawless guidance on operating procedures--dramatically improved the quality of the mission at Altus AFB
- Coordinated daily w/ the flight surgeon's office--100% accurate DNIF status reported daily to all flying units
- Self motivated! Completed nine credits towards CCAF degree in Airport Resource Management w/ a 3.5 GPA
- Commitment to fellow Airmen as the Assistant Program Manager for Airmen Against Drunk Driving (AADD)
  -- Selflessly devoted his off-duty time to AADD; contributed 20+ hours to protect our most valuable resources
- Model for AF fitness standard! Pivotal role in organizing and implementing the new AF fitness program for sq
  -- Led squadron in physical fitness over twice a week; helped ensure squadron meets & exceeds AF standards
- Leadership excels above peers, consistently raised the bar; ready for increased responsibility; promote ASAP!

Last performance feedback was accomplished on: 30 Jan 2004 (Consistent with the direction in AFI 36-2406. If not accomplished, state the reason.)

I certify this is a true copy of the original document.

Verifying Official's Signature:

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
SURITA A. RORIE, SSgt, USAF 97th Operations Support Squadron (AETC) Altus AFB OK	Assistant NCOIC, Host Aviation Resource Management	18 Jan 04
	SSN 2804	SIGNATURE Surita A Rorie

VI. ADDITIONAL RATER'S COMMENTS — X CONCUR ☐ NONCONCUR

- My #1 Airman! Sets the example for all others to follow in time management, self-improvement and dedication
  -- Distinguished as the 97th Air Mobility Wing Aviation Resource Management Airman of the Year for 2003
- Handpicked by Honor Guard NCOIC to promote "esprit de corps" to all new Airmen assigned to Altus AFB
  -- Briefed at the First Term Airman Center on the rewarding & challenging experiences the Honor Guard offers
- Outstanding attitude, military bearing, dress and appearance; exhibits a professional AF image for all to follow
- Dedicated and talented Airman with infinite qualities for leadership & responsibility--promote ahead of peers!

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
ANDREW J. LESHIKAR, Maj, USAF 97th Operations Support Squadron (AETC) Altus AFB OK	Commander, Operations Flight/ C-17 CCTS Evaluator Pilot	18 Jan 04
	SSN 8848	SIGNATURE Andrew Leshikar

INSTRUCTIONS

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When the rater's rater is not at least a MSgt or civilian (GS-07 or higher), the additional rater is the next official in the rating chain serving in the grade of MSgt or higher, or a civilian in the grade of GS-07 or higher.
When the final evaluator (rater or additional rater) is not an Air Force officer, enlisted, or DAF civilian, an Air Force advisor review is required.
All evaluators enter only last four numbers of SSN

VII. COMMANDER'S REVIEW

X CONCUR	NONCONCUR (Attach AF Form 77)	SIGNATURE
		Robert C Wood

AF IMT 910, 20000801, V2 (REVERS) FOR OFFICIAL USE ONLY (When filled in)

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ENLISTED PERFORMANCE REPORT *(AB thru TSGT)*

I. RATEE IDENTIFICATION DATA *(Read AFI 36-2406 carefully before completing any item.)*

1. NAME (Last, First, Middle Initial)	2. SSN	3. GRADE	4. DAFSC
VERDEJO RUIZ, RAFAEL	583-81-1958	A1C	1C052

5. ORGANIZATION, COMMAND, AND LOCATION	6a. PAS CODE	6b. SRID
56th Airlift Squadron (AETC), Altus AFB OK	AM0JFCWC	0J1AM

7. PERIOD OF REPORT	8. NO. DAYS SUPERVISION	9. REASON FOR REPORT
From: 18 Jun 2002 Thru: 17 Jun 2003	365	Annual

II. JOB DESCRIPTION

1. DUTY TITLE
Aviation Resource Management Journeyman

2. KEY DUTIES, TASKS, AND RESPONSIBILITIES
Posts and maintains aircrew flying time and currency requirements on an automated web based program. Maintains flight publications and aircrew related forms. Generates flight orders and related go/no-go records. Processes incoming and outgoing students. Manages student aircrew training records in selectively manned C-5 transition training unit. Maintains and updates support publications and forms in local and trip mission kits. Inputs aircrew member currency requirements into Aviation Resource Management System (ARMS). Reviews personnel action requests on aircrew members to determine the effect on their flight status. ADDITIONAL DUTIES: Alternate Passport Clerk, Assistant NCOIC Unit Control Center (UCC), Alternate AVPOL Monitor, SAR Member, Alternate Personal Wireless Communications Systems Manager (PWCS), Alternate Ancillary Training Manager, Honor Guard Trainer, Security Forces Augmentee.

III. EVALUATION OF PERFORMANCE

1. HOW WELL DOES RATEE PERFORM ASSIGNED DUTIES? *(Consider quality, quantity, and timeliness of duties performed)*

☐ Inefficient. An unprofessional performer.	☐ Good performer. Performs routine duties satisfactorily.	☐ Excellent performer. Consistently produces high quality work.	☒ The exception Absolutely superior in all areas.

2. HOW MUCH DOES RATEE KNOW ABOUT PRIMARY DUTIES? *(Consider whether ratee has technical expertise and is able to apply the knowledge)*

☐ Does not have the basic knowledge necessary to perform duties.	☐ Has adequate technical knowledge to satisfactorily perform duties.	☐ Extensive knowledge of all primary duties and related positions.	☒ Excels in knowledge of all related positions. Mastered all duties.

3. HOW WELL DOES RATEE COMPLY WITH STANDARDS? *(Consider dress and appearance, weight and fitness, customs, and courtesies)*

☐ Fails to meet minimum standards.	☐ Meets Air Force standards.	☐ Sets the example for others to follow.	☒ Exemplifies top military standards.

4. HOW IS RATEE'S CONDUCT ON/OFF DUTY? *(Consider financial responsibility, respect for authority, support for organizational activities, and maintenance of government facilities)*

☐ Unacceptable.	☐ Acceptable.	☐ Sets the example for others.	☒ Exemplifies the standard of conduct.

5. HOW WELL DOES RATEE SUPERVISE/LEAD? *(Consider how well member sets and enforces standards, displays initiative and self-confidence, provides guidance and feedback, and fosters teamwork)*

☐ Ineffective.	☐ Effective. Obtains satisfactory results.	☐ Highly effective.	☒ Exceptionally effective leader.

6. HOW WELL DOES RATEE COMPLY WITH INDIVIDUAL TRAINING REQUIREMENTS? *(Consider upgrade training, professional military education, proficiency/qualification, and contingency)*

☐ Does not comply with minimum training requirements.	☐ Complies with most training requirements.	☐ Complies with all training requirements.	☒ Consistently exceeds all training requirements.

7. HOW WELL DOES RATEE COMMUNICATE WITH OTHERS? *(Consider ratee's verbal and written skills)*

☐ Unable to express thoughts clearly. Lacks organization	☐ Organizes and expresses thoughts satisfactorily.	☐ Consistently able to organize and express ideas clearly and concisely.	☒ Highly skilled writer and communicator.

Contesting Official Signature

AF FORM 910, 20000601 *(EF-V1)* PREVIOUS EDITIONS ARE OBSOLETE FOR OFFICIAL USE ONLY (When filled in)

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IV. PROMOTION RECOMMENDATION (Compare this ratee with others of the same grade and AFS)				RATEE NAME: VERDEJO RUIZ,	
RECOMMENDATION	NOT RECOMMENDED	NOT RECOMMENDED AT THIS TIME	CONSIDER	READY	IMMEDIATE PROMOTION
RATER'S RECOMMENDATION	1	2	3	4	X
ADDITIONAL RATER'S RECOMMENDATION	1	2	3	4	X

V. RATER'S COMMENTS

- The office microscope; processed daily and monthly ARMS audit products; reviewed 300 pages monthly
  -- Identified and corrected an average of 30 errors per month--kept ARMS shop 100% accurate all the time
- Attended Oracle Report Writer Course; graduated w/100% average earning the Academic Excellence Award
  -- Used knowledge gained from this course to maintain a revolutionary web-based aircrew currency system
  -- Gave aircrew instant access to their currency training; virtually eliminated overdue flight training events
- Extremely reliable airman; handled multiple responsibilities after short-notice TDY of 58 AS ARMS NCOIC
  -- Assisted the 58 AS ARMS office ensuring all tasks were complete while still performing his primary job
- Trustworthy; assisted sq training office in updating and managing student training folders and flying time
  -- Lauded by 97 AMW HARM Chief for accuracy of student updates; the only squadron that had zero errors
- Responsible; appointed to serve as trainer for 51 honor guard members and managed $38,000 training budget
  -- Performed in highly visible full honors funeral detail for the Space Shuttle Columbia Commander, Colonel Rick Husband; spent 4 days training 22 members of his flight to properly honor this fallen America hero
- Priceless asset; embodies the professional airman; HARM duty a must--absolutely promote ahead of peers!

Last performance feedback was accomplished on: 10 Oct 2003 *(Consistent with the direction in AFI 36-2406.)*
(If not accomplished, state the reason.)

I certify this is a true copy of the original document.

Rater's Signature

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
LISA M. BITTON, SSgt, USAF 56th Airlift Squadron (AETC) Altus AFB OK	NCOIC, Aviation Resource Management SSN: 0466	17 Jun 03 SIGNATURE: Lisa M. Bitton

VI. ADDITIONAL RATER'S COMMENTS — X CONCUR — NONCONCUR

- Assisted in the management of the squadron Aviation Petroleum, Oils and Lubrication (AVPOL) process
  -- Tracked 1.1M gallons of fuel worth $990K; flawless auditing led to 100% accountability--best in 97 OG
- Prudently monitored the unit flying hour program; reconciled daily and monthly Aircraft Utilization Report
  -- Expertly accounted for 250 plus flying hours per month ensuring hours matched w/maintenance analysis
- Fierce publications manager; maintained aircrew flt msn kits--updated six kits daily, 120 forms & zero errors
- Superior Performer! Selected as 97 OG "ARMS AMN of the Qtr" three of four qtrs; promote immediately!

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
MARK A. BOVA, Maj, USAF 56th Airlift Squadron (AETC) Altus AFB OK	Assistant Operations Officer SSN: 1165	17 Jun 03 SIGNATURE: Mark A Bova

INSTRUCTIONS

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Reports written by colonels or civilians (GS-15 or higher) do not require an additional rater; however, endorsement is permitted unless prohibited by the instruction above.

When the rater's rater is not at least a MSgt or civilian (GS-07 or higher), the additional rater is the next official in the rating chain serving in the grade of MSgt or higher, or a civilian in the grade of GS-07 or higher.

When the final evaluator (rater or additional rater) is not an Air Force officer or a DAF civilian, an Air Force advisor review is required.

All evaluators enter only last four numbers of SSN.

VII. COMMANDER'S REVIEW

X CONCUR		NONCONCUR *(Attach AF Form 77)*	SIGNATURE

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IV. PROMOTION RECOMMENDATION (Compare this ratee with others of the same grade and AFS)				RATEE NAME: VERDEJO RUIZ,	
RECOMMENDATION	NOT RECOMMENDED	NOT RECOMMENDED AT THIS TIME	CONSIDER	READY	IMMEDIATE PROMOTION
RATER'S RECOMMENDATION	1	2	3	X	5
ADDITIONAL RATER'S RECOMMENDATION	1	2	3	X	5

V. RATER'S COMMENTS

- Focal point of the 56th Airlift Squadron Operations Center; kept the operations center running smoothly
  -- Important player; helped the squadron transition to a completely new and updated scheduling program
  -- Invested off-duty hours to input aircrew personnel data for over 70 aircrew members into the ARMS
- Mastered intricate mission review process as a three level; critical link in chain of mission accomplishment
  -- Collates flight data; ensures mission forms are complete/accurate and all flying hours are accounted for
  -- Input/audited over 800 flight mission folders; provided accurate data in compliance with AF instructions
- Assisted in the operation of the squadron Aviation Petroleum, Oils and Lubrication (AVPOL) process
  -- Created excel spreadsheet to track over 98,000 gallons of fuel a month; increased efficiency by 75%
- Completed 5-level CDC--perfectly blended studies, office workload and base honor guard--scored 84%
- Dress and appearance always unapproachable; unmatched military bearing and professional attitude
  -- Trainer on the Altus Air Force Base Honor Guard--represented the wing at over 100 ceremonies
- Maintained 100% control/accountability of the flight crew information file--enhanced flight safety
- Exceptionally talented Airman--does an outstanding job and has the potential to go far in the Air Force!

Last performance feedback was accomplished on: 14 Mar 2002 (Consistent with the direction in AFI 36-2406.) (If not accomplished, state the reason.)

I certify this is a true copy of the original

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
LISA M. BITTON, SSgt, USAF 56th Airlift Squadron (AETC) Altus AFB OK	Chief, Aviation Resource Management	18 Jun 2002
	SSN: 0466	SIGNATURE: Lisa M. Bitton

VI. ADDITIONAL RATER'S COMMENTS — X CONCUR — NONCONCUR

- Pugnacious warrior and bedrock of the ARMS shop; never hesitated to tackle any assigned taskings
  -- Monitored all critical training requirements for over 70 aircrew members; ensured squadron readiness
- Swiftly built student flight training folders--ensured critical documentation readily available for instructors
- Flawlessly managed 400 flight publications and forms--ensured mission kits were accurate and current
  -- Efforts significantly contributed to section receiving an "Excellent" rating during 2002 HQ AETC ORI
- Highly skilled performer with superior job knowledge--56th AS Airman of the Year for 2001--promote!

NAME, GRADE, BR OF SVC, ORGN, COMD & LOCATION	DUTY TITLE	DATE
DAVID E. HAFER, JR., Maj, USAF 56th Airlift Squadron (AETC) Altus AFB OK	Operations Officer	19 Jun 2002
	SSN: 9959	SIGNATURE: David E. Hafer Jr.

INSTRUCTIONS

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When the rater's rater is not at least a MSgt or civilian (GS-07 or higher), the additional rater is the next official in the rating chain serving in the grade of MSgt or higher, or a civilian in the grade of GS-07 or higher.

When the final evaluator (rater or additional rater) is not an Air Force officer or a DAF civilian, an Air Force advisor review is required.

All evaluators enter only last four numbers of SSN.

VII. COMMANDER'S REVIEW

X CONCUR	NONCONCUR (Attach AF Form 77)	SIGNATURE
		Donna Bam

AF FORM 910, 20000601 (REVERSE) (EF-V2) FOR OFFICIAL USE ONLY (When filled in)

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19-40277.228

APPENDIX O

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RAFAEL VERDEJO RUIZ,	§	
Petitioner,	§	
v.	§	CASE NO: 19-40277
DEREK EDGE, WARDEN,	§	
Respondent.	§	

REQUEST FOR RECONSIDERATION AND RECONSIDERATION EN BANC

Petitioner requests reconsideration and reconsideration En Banc because this court erred by failing to follow its own circuit and Supreme Court precedent and due to the exceptional circumstance of deciding whether there are additional exceptions that allow civilian courts to review military court-martial claims. It has been 45 years sind Calley v. Callaway, 519 F. 2d. 184, 1975 U.S. App. LEXIS 12794 (5th Cir. 1975) and Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L. Ed. 1508 (U.S. S. Ct. 1953), which do not reflect Supreme Court and circuit precedent in Evitts v. Lucey, 105 S. Ct. 830, 83 LED2D 821, 469 U.S. 387 (U.S. S. Ct. 1984); Massaro v. United States, 538 U.S. 500 (U.S. S. Ct. 2003); Martinez v. Ryan, 182 LED2D, 566 U.S. 1 (U.S. S. Ct. 2012); Sullivan v. Secretary, 837 F. 3d. 1195 (11th Cir. 2016); Finley v. Johnson, 243 F. 3d. 215 (5th Cir. 2001); United States v. Alanis, 88 Fed. Appx. 15 (5th Cir. 2004); Johnson v. Zerbst, 304 U.S. 458 (U.S. S. Ct. 1938); and Rheuark v. Shaw, 628 F. 2d. 297 (5th Cir. 1980) decisions to name a few. The cases mentioned, among others included in this request reflect that the prior rules and decisions in Burns and Calley have been altered.

This court also erred in following Supreme Court precedent regarding petitioner's addition of arguments of lack of subject-matter-jurisdiction (see Petitioner's appeal brief dated 5 August 2019 addressing court's lack of power to review; Request to Review Military Appeal Review's Subject Matter Jurisdiction dated 23 October 2019 which clarifies that military appeal was conducted by resorting to procedural rules to remedy the expiration of their appellate jurisdiction along with subsequent submissions of violations of speedy trial which barred prosecution. See also Petitioner's Reply Brief dated 5 March 2020, Request for judgment on the Pleadings dated 13 March 2020, Request for Summary Judgment dated 22 March 2020). (This court in its final decision Granted the request to Supplement his reply Brief. See Petitioner's 27 MArch 2020 request to file supplemental response by treating his motions as supplements to his 12 March reply brief). This court acknowledged that petitioner raised the

subject-matter jurisdiction argument when deciding against Respondent's motion for summary dismissal (Per Curiam decision denying Respondent's motion to dismiss), yet, in its final decision denied review of this claim. This is against Supreme Court precedent. See for example, Huddleston v. Nelson Bunker Hunt Trust Estate, 109 B.R. 197, 1989 U.S. Dist. LEXIS 15760 at LEXIS 7-8 (circuit court authorized to examine jurisdiction sua sponte even though district court did not consider it; Absence of subject matter jurisdiction may render judgment void where a court exceeds its jurisdiction beyond the scope of its authority; desicion by court lacking subject matter jurisdiction is void ab initio; and "it is axiomatic that an alleged lack of subject matter jurisdiction may be raised at any time by a party or by the court sua sponte). This court acknowledged in Jones v. Valvoline Co., 1999 U.S. Dist. LEXIS 7830 at LEXIS 4 that "Subject-matter jurisdiction can never be waived...". This court has failed to review Petitioner's lack of subject matter jurisdiction claims. This also goes against this circuit's-followed-precedent in Clisby v. Jones, 960 F. 2d. 925, 935 (11th Cir.).

This court also failed to accept Petitioner's claim of trial ineffective assistance of counsel. This court has also already acknowledged that trial-IAC may be raised on collateral review regardless if the claim was available to be raised on direct appeal because IAC is excepted from the procedural bar because requiring a criminal defendant to bring claims of IAC cannot be properly resolved on appeal because there has been no opportunity to develop the record of the merits of these allegations. See Alanis at 19. In Petitioner's case, he in fact did submit his IAC claims on direct appeal, yet, were not accepted nor were they reviewed by the military courts. Additionally, Petitioner could not discover that his appellate counsel provided ineffective assistance by the failure to present the claims properly to the military court via a showing of good cause. Without this showing the military court lacked jurisdiction to accept and review Petitioner's claims. The facts are undisputed by the Respondent.

The cases and argument included below also show and prove that this court and the district court erred in failing to construe as true petitioner's presented facts and evidence. Respondent failed to deny, controvert, and come forward with controverting evidence. This court should be concerned with the motivation of Respondent in failing to controvert Petitioner's asserted facts.

The underlying claims, to include facts and evidence presented by Petitioner, also show a miscarriage of justice. Those facts and evidence are also undisputed.

Because this court has failed to follow its own circuit precedent and Supreme Court precedent, because this court failed to accept as true Petitioner's uncontroverted facts and evidence in accordance with district case-law, and because this court failed to address Petitioner's lack of subject matter jurisdiction claims, Petitioner requests Reconsideration En Banc.

ARGUMENTS

1a. THIS COURT FAILED TO ACCEPT AND REVIEW PETITIONER'S CLAIM OF LACK OF SUBJECT MATTER JURISDICTION

In the denial order this court states:

"We will not review the plethora of new claims Ruiz has raised for the first time in the many briefs and motions he has filed before this court...Accordingly, the district court's dismissal of Ruiz's §2241 petition is AFFIRMED..." (denial at 3).

Petitioner has argued in subsequent motion the lack of subject-matter jurisdiction by way of the military appellate court's lack of subject matter jurisdiction by resorting to procedural maneuvers to remedy the jurisdictional deadline when the first appellate decision was conducted with the illegal appointment of Judge Soybel in violation of the appointments clause and the "reconsideration" conducted after Petitioner had submitted his request for grant of review to the military Court of Appeals for the Armed Forces (CAAF). In this instant, since the first decision at the Air Force Court of Criminal Appeals (AFCCA) was illegal and Petitioner's request for a grant of review divested the AFCCA of jurisdiction, the "reconsideration" was also conducted illegally because there is no remand from CAAF directing AFCCA to make any new decision.

"It is not until that appeal of right is complete that we can rest assured the interests of justice have been served." See United States v. Wright, 160 F. 3d. 905, 908 (2d Cr. 1998).

The interest of justice is not served here where the first appeal is illegally conducted and the second decision is conducted without the remand from the CAAF court. This is especially egregious knowing that a "reconsideration" in the military courts is not conducted with de novo review unless instructed to do so by the CAAF. In this case there exists no remand order to AFCCA.

"...Petitioner is not being afforded an appellate review of his findings and sentence that comports with the requirements of Article 66 and Article 70. The rights must be recognized, enforced and protected by the Government, by the appellate attorneys, by the Court of Criminal Appeals, and by this Court." See Diaz v. JAG of the Navy, 59 MJ 34 at 39 (CAAF 2003).

1b. Petitioner also raised the issue of lack of Subject Matter jurisdiction as to his trial. Specifically, the speedy trial violation for failure to prosecute within 120 days of Petitioner's preferral of charges. Petitioner was preferred charges on 12 October 2010 (ROA.157-158) and his trial and arraignment occurred on 22 February 2011 (ROA.235). Excluding the day of preferral, this equals to **130** days. Due to this delay, Petitioner did not have relevant witnesses such as Mrs. Delfina Rivero who was away on a family emergency to Mexico. Nevertheless, Rule of Court Martial (RCM) 707 and Article 10, of the Uniform Code of Military Justice (UCMJ) are violated.

"Sixth Amendment trial protections are triggered upon initiation of a court-martial by preferral of charges. United States v. Grom, 21 MJ 53 (CMA 1985). Rule for Courts Martial 707 provides a bright-line 120 rule for speedy trial, triggered by either initiation of restraint ot preferral of charges. RCM 707(a)...Violations of UCMJ art. 10 or the Sixth Amendment will preclude prosecution. RCM 707(d)(1)." (emphasis added). "An accused is brought to trial at arraignment, when he is "called upon to plead." See Doty, 51 MJ at 465. Dismissal cf the charges is the only possible remedy for denying the defendant a speedy trial. See STRUNK v. United States, 412 U.S. 434, 37 LED 2D 56.

As petitioner showed, the military court lacked jurisdiction to try petitioner after 120 days and was barred from prosecution in accordance with Article 10, UCMJ, RCM 707, and the Sixth Amendment. Petitioner did not request extensions and did not agree to exclusion of time for speedy trial purposes. Petitioner in his original appellate brief addressed the inclusion of this argument in his "Additional Facts Submitted" section (page 18 of Petitioner's appeal brief dated 5 August 2019) addressing the inclusion of the 28 July 2019 brief to the appeal brief). Therefore, Petitioner's resubmission on 21 February 2020 of said brief was a mere rehash and insurance that the Respondent replies to said claims. Nevertheless, the military court lacked subject matter jurisdiction on these charges, this argument is not waivable and is exempt from procedural bar which this court must also address.

2. PETITIONER PRESENTED FACTS WHICH IF ACCEPTED BY A JURY COULD RESULT IN ACQUITTAL EQUATES TO SUFFICIENT SHOWING TO EXEMPT BEING PROCEDURALLY DEFAULTED.

Petitioner was tried for a timeframe and location of "within the continental united states...on or about 1 August 2004 and on or about 30 September 2004..." (ROA.157). In Petitioner's brief he has argued actual innocence by way of showing the government's own evidence show Petitioner was not within the continental United States and was not within this period of

charges within the Continental United States. Petitioner was stationed in Hawaii since June 2004 (ROA.222) and had not been back in the continental United States until his assignment at Florida in 2008 (ROA.214). Petitioner asserted that at his military trial the government provided no evidence that Petitioner was within the continental United States during the preferral period charged. In fact, Respondent provided no evidence either. At trial and during this habeas process there has been no documentation presented as to when did Petitioner's wedding occur. One thing for fact is certain: Petitioner's documents are official military records signed by his Supervisor and Commanding officer (ROA.211-228). The facts and documents are undisputed and uncontroverted by Respondent. Trial counsel failed to present this defense to the jury and constitutes deficient performance. Additionally, Petitioner showed that he could not be found guilty for charge 1 and additional charge 1 because the statute prohibits it. Because Petitioner has shown facts and evidence which went undisputed by Respondent, specifically that Petitioner was not at the time of the allegations in the original indictment, the amended indictment, nor the illegally-broadened timeframe, petitioner should be exempt from being procedurally defaulted.

"...[A] showing of facts which are highly probative of an affirmative defense which if accepted by a jury would result in the defendant's acquittal constitutes a sufficient showing of 'actual innocence' to exempt a ...claim from the bar of procedural default." See Finley v. Johnson.

The government at trial nor Respondent presented any evidence related to the timeframe that claimed Petitioner was in the continental United States as indicted. See United States v. Trevino, 720 F. 2. 395, 1983 U.S. App. LEXIS 15412 at LEXIS *17 (U.S. Ct. App. 5th Cir. 1983)(No evidence cannot be sufficient evidence, compelling dismissal of count 1, not just remand for new trial with better evidence).

3. THIS COURT ERRED BY FAILURE TO CONSIDER PETITIONER'S UNCONTROVERTED CLAIMS AS TRUE IN LIGHT OF DISTRICT CASE LAW.

This court in its denial states:

Based on our review of the record and submissions, we are unpersuaded that Ruiz demonstrated an excuse for the procedural default of his claims based on ineffectiveness of appellate counsel..., the purported loss of his trial record..., actual innocence, or Martinez v. Ryan, 566 U.S. 1, 16-17 (2012). We are likewise unpersuaded by Ruiz's arguments regarding the forfeiture component of his sentence...Accordingly, Ruiz has failed to show that the district court

abused its discretion in dismissing his §2241 petition for failure to exhaust his military remedies without conducting an evidentiary hearing." (Appeals decision at 3, internal citations ommitted).

It appears to Petitioner that this court when it made its decision chose to weigh in favor of Respondent based on Petitioner's conviction, and the Respondent's status. Petitioner provided documentation and asserted facts that have been undisputed and uncontroverted by Respondent. This court should be concerned with the motivation of Respondent in failing to controvert petitioner's asserted facts. Respondent bore the burden of coming forward with controverting evidence. See Jones v. Scott, 1995 U.S. App. LEXIS 41787 at LEXIS *5 which addressed Koch v. Puckett, 907 F. 2d 524, 529-30 (5th Cir. 1990)(emphasis added). In this case Respondent did not controvert nor did he come forward with evidence. Instead, merely made assumptions and tried to mischaracterize facts.

"See Beverly Hills Fan, 21 F. 3d 1558 at 1563 (explaining that the defendant must "directly" controvert the plaintiff's allegations, and denials that are either "inartfully phrased or craftily written" to avoid a direct refutation will not suffice)." See Crystal Semiconductor Corp. v. OPTi Inc., 1997 U.S. Dist. LEXIS 20608, footnote 7.

"Because of the gov't silence on this issue, the court must accept Martinez's uncontroverted testimony of this event." See United States v. Martinez, 2006 U.S. Dist. LEXIS 97878 (5th Dist. 2006), LEXIS *15, footnote 6.

"Collins in both his initial brief and his recent supplement argues that there was no evidence at trial which would suggest that he caused or aided and abetted the interstate transportation of such a check. We take the government's silence on this point as agreement. Collin's conviction on this count is reversed." See United States v. Adkinson, 158 F. 3d 1147, 1164 (U.S. Ct. App. 5th Cir., Oct. 26, 1998).

"It is clear from the undisputed facts that Fitzgerald was denied the effective assistance of counsel. The judgment denying habeas corpus is therefore reversed and the case is remanded with directions to grant Fitzgerald's petition for habeas corpus." See Horowitz v. Henderson, 1973 U.S. Dist. LEXIS 12547 at LEXIS *3.

"...During the federal habeas corpus proceedings, the Director again failed to present any evidence, either in his answer or in his motion for summary judgment, controverting this allegation. Because Wyatt's allegation was supported by an affidavit from Wyatt, the court found that the allegation had

been established as a fact by a preponderance of the evidence." See Wyatt v. Dretke, 2004 U.S. Dist. LEXIS 29289 at LEXIS *5-6 (U.S. Dist. 5th Cir., 2004).

"Clearly, Ross involved a petitioner who asserted matters about which he had no personal knowledge, i.e., what a witness's testimony would have shown. In contrast, Jones's sworn testimony was based on personal knowledge - he requested that counsel file an appeal, which counsel failed to do. Jones made more than a conclusory allegation, and the district court did not err in finding that Respondent bore the burden to come forward with controverting evidence. See Koch v. Puckett, 907 F. 2d 524, 529-30 (5th Cir. 1990)..." See Jones v. Scott, 1995 U.S. App. LEXIS 41787 at LEXIS *5.

As shown, this court has failed to follow its own case law. Petitioner's uncontroverted facts and evidence must have been construed as true and the case remanded with instructions to grant petitioner habeas relief. Respondent merely provided craftily written denials that avoided direct refutation. Respondent claimed petitioner's facts lack merit in one instant and then in another claim that even if the claims had merit, that they were not stronger than the claims raised by appellate counsel (Respondent reply to Petitioner's brief). Do Petitioner's cl ims have merit or not? Petitioner's craftily written denials should not have been entertained. Further, Respondent was to come forward with controverting evidence. Where in the record is there controverting evidence? Respondent provided none. Therefore, this court committed error by being "unpersuaded" by Petitioner's claims. In this request for Reconsideration En Banc petitioner has once more stated in these individualized sections the undisputed facts.

"This court must follow its own precedent unless it is overruled by this court en banc or by a decision of the Supreme Court." See United States v. Lechuga, 229 F. App'x 317 (5th Cir. 2007).

4. PETITIONER DID NOT RECEIVE FULL AND FAIR APPELLATE REVIEW WHICH OVERCOMES PROCEDURAL DEFAULT.

Petitioner has claimed above in **subsection 1a** that the military appeal lacked subject matter jurisdiction. This is suffient to overcome procedural default. This issue was not addressed in the court's denial as mentioned above.

Additionally, in the same fashion, Petitioner also argued that his trial was not full and fair. This court also failed to address this claim in accordance with Clisby. Petitioner will again address this issue.

Petitioner did not receive full and fair review of his claims because Petitioner submitted his affidavit Trial-IAC claim to his appellate attorney on

1 June 2014 (ROA.281-282). Declarations were sent by his mother (ROA.284), and wife (ROA.338). On 24 June 2014, before Petitioner's appeal became final, his appellate counsel submitted Petitioner's IAC claim (ROA.288). Petitioner's appeal "reconsideration" decision was made on 14 August 2014 (ROA.286). The military appellate court in its decision did not accept Petitioner's submission and it was not reviewed. The decision states:

"...On 24 June 2014, well after the deadline for supplemental briefs to be submitted in this case and after oral argument, the appellant moved for leave to file yet another supplemental assignment of errors, alleging he received ineffective assistance of counsel. Given that this Court has repeatedly allowed the appellant to raise additional issues out of time during this lengthy appellate processing of this matter, and given that the appellant made no attempt to explain why this latest issue could not have been raised earlier, we denied the appellant's motion to submit this latest supplemental assignment of errors." (ROA.288 emphasis added).

As mentioned, Petitioner's trial IAC claims were not accepted by the appellate court. The IAC claim was not reviewed either (how can the court review something not accepted for review?). In fact, in the enumerated issues reviewed Trial IAC is not even mentioned (ROA.287). Respondent does not deny that all of petitioner's claims were submitted via appellate counsel. Respondent does not provide a single piece of document directly sent to the military court by petitioner. This is uncontroverted.

The military appellate court did not accept the trial IAC claim for failure to show good cause. Good cause must be shown for any late submission. See **AFCCA rules 19(b) and 19(d) (Crim. App. R. 150.24, 150.25, and 150.19(d))**.

As shown, the appellate court refused to accept petitioner's IAC claim at a time when the court had not made a final decision of the case. Appellate counsel failed to provide good cause to the military courts (ROA.288). Petitioner's Appellate counsel in its motion to the court only provided the history of the case and failed to show good cause (ROA.276-278). In fact, Opposing appellate counsel (government) submitted their own motion objecting to this submission (ROA.342-344):

The government's opposing motion to appellate defense counsel's submission of Petitioner's IAC claims state that:

"The Air Force Court of Criminal Appeals issued their final and pertinent decision in Appellant's case on 14 August 2014, and the reconsideration period before the lower court lasted 30 days past that date. So, Appellant had more

than ample opportunity to submit his documents to the Air Force Court, if he deemed them actually relevant and necessary to his appeal, at a time when the lower court still had **JURISDICTION to review his case** and his new allegations." (ROA.342).

"However, Appellant chose to wait to offer his new declarations to a Court that **LACKS AUTHORITY** to receive it." (ROA.343)

and,

"As part of this Court's 7 July 2014 order in this case, this Court articulated that "appellant's motion does not explain why this latest matter could not have been raised earlier during the lengthy appellate processing of this case." As part of his Motion for reconsideration, Appellant still refuses to answer this basic question..."(ROA.344).

Therefore, in accordance with AFCCA rules 19(b) and 19(d) (Crim. App. R. 150.24, .25, and .19(d) the rules are jurisdictional in order for the court to accept and review Petitioner's trial-IAC claims. These rules are jurisdictional. See United States v. Rodriguez, 67 MJ 110 at 112, 2009 CAAF LEXIS 2. Just as Congress authorized CAAF to prescribe its own rules under Article 144, 10 USC §944, in the same fashion Congress gave the Judge advocate general authority to prescribe rules for the Courts of Criminal Appeals pursuant to Article 66(f), 10 USC §866(f)(1994), 32 CFR 150.

Therefore, failure to provide effective appellate counsel caused petitioner's Trial IAC claim to be denied acceptance and review on direct appeal. Appellate counsel should have known that he must show good cause in order to have Petitioner's claims to be accepted for review in the military appellate courts. Appellate counsel failed to present good cause when he submited the request on 24 June 2014. He also failed to show good cause in his reconsideration request. Appellate counsel continued to be deficient by failing to attempt other avenues still available to correct his mistake such as a writ of habeas corpus (a writ of habeas corpus is not accepted in the military courts after finality of appeals). "...[N]either the UCMJ nor the Manual for Courts Martial provide for collateral review within the military courts. See United States v. Murphy, 50 MJ 4, 5 (CAAF 1998)." See Witham v. United States, 355 F. 3d. 501, 2004 U.S. App. LEXIS 427 at LEXIS *10 (U.S. Ct. App. 6thLCir.).

Therefore, it is undisputed that Petitioner submit ed his trial IAC claims on direct appeal at a time when the military appellate court could have accepted his claims, however, it was appellate counsel who failed to demonstrate cause in its motion for the military court to have jurisdiction to accept and review the

claim. Seeking relief or redress to the military courts by any avenue available prior-to the finality of appeals is still related-to appellate counsel's deficient performance.

4b. At a bare minimum, in light of Johnson v. Zerbst and Massaro v. United States, the military court failed to accept petitioner's IAC claim.

An IAC claim raises the jurisdictional question whether answered in Johnson v. Zerbst : the court's jurisdiction at the beginning of trial may be lost in the course of the proceedings due to a failure to complete the court via the unavailability of counsel. Thus, if counsel is ineffective, petitioner was deprived the constitutional guarantee of providing counsel for an accused. Second, because the military court nor the UCMJ provide for collateral attack, this is the only option petitioner has to address his claims.

"If these contentions be true in fact, it necessarily follows that no legal remedy is available to grant relief for a violation of constitutional rights, unless courts protect petitioner's rights by habeas corpus." See Johnson v. Zerbst at 467.

Appellate IAC caused an improper and incomplete appellate review. An accused has a fundamental right to appellate review. This right is violated.

"A first appeal as of right therefore is not adjudicated in accord with du eprocess of law if the appellant does not have the effective assistance of an attorney. This result is hardly novel." See Evitts v. Lucey at 396.

4c. THE MILITARY COURT MANIFESTLY REFUSED TO CONSIDER PETITIONER'S CLAIMS

Because petitioner's claims were manifestly refused (even though denied for failure to show good cause), in light of Burns v. Wilson, at 142-143, this court and the District Court was empowered to review them de novo. Calley v. Callaway also states that where it is asserted that "...the court-martial acted without jurisdiction, or that substantial Constitutional rights have been violated...Consideration of such issues will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law..." See Calley v. Ca&llaway at LEXIS *46 (emphasis added).

Effective assistance of counsel is a basic consitutional right. Therefore, in light of Burns v. Wilson and Calley v. Callaway, this court is not precluded judicial review and is empowered to review them de novo. Especially because the military courts do not provide fo collateral review and because the All-Writs Act does not allow the military courts to act in the face of another, specific statute.

Also, in this case the military court manifestly refused to consider petitioner's claims on direct appeal due to appellate counsel deficiency. As confirmed by Respondent there were numerous avenues available to have Petitioner's claims reviewed. Appellate counsel failed to do so. Petitioner submits with this motion a copy of the letter and envelope sent to his Appellate attorney requesting that he seek all avenues possible in pursuit of Petitioner's case along with an affidavit supporting that these are true and correct documents received from his appellate record.

"An attorney's errors during appeal on direct review may provide cause to excuse a procedural default for if the attorney appointed by the state is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain adjudication on the merits of his claims." See Martinez v. Ryan at 278.

"[N]evertheless, when a state provides a right to appeal, it must meet the requirements of due process and equal protection." See Rheuark v. Shaw, 628 F, 2d 297, 302 (5th Cir. 1980)(citing Supreme Court decisions Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 811 (1963) and Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) in support of this proposition.).

"...[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." See Evitts v. Lucey at 469 U.S. 396.

"If a State has created appellate courts as "an integral part of the...system for finally adjudicating the guilt or innocence of a defendant," Griffin v. Illinois, 351 U.S. at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. id. (quoting Evitts, 469 U.S. at 393). The court noted that the Supreme Court had held that, to ensure a defendant's right to meaningful appeal, the state must afford counsel to an indigent defendant, **the counsel must be effective**, and an indigent defendant must be provided with a free transcript of the trial proceedings. id. (citing Evitts, 469 U.S. at 396, Douglas, 372 U.S. at 358, and Griffin, 351 U.S. at 19-20). The court concluded that "an appeal that is inordinately delayed is as much of a 'meaningless ritual' as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." id. (internal citations ommitted)." See Reed v. Quarterman, 504 F. 3d 465 at 486, U.S. Ct. App. 5th Cir., 9 Oct. 2007. (emphasis added).

Not only was the appeal adjudicated without the benefit of effective counsel, Petitioner was precluded adequate review of his record of trial by the loss of his record of trial at the hands of military prison officials. Inadequate counsel and inadequate acess to his trial and appellate documents causes this "meaningless ritual." Even though this court may have been "unpersuaded," the fact remains that Respondent did not controvert or dispute nor did he provide evidence to controvert causing this court to consider petitioners facts as true.

5. THE PRIOR RULES AND DECISIONS IN BURNS AND CALLEY V. CALLAWAY HAVE BEEN ALTERED BY NEWER SUPREME COURT DECISIONS

Burns v. Wilson was decided in 1953. Calley v. Callaway was decided in 1975. After these cases were decided, Evitts v. Lucey was decided among other cases cited within this request. These cases alter the prior decisions of Burns and Calley v. Callaway. Trial IAC claims are not procedurally defaulted; subject matter jurisdiction can be raised at any time and can never be waived; inefectiveness of trial and appellate counsel are basic constitutional rights and this court is under empowered and under an obligation to review such claims regardless of any procedural default argument Respondent raised.

Petitioner has provided two questions which Calley v. Callaway and Burns did not address. Specifically, whether an IAC claim can be raised at any time and whether appellate-IAC is sufficient to overcome procedural default. This court also failed to acknowledge that the military court manifestly refused to accept Petitioner's IAC claims empowering this court to conduct a de novo review. This court failed to follow this precedent in Burns.

Petitioner has shown from the record that appellate counsel failed to provide good cause, causing his claims to not be accepted in the military appellate courts. No full and fair review exists by a failure to review these claims and a failure to provide Petitioner effective appellate counsel as guaranteed under the Sixth Amendment. This court should not and cannot presume or be "unpersuaded" of the facts where Respondent completely failed to provide controverted evidence whatsoever.

6. THIS COURT FAILED TO CONDUCT THE STRICKLAND TEST IN REGARDS TO THE APPELLATE IAC CLAIM.

This court concluded to be unpersuaded by Petitioner's Appellate IAC claim

7. THIS COURT FAILED TO CONDUCT STRICTLAND TEST AS TO TRIAL IAC CLAIMS. THIS COURT FAILED TO ADDRESS THE UNDERLYING CLAIMS PETITIONER SUBMITTED.

To make clear, Petitioner addressed his Trial IAC claim in his original habeas petition. Petitioner in that brief in support of the Petition addressed the IAC claims submitted to his appellate attorney (ROA.281-282). Petitioner stated:

"Petitioner's grostefon brief complained of trial defense's ineffective assistance of counsel claim...Petitioner submits this Grostefon submission as an attachment for review and relief..." (ROA.30). Therefoer, Petitioner argued the inefectiveness of counsel in his habeas brief by pointing to the original-denied claims petitioner made at the military court.

This court failed to conduct the strickland test as to whether appellate counsel provided inefective assistance and whether Petitioner's underlying claims have merit.

This court only concerned itself with the procedural default argument regarding ineffectiveness of appellate counsel; the purported loss of the trial record; actual innocence; and the forfeiture component of the sentence. However, as mentioned previously above, all of petitioner's uncontroverted facts must be construed as true, especially in this case where Petitioner presented evidence and Respondent provided none. Therefore this Court is incorrect in its final decision for a failure to conduct the strickland test and failure to construe all of petitioner's facts as true.

Although this court refused to consider petitioner's "plethora of new claims," this court still failed to consider the original issues submitted to include unwaivable issues that can be raised at any time. This goes against Supreme Court and circuit court precedent.

8. THIS COURT FAILED TO CONSTRUE PETITIONER'S CLAIMS TO RAISE ANY AND ALL ARGUMENTS AVAILABLE

When Petitioner addressed his claim that appellate counsel failed to submit his claims timely to the military courts regarding his IAC claims (ROA.281-282), this court did not question why would appellate counsel fail to take any step to investigate the trial-IAC claim. This is also deficient performance during direct appeals. Appellate counsel also failed to advise Petitioner as to the procedure and time limits involved as to his appellate rights. This is also deficient performance. Surely this error comes from a failure to conduct the Strickland test.

See Evitts v. Lucey, at 396 (Constitution guarantees a defendant an effective appellate counsel, just as it guarantees a defendant an effective trial counsel).

By a failure to conduct the Strickland test this court failed to adequately determine whether petitioner's attorney on direct appeal was ineffective or whether Petitioner's claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice.

9. SUMMARY OF ARGUMENT

In sum, Petitioner's conviction was conducted by a military court-martial. This circuit, in determining whether to grant habeas corpus review and relief utilizes Calley v. Callaway, which follows Supreme Court case law of Burns v. Wilson. However, this case law is altered by way of Massaro v. United States, Martinez v. Ryan, Evitts v. Lucey, and Johnson v. Zerbst to name a few. Petitioner met the requirements when he showed cause and prejudice, that the military courts manifestly refused to consider his claims, and did not conduct a full and fair review, that the appellate review was legally inadequeate, and that he was deprived substantial and fundamental constitutional rights and that there is a miscarriage of justice. This court failed to assert as true the facts presented by Petitioner and did not follow Supreme Court and its own Circuit case-law. Because there are newer Supreme Court cases which alter the 1953 Burns decision and the 1975 Calley v. Callaway decisions, and because the facts are uncontroverted, this court should reconsider whether its decision still stands. Failure to reconsider and apply Supreme Court precedent would affirm a decision contrary to the Supreme Court decisions. It would be anarchy. See Hutto v. Davis, 454 U.S. 370 at 375, 70 LED 2D 556 (1982).

The military appellate court and this court also erred by disregarding Massaro v. United States and Johnson v. Zerbst. A claim of IAC may be raised at any time because compliance with this Constitutional mandate is an essential JURISDICTIONAL prerequisite to a Federal Court's authority to deprive an accused of his life or liberty. Further, IAC is excepted from a procedural bar because requiring a criminal defendant to bring claims of ineffective assistance of counsel cannot be properly resolved on appeal because there has been no opportunity to develop the record of the merits of these allegations. See United States v. Alanis at 19 (Addressing Massaro v. United States).

Petitioner has asserted substantial constitutional right violations. As such, they are not precluded from being reviewed by this court. In fact and law, they may be raised on collateral review in a civil court because tje military lack the authority to review habeas corpus writs.

Petitioner provided evidence of 'actual innocence' which went undisputed by respondent (Petitioner was not within the continental United States at the time

of the offenses). This sufficient showing also exempts his claims from being procedurally defaulted. See Finley v. Johnson, 243 F. 3d 215 (5th Cir. 2001). Therefore, this court erred by failing to construe Petitioner's facts as true and failing to follow Supreme Court and Circuit court precedent.

Further, even if habeas corpus review of convictions by court-martial is limited to questions of jurisdiction, an IAC claim raised by a military convicted may be raised at any time because it relates to jurisdiction. Failure to provide effective counsel causes a "failure to complete the court" in violation of the Sixth Amendment. "If this requirement is not complied with, the court no longer has jurisdiction to proceed." See Johnson v. Zerbst at 467 (emphasis added).

Trial and appellate counsel also failed to advise Petitioner of the procedure and time limits involved. This is also uncontroverted.

Additionally, the original appellate decision was illegal due to the appontment of Judge Soybel. The second review "reconsideration" was also conducted illegally because there was no remand from CAAF to do so. This is especially egregious because it essentially means that Petitioner has not received a legal appellate review:

"The appellant sought to raise an additional issue after the remand. However, we can only take action that conforms to the limitations and conditions prescribed by the remand from our superior court. United States v. Riley, 55 MJ 185, 188 (CAAF 2001)." See United States v. LaBella, 2014 CCA LEXIS 385, footnote 3 (emphasis added).

Petitioner still asks this court, where is the remand from CAAF to AFCCA to conduct the second "reconsideration" review? There is none. Once Petitioner requested the grant of review, there has been no legal appellate review in violations of Articles 66 and 70, UCMJ. This is also due to appellate counsel deficiency which gives this court the empowerment and obligation to review Petitioner's case in its fullest and grant the habeas writ.

"Counsel is constitutionally required to fully inform a defendant as to appellate right." Id. (citations omitted). This duty encompassess more than mere notice that an appeal is available or advise that an appeal may be futile. See id. (citations omitted). The United States Constitution demands "that the client be advised not only of his right to appeal, but also of the procedure and time limits involved and of his right to appointed counsel on appeal," Id. (citations omitted). (emphasis added). See United States v. Ferguson, 2008 U.S. Dist. LEXIS 52576 at LEXIS *4.

Petitioner (and Respondent) provided Petitioner's affidavits regarding the ineffectiness of counsel (ROA.281-282, 284, 375). By Respondent doing so, he also admits them as true. In accordance with circuit caselaw mentioned above this court erred by not construing these facts as true. They are part of petitoner's claims as addressed in petitioner's brief in support of the petition (ROA.30). Petitioner also signed all his motions and briefs stating they are true under penalty of perjury.

This court also failed to acknowledge Petitioner's affirmative defense argument which caused the jury to doubt petitioner's affirmative defense rather than ensuring that the jury is on notice that it is the government's burden to disprove the existence of the affirmative defense.

This court also erred in acknowledging that the record of trial show that the trial defense attorney had witnesses that could raise doubt about the timeframe of events by at least 4 years difference (ROA.374). This also shows trial counsel ineffectiveness and or a sufficient showing of facts which if accepted by a jury could have resulted in an acquittal that equates to 'actual innocence' (coupled with ROA.222 that depict petitioner was not in the continental United States)(see also that the agents the interrogated petitioner admitted that it was very possible that petitioner was more likely than the average person to be in a fragile state of mind that could acquiesce even though he did not commit any action (ROA.173-174,line 20), was susceptble to acquiesce to things he did not do is a sufficient showing to exempt petitioner from being procedurally defaulted.

This court also failed to seek all possible arguments on Petitioner's behalf. Petitioner marked for review footnote 30 (ROA.390). This instruction is given based on the 2012 MCM as shown. However, it is an ex post facto violation to alter the legal rules of evidence to the accused's disadvantage. This footnote contradicts the rules and instructions in 2004.

Petitioner also argued the fact that Petitioner could not be guilty of Charge 1 and Additional charge 1 because the statute does not allow it. See United States v. Morris, 40 MJ 792, 1994 CMR LEXIS 267. (See petitioner's 28 July 2019 brief (remailed 21 February 2021), addressed in Petitioner's appellate brief dated 5 August 2019. This could also be used to excuse the procedural bar. Any charge that should be dismissed is prejudicial as it still leaves stigma and if it would have been dismissed at trial, the jury could have imposed a lesser sentence. This charge left the impression to the jury that petitioner knew or had knowledge of facts sufficient to convict of charge 1 and additional charge

1. However, it was never proved that petitioner had knowledge (ROA.175, line 18-19).

Also, although this court is not "persuaded" as to Petitioner's argument as to the forfeiture component of his sentence, Petitioner provided caselaw which show that the military convening authority and the military AFCCA court had a plenary-unfettered power to approve so much of the sentence as they believe is sufficient to do justice. This plenary power gave them the power to approve any such sentence even below any mandatory sentence such as in Murder offenses that carry a mandatory minimum sentence of life. Petitioner provided two cases related to Petitioner's argument: United States v. Emerick (ROA.345)(his adjudged sentence was composed similarly to petitioner: Punitive discharge, confinement over 6 months (15 months), and forfeiture of $500 per month for 15 months. The convening authority did not approve the adjudged forfeiture. (see ROA.347). Because Emerick was improperly precluded from receiving this pay (likely due to Article 58b), however, the unapproved forfeitures which Respondent calls "mandatory" are called avoided forfeitures via the convening authority's action that did not include forfeitures. Against Article 58b, Emerick received 15 months of forfeitures converted into confinement credit. This was not an act of clemency (ROA.350).

As to Petitioner's forfeiture component argument, Petitioner also pointed with a "Notice of Judicial Authority" to United States v. Kelly (ROA.417) which addressed that his mandatory punishment of a dishonorable discharge could be disapproved by the convening authority or the court of criminal appeals. It states:

"Uniform Code Mil. Justice (UCMJ) art. 56, 10 USCS §56(b) and Unf. Code Ml. Justce art. 66(c) 10 USCS § 66(c) initially appear to be in tension. However, the two provisions may be harmonized by construing art. 56(b) UCMJ as a limiton the court-martal not on any of the reviewing authorities... Congress has vested the Courts of Criminal Appeals with the oft-cited awesome plenary, de novo power of review that effectively gives them carte blanche to do justice. The Courts of Criminal Appeals and their predecessors have enjoyed this discretion over sentence appropriateness since the inception of the Uniform Code of Military Justice. This power has no direct parallel in the federal civilian sector, and no other federal appellate court, including ours, in the American justice system possesses the same power; refer to Unif. Code Mil. Justice art. 67(c), UCMJ, 10 USCS §867(c)." See United States v. Kelly at 408.

Therefore, if this court should conclude that the military appellate decision in fact was legal, then it must also honor that the "automatic forfeitures" are disapproved by way of the convening authority action, and the military appeal decision where the sentence adjudged at trial is disapproved nullifying the effect of article 58b.

At a bare minimum, this court erred by failing to fully address Petitioner's brief in support of the petition (ROA.6-31) along with Petitioner's appellate arguments in the original appellate brief dated 5 August 2019, that referred to his 28 July 2019 submission (that was remailed 21 February 2020) along with the lack of subject matter jurisdiction claim (see reply to Respondent's Motion for Summary Affirmance dated 6 October 2019)(and the subsequent clarification via Petitioner's Submission of Request to Review Military Appeal Review's Subject Matter Jurisdiction dated 23 October 2019), and his speedy trial violation argument that barred prosecution (See Motion Requesting Respondent Address the Speedy Trial Violation dated 21 February 2020). This court failed to construe as true Petitioner's affidavits which were also submitted by Respondent as mentioned above and failed to conduct the Strickland test for the Appellate IAC and consider whether petitioner's underlying claims (addressed via his original brief in support of the petition that included referring to his affidavits) to determine if they are substantial. This Court failed to follow Supreme Court and Circuit Court precedent. This court must follow circuit precedent and can only deviate from it En Banc.

RELIEF REQUESTED

Because the facts surrounding trial counsel's deficient performance and appellate counsel's deficiencies went undisputed and uncontroverted with evidence, to include the military appellate court's lack of subject matter jurisdiction, 'actual innocence' claim, lack of evidence to support elements of the crime, affirmative defense shifted burden of proof by raising doubt of petitioner's defense against statute, speedy trial violation, and subject matter jurisdiction, to include other claims in original brief submitted (which included adressing his 28 July 2019 brief), Petitioner's assertions must be accepted as true and the case remanded with instructions to GRANT Petitioner's habeas writ. Petitioner does not request a retrial.

"The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished

under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice." Ex Parte Milligan, 18 LED 281, 4 Wall 2 at 132, U.S. S. Ct. 3 April, 1866.

"The district court must accept the facts alleged in the complaint as true, to the extent they are uncontroverted by the defendant's affidavits." See Madara v. Hall, 916 F. 2d 1510, 1514 (11th Cir. 1990).

CERTIFICATE OF MAILING

I hereby declare under penalty of perjury that I mailed this motion to the clerk of the court on this 16th of April, 2021 by dropping in the inmate dropbox first class mail postage prepaid. I declare that the statements in the above motion are true to the best of my knowledge. Signed under penalty of perjury. 28 USC §1746. I received this court's decision on 14 April 2021.

Rafael Verdejo Ruiz #17670-035

APPENDIX P

No. 19-40277

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAFAEL VERDEJO RUIZ,
Petitioner

v.

DEREK EDGE, Warden, Federal Correctional Institution, Texarkana,
Respondent.

PETITIONER'S MOTION REQUESTING REVIEW OF MILITARY APPEAL REVIEW'S SUBJECT MATTER JURISDICTION

Petitioner respectfully requests this Honorable Court consider and review whether the military appellate court had subject matter jurisdiction. As acknowledged by Fifth Circuit precedent and Supreme Court precedent, subject matter jurisdiction can never be waived and subject matter jurisdiction may be raised at any time by a party or by the court sua sponte.

Petitioner has addressed from the initiation of his Habeas Corpus writ that he has not received full and fair appellate review. Respondent has recently addressed the military court's jurisdiction, which, for clarity's sake, petitioner requests review.

I.

In petitioner's habeas writ, petitioner addressed that he did not receive full and fair appellate review (ROA.320-324, 328-329, 412, 474). Respondent argued that petitioner received full and fair review (ROA.398).

Similarly, respondent stated that the military court summarily disposed of the issues. Respondent addressed that the military court's jurisdiction ceased (Respondent Motion for Summary Affirmance, etc. dated 1 October, 2019) to which petitioner has timely objected (Respondent brief received 4 October, filed 10 October, 2019).

In petitioner's appeal brief, filed 9 August, 2019, petitioner addressed the military court's lack of subject matter jurisdiction. Similarly, respondent in his request for summary affirmance addressed that the military court's jurisdiction ceased. In petitioner's opposition brief, filed 10 October, 2019, petitioner has addressed and clarified with evidence from the record that petitioner's 2013 appeal was illegal, void ab initio, and that the 2014 reconsideration, like the 2013 decision, lacked subject matter jurisdiction.

Respondent has outlined the history of the case (ROA.253-256). However, this outline misconstrues who in truth requested reconsideration and when did it occur. Petitioner presented undisputed evidence that the government had requested, not petitioner, to treat petitioner's motion to vacate (ROA.146) into reconsideration (ROA.393) in order to return the case to AFCCA (ROA.393). The government's request ocurred well after petitioner's request for grant of review (ROA.136).

Because no vacate and remand was ever ordered by the CAAF to the AFCCA to conduct the reconsideration after the illegal 2013 decision, and after petitioner's request for grant of review, the 2014 decision lacked subject matter jurisdiction just like the 2013 decision.

II.
TIMELINES AND EVIDENCE IN SUPPORT OF THE PETITION

ROA.355 - On May 2013m, Air Force Court released document indicating Mr. Soybel appointed in violation of Appointments Clause.

ROA.391 - On 18 July 2013, Special panel assigned with Mr. Soybel.

ROA.263 - On 18 July 2013, AFCCA affirms case with Mr. Soybel in panel.

ROA.393 - On 23 August 2013, petitioner counsel file motion to vacate AFCCA ruling to CAAF due to wrongful appointment of Mr. Soybel.

ROA.136 - On 6 September 2013, petitioner files petition for grant of review to the CAAF. (AFFCA loses jurisdiction)

ROA.393 - On 28 October 2013, the government requests to CAAF that petitioner's motion to vacate be treated as reconsideration.

ROA.144 - On 12 November 2013, CAAF grants the government's motion to treat petitioner's motion to vacate (see text of ROA.393) as reconsideration.

III.
CASELAW IN SUPPORT OF THE PETITION

The military courts in United States v. Rodriguez, 67 MJ 110 (CAAF 2009) acknowledge Supreme Court precedent in Bowles v. Russell, 551 US 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007) by stating:

> "As...long held, when an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." Bowles at 104 (emphasis added).

United States v. Riley, 58 MJ 305 (CAAF 2003) makes clear that a petition for grant of review to the CAAF removes jurisdiction from the AFCCA, gives jurisdiction to the CAAF, and jurisdiction can only be returned by a remand. It states:

> "The timely filing of a petition for review vests jurisdiction in this court and divests the Court of Criminal Appeals of jurisdiction to reconsider its decision. United States v. Jackson, 2 CMA 179, 181, 7CMR 55, 57 (1953). This court may, however, return jurisdiction to the lower court by a remand. id. at 182, 7 CMR at 58..." (emphasis added).

Riley is also quoted in United States v. Humphries, 2011 CCA LEXIS 312 (AFCCA 2011) as follows:

> "...On remand from CAAF, this court can only take action that conforms to the limitations and conditions prescribed by the remand."

The Fifth Circuit has also made clear that subject matter jurisdiction can never be waived and subject matter jurisdiction may be raised at any time.

The Fifth Circuit also stated in Huddleston v. Nelson Bunker Hunt Trust Estate, 109 B.R. 197, 1989 US Dist. LEXIS 15760 at LEXIS 7-8:

> "It is axiomatic that an alleged lack of subject matter jurisdiction may be raised at any time by a party or by the court sua sponte. In re Ryther, 799 F. 2d 1412, 1414 (9th cir. 1986); In re Crystal Sands Properties, 84 Bankr. 665, 666-667 (9th cir. BAP 1988). An appellate court is under a duty, moreover, to ensure that the lower court has not exceeded its jurisdiction. Sumner v. Mata, 449 US 539, 547 n.2, 66 L. Ed. 2d 722, 101 S. Ct. 764 (1981)(citing Louisville & Nashville R.R. Co. v. Motley, 211 US 149, 152, 53 L.Ed. 126, 29 S. Ct. 42 (1908)); see United States v. Alabama, 791 F. 2d 1450, 1454 (11th Cir. 1986), cert. denied, 479 US 1085, 94 L. Ed. 2d 144, 107 S. Ct. 1287 (1987)(circuit court authorized to examine jurisdiction sua sponte even though district court did not consider it). Absence of subject matter jurisdiction may render a judgment void where a court exceeds its jurisdiction beyond the scope of its authority. Jones v. Giles, 741 F. 2d 245, 248 (9th Cir. 1984); see Alabama Hosp. Ass'n v. [redacted] United States, 228 Ct. Cl. 176, 656 F. 2d 606, 610 (1981), cert. denied, 456 US 943, 72 L. Ed. 465, 102 S. Ct. 2006 (1982)(decision by court lacking subject matter jurisdiction is void ab initio); Crystal Sands, 84 Bankr. at 667 (judgment entered without jurisdiction is void)."

The Fifth Circuit also stated in Jones v. Valvoline Co., 1999 US Dist. LEXIS 7830 at LEXIS 4:

> "Subject-matter jurisdiction can never be waived. The court has the authority, and even more the obligation, to inquire into the lack of subject-matter jurisdiction sua sponte. Jurisdiction must be established as a thresahold matter. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 US 274, 278, 97 S. Ct. 568, 571, 50 L. Ed. 2d 471 (1977) (citations omitted)."

The military courts also made clear of their lack of subject matter jurisdiction in Labella v. United States, 2016 CCA LEXIS 394 (2016) which states:

> "The CAAF dismissed the petition after concluding we lacked jurisdiction to grant the petition to file an out of time request for reconsideration and that, consequently, our superior court also lacked jurisdiction. United States v. Labella, 75 MJ 52 (CAAF 2015)." (emphasis added)

IV.
RELIEF REQUESTED

Petitioner respectfully requests the writ be granted in petitioner's favor. Immediate release from confinement. To order, utilizing any motion necessary, that petitioner's discharge be revoked/voided (ROA.309) due to the appeal not prosecuted in the manner directed. Petitioner had a statutory right to speedy appellate review.

Retitioner respectfully requests that the reversal of Judgment order or whichever order this honorable court executes, to state that:

> "Petitioner is restored all rights and priviledges previously taken from him to include those taken via GCMO #13 and GCMO #68, confinement credit in the form of 105 months of E-8 pay and allowances due to him to include family separation pay, hazardous duty pay, and BAH at rate "with dependents", to issue any and all backpay due to him, restore him to former E-6 rank effective 25 February 2011 and increase his rank in 2-year increments (2013, 2015, 2017) up to E-9. All confinement credit and backpay due to him within 30 days. To count all confined time as active duty for any and all purposes to include retirement."

(This will ensure petiotioner is truly restored and prevent the coorections made in other cases such as United States v. Landon, 2006 CCA LEXIS 21 and United States v. Hammond, 61 MJ 676, 680 where administrative and legal conflicts occured. GCMO#13 and GCMO #68 mentioned above are ROA.258-261 and ROA.309).

Alternatively, petitioner requests reversal of the judgment in the 2013 and 2014 decisions and a new and <u>full</u> Article 66 review in which petitioner can raise any and all issues he wishes to present anew. To order and appellate decision be made within 90 days or

immediate release from confinement with all charges dismissed. Petitioner doers not waive appellate representation and requests appointment of military counsel within 14 days, however, petitioner will submit his grostefon issues directly to the military court instead of via counsel this time upon receipt of the AFCCA address from this court (LEXIS only has CAAF address).

Alternatively to the requests above, petitioner respectfully requests whatever relief this Honorable Court can provide except a retrial. Petitioner still requests immediate release pending resolution of this writ, or immediate release pending resolution of a military appeal if deemed necesary.

CERTIFICATE OF COMPLIANCE

tHIS motion complies with the type-volume limitation of Fed. R. App. P. 32. It contains 6 pages including the cover page. This motion was made using a typewritter.

Rafael Verdejo Ruiz, #17670-035

CERTIFICATE OF SERVICE

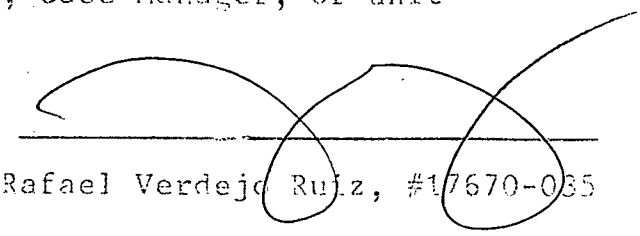
I certify that he has mailed a true and correct copy of the above said claims first-class mail postage prepaid to the Court of Appeals for the Fifth Circuit by dropping in the inmate dropbox. 28 USC §1746. Signed and mailed this 23rd day of October 2019.

Rafael Verdejo Ruiz, #17670-035

CERTIFICATE OF CONFERENCE

I have not been able to discuss this motion with Respondent because I am incarcerated. However, for this purpose or any future purpose, respondent is informed that he can schedule a telephone or video con-

ference byu calling the institution where petitioner is confined and coordinating with petitioner's counselor, case manager, or unit manager similarly as an attorney call.



Rafael Verdejo Ruiz, #17670-035

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RAFAEL VERDEJO RUIZ,	§	
Petitioner	§	
v.	§	**Case No. 19-40277**
DEREK EDGE, WARDEN,	§	
Respondent.	§	

MOTION REQUESTING RESPONDENT ADDRESS THE SPEEDY TRIAL VIOLATION

There is a material variance between the indicted timeframe that was different to the jury's findings. This variance was due to trial judge's instructions. However, the government cannot deny either that no evidence was presented depicting that petitioner was in fact withing the continental united states. Instead the evidence presented by the government during sentencing depicts that petitioner was stationed in HAwaii and abroad since June 2004. ROA 222, 216-221.

Petitioner was never required to plead anew to the charges. "When a specification is amended after the accused has entered a plea to it, the accused should be asked to plead anew to the amended specification." See RCM 906, discussion, RCM 906(b)(4).

In fact, on 12 October 2010, charger I, II, and III were preferred (ROA 157). However, petitioner was not arraigned until 22 February 2011. **132 days.** This was a speedy trial violation. See United States v. Wilder, 75 MJ 135 at 138 (Oct 6, 2015) which states:

"If an appellant id arraigned within 120 days after the earlier of, inter alia, the preferral of, or restraint based upon, a particular charge, then RCM 707 is not violated. See e.g. Leahi, 73 MJ at 367" (emphasis added).

As to arraignment, the military courts have clarified when this occurs: "An accused is brought to trial at arraignment, when he is "called upon to plead." See Doty, 51 MJ at 465; RCM 707(b)(1).

"Because the Government violated appellant's rights by bringing him to trial more than 120 days after the original preferral of charges against him, appellant is entitled to a dismissal of charges. See RCM 707(d). Considering the age of this case, the proper remedy would be to dismiss the charges with prejudice. See United States v. Dooley, 61 MJ 258, 264 (CAAF 2005)."

For this reason, charges I, II, and III must be dismissed. "As the Government failed to comply with the appellant's right to a speedy trial, the

remedy os dismissal of the affected charge. RCM 707(d)" See United States v. Bray, 52 MJ 659 at 662. "When charges are separately preferred, separate speedy trial clocks are run on each charge." See United States v. Robinson, 28 MJ 481 at 482.

The government illegally utilized the addition of "additional charge I" to extend the 120-day clock which as shown above, causes two separate speedy trial clocks. Petitioner did not request extensions and did not agree to exclusion of time for speedy purposes.

"Sixth Amendment Speedy trial protections are triggered upon initiation of a court-martial by preferral of charges. United States v. Grom, 21 MJ 53 (CMA 1985). Rule fo COurt-Martial 707 provides a bright-line 120 day rule for speedy trial, triggered by either initiation of restraint or preferral of charges. RCM 707(a)...Violations of UCMJ art. 10 or the Sixth Amendment will preclude prosecution. RCM 707(d)(1)."

Dismissal of the charges is the only possible remedy for denying the defendant a speedy trial. See STRUNK v. United States, 412 US 434, 37 LED2D 56.

Trial and Appellate Delays.

As mentioned, the government failed to prefer and arraign petitioner within 120 days. Under this delay, Mrs. Delfina Rivero became unavailable fo trial due to leaving to Mexico to deal with a family emergency. Mrs. Delfina Rivero could directly contradict the government's witnesses which asserted in court that anything that Mrs. Delfina Rivero testified to would be true (See ROA 282)(See also closing arguments by trial defense counsel in record of trial).

In this same fashion, appellate delay has prejudiced petitioner. Mr. Ricardo Rivero is dead and Mrs. Delfina Rivero's last known whereabouts is in Mexico. Petitioner has no way of knowing her whereabout. Petitioner would require her testimony to present on appeal. Her presence and restimony is important as petitioner was misinformed that there was no choice but to submit a stipulation of fact or else have no witness or testimonies whatsoever (See ROA 282).

Also, petitioner no longer has possession of the car in question which petitioner wanted to present for analysis to acquit him as petitioner's brother had possession of this car after his parents). Further, appellate delay has caused anxiety where petitioner's claims warrant dismissal of charges with prejudice and at a minimum, require a substantial sentence reduction due to only Additional Charge I remaining to which no more than 5 years confinement should be approved for. Petitioner could have been eligible for parole at 3.3 years and released aproximately (without parole) on supervision at 6 years with a sentence

of 10 years. (Petitioner receives 10 days GCT credit per month and 5 days work abatement for every month worked. Petitioner has worked entire time he has been confined).

Charges I, II, and III should have been dismissed under Article 10 and the Sixth Amendment. Trial and Appellate defense counsel were also ineffective for failing to address this. (See petitioner's IAC claims and cause/prejudice arguments previously submitted).

RELIEF REQUESTED

Petitioner respecfully requests the writ be granted in petitioner's favor as outlined (see at 521) including a statement "to include 110 months confinement credit at pay grade of E-8 to include BAH at rate "with dependents" and Hazardous duty pay, along with backpay of pay and allowances and increases in rank in 2-year increments beginning with E-7 effective 25 February 2011 up to E-9 effective 25 February 2015." To revoke the dishonorable discharge being null and without effect and count all confined time as active duty for any and all purposes to include retirement. Immediate release from confinement and allowed to be stationed at Hurlburt Field, FL until eligible for retirement. Alternatively, petitioner requests whatever relief this Honorable court deems coorect except a retrial.

CERTIFICATE OF SERVICE

Petitioner affirms that the above and foregoing is true and that he has mailed a true and correct copy of this motion first-class mail postage prepaid to the Court of Appeals for the 5th Circuit. Signed under penalty of perjury. 28 USC 1746. This ___ day of February, 2020.

Rafael Verdejo Ruiz
#17670-035
Case No. 19-40277