APPX
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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

APPX
B

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

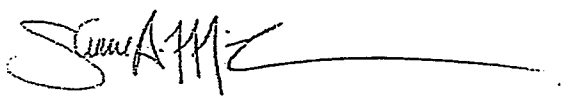
[2] Chapter 51 provides a plan for classification of positions where the basic pay rate is determined and so "individual positions will, in accordance with their duties, and qualification requirements, be so grouped and identified by classes and grades." *See* 5 U.S.C. § 5101, *et seq.*

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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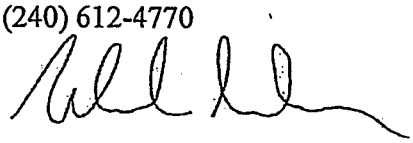

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[3] Instead, 5 U.S.C. § 5103 vests this power in the Office of Personnel Management (OPM), rather than in the Secretary of Defense. *See also* 5 U.S.C. § 5103 (granting OPM authority over Department of Defense positions); 5 U.S.C. § 5105(a) (OPM is 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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APPX C

6 September 2013

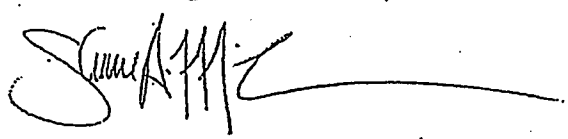
IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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,



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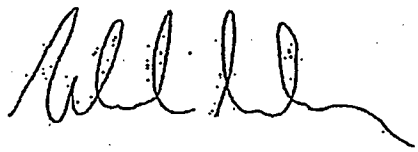

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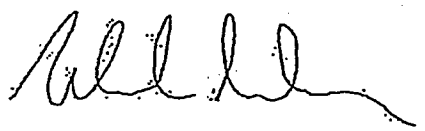
CERTIFICATE OF FILING AND SERVICE

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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APPX D

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.

APPX
E

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.

APPX F

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.

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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.

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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.

APPX W

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.

RAFAEL VERDEJO RUIZ VS. WARDEN, FCI TEXARKANA
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION
2019 U.S. Dist. LEXIS 35347
CIVIL ACTION NO. 5:18-CV-22
March 5, 2019, Decided
March 5, 2019, Filed

Editorial Information: Prior History

Ruiz v. Warden Edge, 2018 U.S. Dist. LEXIS 222281 (E.D. Tex., Dec. 13, 2018)

Counsel {2019 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: RODNEY GILSTRAP, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: RODNEY GILSTRAP

Opinion

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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

The Court referred this matter to the Honorable Caroline Craven, United States Magistrate Judge, at Texarkana, Texas, for consideration pursuant to applicable laws and orders of this Court. The magistrate judge found that the petitioner's grounds for review were unexhausted and procedurally barred from habeas review. Accordingly, the magistrate judge recommended dismissing the petition.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. The petitioner filed objections to the Report and Recommendation of United States Magistrate Judge.**{2019 U.S. Dist. LEXIS 2}**

The petitioner raised five grounds for review in this petition. First, the petitioner contends the trial judge failed to instruct the jurors that the government had the burden of disproving his affirmative defense beyond a reasonable doubt, which the petitioner alleges was contrary to military court decisions in *United States v. Cartwright*, 2013 CCA LEXIS 735, 2013 WL 4734520 (A.F.C.C.A. Aug. 15, 2013) (unpublished), and *United States v. Medina*, 68 M.J. 587 (N.M.Ct.Crim.App. 2009). The petitioner challenges the salary forfeiture portion of his sentence, asserting that he should receive his pay or his sentence should be reduced for each day of forfeited pay. Finally, the 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.

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

APPX X

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.

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.