

**United States Court of Appeals  
for the Armed Forces  
Washington, D.C.**

United States,  
Appellee

USCA Dkt. No. 26-0073/AF  
Crim.App. No. 39903

v.

**ORDER DENYING PETITION**

Jesus  
Martinez,  
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 25th day of March, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ David A. Anderson  
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force  
Appellate Defense Counsel (Johnson)  
Appellate Government Counsel (Payne)

**APPENDIX A**

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

---

**No. ACM 39903 (reh)(f rev)**

---

**UNITED STATES**

*Appellee*

**v.**

**Jesus MARTINEZ**

Airman First Class (E-3), U.S. Air Force, *Appellant*

---

Appeal from the United States Air Force Trial Judiciary  
*Upon Further Review*

Decided 31 October 2025

---

*Military Judge:* Matthew P. Stoffel.

*Sentence:* Sentence adjudged 22 November 2022 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 31 May 2023: Dishonorable discharge, confinement for 46 months, forfeiture of all pay and allowances, and reduction to E-1.

*For Appellant:* Captain Michael J. Bruzik, USAF.

*For Appellee:* Colonel Steven R. Kaufman, USAF; Colonel Matthew D. Talcott, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Major Vanessa Bairos, USAF; Major Jocelyn Q. Wright, USAF; Jack C. Korologos, Legal Intern;<sup>1</sup> Mary Ellen Payne, Esquire.

Before JOHNSON, KEARLEY, and MCCALL, *Appellate Military Judges*.

Chief Judge JOHNSON delivered the opinion of the court, in which Judge KEARLEY and Judge MCCALL joined.

---

---

<sup>1</sup> Mr. Korologos is a legal intern who was at all times supervised by an attorney admitted to practice before this court.

**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

---

JOHNSON, Chief Judge:

In August 2019, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault, in violation of Articles 120 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 880.<sup>2</sup> The court-martial sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

In his initial appeal to this court, Appellant raised 11 assignments of error. *United States v. Martinez*, No. ACM 39903, 2021 CCA LEXIS 250 (A.F. Ct. Crim. App. 21 May 2021) (unpub. op.) (*Martinez I*). In its initial opinion, this court found the convening authority failed to take action on Appellant's entire sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860. *Martinez I*, unpub. op. at \*2. As a result, this court remanded the record of trial to the Chief Trial Judge, Air Force Trial Judiciary, to resolve the ambiguous and incomplete convening authority action, and deferred consideration of the remaining issues. *Id.* at \*7–8. We deferred addressing the remainder of Appellant's assignments of error until the record was returned. *Id.* at \*2.

On remand, the convening authority approved the adjudged sentence and the case was re-docketed with this court. On further review, this court found prejudicial error in the military judge's findings instructions regarding attempted sexual assault. *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 324, at \*106–12 (A.F. Ct. Crim. App. 31 May 2022) (unpub. op.) (*Martinez II*). Consequently, this court set aside the findings of guilty as to that charge and specification and the sentence; dismissed that charge and specification; authorized a rehearing as to the dismissed charge and specification and the sentence; and affirmed the findings of guilty as to sexual assault. *Id.* at \*136.

On 22 November 2022, a rehearing was held as to the sentence only. For the previously affirmed sexual assault conviction, a general court-martial composed of a military judge alone sentenced Appellant to a dishonorable discharge, confinement for 46 months, forfeiture of all pay and allowances, and

---

<sup>2</sup> Unless otherwise indicated, all references to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

reduction to the grade of E-1. The military judge awarded Appellant 1,055 days of confinement credit for confinement served pursuant to the original sentence, 121 days of pretrial confinement credit, and 242 days of judicially ordered credit for illegal pretrial confinement. The military judge further ordered that 182 days of the confinement credit be applied against the adjudged total forfeiture of pay and allowances.

After the sentencing rehearing, Appellant raised three issues to this court: (1) whether Appellant is entitled to greater relief than that ordered by the military judge for illegal pretrial confinement; (2) whether the delay before Appellant's sentencing rehearing violated his speedy trial rights under Article 10, UCMJ, 10 U.S.C. § 810, and Rule for Courts-Martial (R.C.M.) 707; and (3) whether Appellant is entitled to relief for post-trial delay. However, this court remanded the record to the Chief Trial Judge, Air Force Trial Judiciary, for correction with respect to several missing appellate exhibits. *See United States v. Martinez*, No. ACM 39903 (reh), 2024 CCA LEXIS 551 (A.F. Ct. Crim. App. 16 Dec. 2024) (order). After correction, upon re-docketing, Appellant filed a brief with this court providing additional argument with respect to issue (3), but raised no additional issues.

We find no error materially prejudicial to Appellant's substantial rights with respect to issues (1) and (2), but we find relief for excessive post-trial delay appropriate, and take corrective action in our decretal paragraph.

## I. BACKGROUND

This court's 2022 opinion provides a concise summary of the evidence underlying Appellant's affirmed conviction for sexual assault. *Martinez II*, unpub. op. at \*4–5. For purposes of the current appeal, we begin the relevant background with the issuance of this court's opinion in *Martinez II* affirming the Article 120, UCMJ, conviction, and setting aside the findings of guilty as to Article 80, UCMJ, and the sentence, and authorizing a rehearing. Following the issuance of the opinion, Appellant continued to be held in confinement at the Naval Consolidated Brig at Marine Corps Air Station Miramar, California (Miramar).<sup>3</sup>

This court issued *Martinez II* on 31 May 2022. On 19 July 2022, the Air Force Military Justice Law and Policy Division (AF/JAJM) sent a copy of *Martinez II* and accompanying memorandum to the Office of the Staff Judge Advocate (SJA) of the general court-martial convening authority (GCMCA). The

---

<sup>3</sup> The following background is drawn primarily from the rehearing military judge's findings of fact which, to the extent we refer to them here, we find to be supported by the record and not clearly erroneous.

memorandum provided instructions regarding a potential rehearing. In part, the memorandum advised, “Pursuant to R.C.M. 707(b)(3)(D), a new 120-day time period begins on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.” The military judge for the rehearing subsequently determined the convening authority received the opinion on 20 July 2022.

On 28 July 2022, Appellant petitioned the United States Court of Appeals for the Armed Forces (CAAF) for review of *Martinez II*. On 16 August 2022, the CAAF denied the petition “without prejudice to Appellant’s right to raise the matters asserted during the normal course of appellate review,” explaining that “given the possibility of a rehearing, the petition is not ripe for review at this time.” *United States v. Martinez*, 83 M.J. 19 (C.A.A.F. 2022) (mem.).

On or about 9 September 2022, the Fairchild Air Force Base (AFB) Victim Witness Assistance Program (VWAP) coordinator began contacting counsel for ES, the named victim of the Article 80, UCMJ, attempted sexual assault charge, to inquire whether ES was willing to participate in a rehearing. ES’s counsel stated she would attempt to obtain a written decision from ES. The VWAP coordinator followed up repeatedly with ES’s counsel between 14 September 2022 and 3 October 2022. On 4 October 2022, ES’s counsel sent the VWAP coordinator an email from ES declining participation in a rehearing.

In the meantime, the VWAP coordinator began efforts to determine how KMT, the named victim of the affirmed Article 120, UCMJ, sexual assault charge, could request representation by a victims’ counsel (VC), if she desired. On 7 October 2022, the VWAP coordinator spoke with KMT by telephone. KMT indicated she would like to participate in re-sentencing Appellant and would like to be represented by a VC.

On 17 October 2022, the Fairchild AFB legal office delivered the referral package to the GCMCA’s SJA. On 19 October 2022, assistant trial counsel contacted Appellant’s appellate counsel to inquire about her availability for a rehearing. On 21 October 2022, Appellant’s trial defense counsel, Captain (Capt) SR, notified the Fairchild AFB legal office that she represented Appellant for his rehearing. During discussions with the legal office on 21 October 2022, Capt SR indicated the Defense would be ready for trial on 12 December 2022, expressed willingness to exclude time for speedy trial purposes until then, did not advise the legal office Appellant was still in confinement, and did not demand speedy trial.

On 24 October 2022, the Fairchild AFB legal office inquired of Capt SR where Appellant was located and whether he was still in confinement. On 1 November 2022, Capt SR responded that Appellant was still confined at

Miramar, should be released immediately, and demanded speedy trial. She also updated the Defense's availability for a rehearing to 30 November 2022.

On 2 November 2022, the GCMCA dismissed the Article 80, UCMJ, charge and specification and referred the case to a sentencing-only rehearing. The same day the base legal office contacted Miramar to inquire about Appellant's release.

The Defense made additional written demands for speedy trial on 4 and 8 November 2022. On 8 November 2022, trial defense counsel advised they were now available on 16 November 2022 for the rehearing. On 9 November 2022, trial defense counsel confirmed the Defense's agreement to the exclusion of 21 October 2022 to 16 November 2022, and again demanded speedy trial. On 13 November 2022, trial defense counsel updated their availability to 17 November 2022, and agreed to exclude 21 October 2022 to 17 November 2022 for speedy trial purposes.

Appellant was served with the referred charge sheet on 15 November 2022. Appellant's new additional trial defense counsel, Major (Maj) AA, subsequently asserted the Defense could no longer agree to the previously agreed-upon exclusion of time because Appellant had only been served with the referred charge sheet on 15 November 2022. Maj AA indicated the Defense would agree to exclude the period from 15 November 2022 until the Defense's case ready date.

Appellant was released from Miramar on 17 November 2022, and was present at his rehearing which began at Fairchild AFB on 21 November 2022. At no time following the issuance of *Martinez II* was Appellant ordered into *pre-trial* confinement, nor were any pretrial confinement procedures required by R.C.M. 305 implemented.

At the rehearing, the Defense filed a motion to "dismiss the charges and specifications [sic]" due to violation of Appellant's speedy trial rights under the Due Process Clause of the Fifth Amendment;<sup>4</sup> Article 10, UCMJ; and R.C.M. 707. In the alternative, the Defense requested the military judge impose a sentence of no punishment due to Appellant's "blatant illegal pretrial confinement" in violation of Article 13, UCMJ, 10 U.S.C. § 813, and R.C.M. 305. The Government opposed the motion to dismiss. The Government contended there was no speedy trial violation, and that the findings of guilty as to the remaining charge and specification had been affirmed by this court and the purpose of the rehearing was sentencing only. However, the Government acknowledged Appellant had been erroneously, though not maliciously, kept in a pretrial confinement status at Miramar without appropriate process. The Government

---

<sup>4</sup> U.S. CONST. amend. V.

contended the appropriate remedy was “day-for-day confinement credit under R.C.M. 305(k)” from 20 July 2022, when the GCMCA received the record of trial and opinion of this court, until 1 November 2022, when the Prosecution belatedly realized Appellant was still in confinement and “moved as quickly as possible to obtain [his] release.”

The military judge issued an oral ruling on the defense motion to dismiss, which he later supplemented in writing after the court-martial. The military judge found Appellant was not entitled to relief for violation of his speedy trial rights. With respect to the R.C.M. 707 requirement that Appellant be brought to trial within 120 days, the military judge found this period began to run on 20 July 2022 when the GCMCA received the record of trial and the opinion of this court authorizing a rehearing. The military judge further found the period between 15 November 2022 and 21 November 2022 was excludable delay. Therefore, the military judge found “it took the [G]overnment 119 days to bring [Appellant] to the first session of the rehearing,” and there was no R.C.M. 707 violation. With respect to the alleged Article 10, UCMJ, violation, the military judge applied the four-factor test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the Government met the “reasonable diligence standard.” See *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F. 2020). The military judge weighted most heavily his finding Appellant suffered no “actual prejudice” from the delay, and also considered that Appellant’s Article 120, UCMJ, conviction already had been affirmed on appeal, in concluding Appellant’s Article 10, UCMJ, and constitutional speedy trial rights were not violated.

With respect to unlawful pretrial confinement, the military judge found Appellant “spent 121 days in a pretrial confinement status in violation of R.C.M. 305’s requirements.” He awarded Appellant two days of confinement credit for each day of illegal pretrial confinement, or 242 days total. However, he found the Defense had not met its burden to demonstrate Appellant was entitled to additional sentence credit for illegal pretrial punishment in violation of Article 13, UCMJ.

The military judge imposed a dishonorable discharge, confinement for 46 months, reduction to the grade of E-1, and forfeiture of all pay and allowances. Appellant received 1,055 days of confinement credit based on confinement Appellant served pursuant to his original sentence; 121 days of pretrial confinement credit; and 242 days of judicially ordered credit for illegal pretrial confinement. Because the total credit exceeded Appellant’s term of confinement, the military judge directed “182 days of credit against the portion of the adjudged sentence to total forfeiture of all pay and allowances.”

## II. DISCUSSION

### A. Credit for Unlawful Pretrial Confinement

#### 1. Law

##### *a. Article 13, UCMJ*

Article 13, UCMJ, provides in part: “No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence . . . .” The CAAF has “interpreted Article 13[, UCMJ,] to prohibit two types of activities: (1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused’s presence at trial, i.e., illegal pretrial confinement.” *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) (citations omitted). The CAAF has explained:

[T]he question of whether particular conditions amount to punishment before trial is a matter of intent, which is determined by examining the purposes served by the restriction or condition, and whether such purposes are “reasonably related to a legitimate governmental objective.”

[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective.

*Howell v. United States*, 75 M.J. 386, 393 (C.A.A.F. 2016) (alterations in original) (quoting *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985)) (additional citation omitted); *see also United States v. Guardado*, 79 M.J. 301, 303 (C.A.A.F. 2020) (relying on *Howell*). “Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment.” *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) (citations omitted).

“The question whether appellant is entitled to credit for a violation of Article 13[, UCMJ,] is a mixed question of fact and law.” *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) (citations omitted). “The burden is on [an] appellant to establish entitlement to additional sentence credit because of a violation of Article 13[, UCMJ].” *Id.* (citing R.C.M. 905(c)(2)); *see also Guardado*, 79 M.J. at 303 (“Appellant bears the burden of proof to establish a violation of Article 13, UCMJ.” (citation omitted)). “We will not overturn a military judge’s findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. We will review de novo the ultimate question

whether an appellant is entitled to credit for a violation of Article 13[, UCMJ].” *Mosby*, 56 M.J. at 310 (citation omitted).

***b. Pretrial Confinement***

R.C.M. 305(b) authorizes the pretrial confinement of “[a]ny person who is subject to trial by court-martial if the requirements of this rule are met.” R.C.M. 305 subsections (d) through (j) set forth a number of procedural requirements for initiating and continuing pretrial confinement. In general, an accused is entitled to day-for-day confinement credit against his or her sentence for every day spent in pretrial confinement pursuant to R.C.M. 305. *See United States v. Allen*, 17 M.J. 126, 128–29 (C.M.A. 1984). R.C.M. 305(k) addresses remedies for noncompliance with particular procedural requirements of the rule, specifically:

an administrative credit against the sentence adjudged . . . .  
Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served.

We review a military judge’s decision whether to award credit under R.C.M. 305(k) for an abuse of discretion. *See United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007); *United States v. Rodriguez*, No. ACM 38519 (reh), 2019 CCA LEXIS 35, at \*15 (A.F. Ct. Crim. App. 30 Jan. 2019) (unpub. op.) (citing *Adcock*, 65 M.J. at 24).

Decisions of the Courts of Criminal Appeals (CCAs) are not “self-executing.” *United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997) (citations omitted). “The Judge Advocate General [TJAG] shall, unless there is to be further action by the President, the Secretary concerned, the [CAAF], or the [United States] Supreme Court, instruct the appropriate authority to take action in accordance with the decision of the [CCA].” 10 U.S.C. § 866(g). “If [TJAG] immediately decides not to pursue a case further, there must be immediate notice to the convening authority of the opinion of the [CCA] and immediate direction to release an accused or conduct a hearing under [R.C.M.] 305 . . . on pretrial confinement.” *Miller*, 47 M.J. at 361 (citation omitted). If TJAG does not make an immediate decision, there is a period during which the Government considers whether to seek reconsideration of the CCA opinion and TJAG considers whether to certify the case to the CAAF for review. *Id.* “During such period, an accused remains in confinement because the opinion below is inchoate.” *Id.* However, when a CCA has set aside the sentence and no further appellate

review is pending, once the record has been remanded to the convening authority the CCA's decision is no longer inchoate, and any further lawful confinement would be subject to R.C.M. 305. *See United States v. Mancini*, No. ACM 38783 (reh), 2018 CCA LEXIS 495, at \*15 (A.F. Ct. Crim. App. 16 Oct. 2018) (unpub. op.).

## **2. Analysis**

Appellant contends he is entitled to greater relief for illegal pretrial confinement than the 242 days of credit provided by the military judge. He makes two primary arguments. First, Appellant contends the military judge should have found his pretrial confinement began on 30 June 2022—30 days after this court issued its opinion in *Martinez II*—rather than 20 July 2022—when the convening authority received the record and decision of this court. Second, Appellant contends the military judge erred in finding Appellant was not illegally punished in violation of Article 13, UCMJ. We address each contention in turn.

### ***a. Pretrial Confinement Start Date***

Appellant cites *Miller*, which stated that if a CCA sets aside a sentence and TJAG does not immediately order the appellant's release, "there will be a 30-day period" during which the CCA opinion is inchoate while a possible motion for reconsideration or certification to the CAAF are pending. 47 M.J. at 361. In Appellant's case, these 30 days would have ended on 30 June 2022. However, as the Government observes, the CAAF's decision in *Miller* was based on the then-current version of the CAAF's rules, which required TJAG's certificate of review be filed not later than 30 days after the CCA decision. *Id.* Appellant concedes that prior to this court's decision in *Martinez II*, the CAAF's rules had since been changed to permit TJAG 60 days from the CCA's decision to certify a case for the CAAF's review. *See* C.A.A.F. R. 19(b)(3). Applying the reasoning of *Miller* to this change, this court's decision in *Martinez II* could have remained inchoate until 30 July 2022, when TJAG's opportunity to certify the case would expire. In the event, *Martinez II* ceased to be inchoate when the record was returned to the convening authority on 20 July 2022, the date the military judge correctly identified. Accordingly, we find no error in this respect.

### ***b. Article 13, UCMJ***

The military judge concluded the Defense "ha[d] not met its burden to persuade this court that any additional sentence credit is warranted for alleged violations of Article 13[, UCMJ]." *See Guardado*, 79 M.J. at 303. He explained "the evidence before the court d[id] not demonstrate" either that Appellant's "continued confinement from 20 July 2022 through 17 November 2022 was the result of an intent of detention officials or government representatives to punish [Appellant] prior to his rehearing," or that Appellant "was subject to unduly rigorous circumstances during this period of detention prior to the rehearing."

We conclude these factual determinations by the military judge are not clearly erroneous. The record supports a conclusion that Appellant’s continued confinement at Miramar, although not in compliance with R.C.M. 305, was attributable to inertia and lack of awareness of Appellant’s circumstances rather than an intent to subject Appellant to pretrial punishment. In addition, the record supports the military judge’s conclusion Appellant failed to prove he was subjected to unusually harsh conditions at Miramar.

Appellant contends the military judge applied the wrong standard to the question of illegal pretrial punishment. He cites *Howell* for the principle that “[i]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective.” 75 M.J. at 393 (citations omitted). Appellant reasons his continued confinement “under the auspices” of his original sentence, without following the procedures required by R.C.M. 305 for pretrial confinement, served no legitimate government purpose and violated Article 13, UCMJ. In response, the Government contends, *inter alia*, that although it was negligent in failing to either release Appellant or initiate a confinement hearing pending the court-martial rehearing, “there was no illegal intent,” and “[t]he military judge appropriately addressed the illegal confinement with two-for-one credit under R.C.M. 305.”

We are not persuaded by Appellant’s argument. The military judge found, and the parties agree, that Appellant’s continued confinement at Miramar was illegal in the sense that it was not conducted in accordance with R.C.M. 305. However, the fact that confinement was imposed erroneously does not mean the confinement itself was necessarily without a “legitimate nonpunitive governmental objective.” *Howell*, 75 M.J. at 393 (citations omitted). For comparison, in *Howell* itself, the CAAF found the Government misinterpreted Article 75(a), UCMJ, 10 U.S.C. § 875(a), when it paid the appellant at the E-1 rate rather than his original E-6 rate after the appellant’s sentence had been set aside, pending a rehearing. *Howell*, 75 M.J. at 391. However, the fact that the Government acted erroneously (in the CAAF’s view) did not mean the Government lacked a legitimate, nonpunitive governmental objective in attempting to pay the appellant at the correct rate, and the CAAF found no Article 13, UCMJ, violation. *Id.* at 394.

In the instant case, the Government had a legitimate, nonpunitive governmental objective in ensuring Appellant would be present for his rehearing. Appellant already had an affirmed conviction for a serious sexual offense. Until the convening authority dismissed the Article 80, UCMJ, attempted sexual assault charge on 2 November 2022, Appellant also faced possible re-prosecution for that offense. As discussed above, the military judge recognized the

Government failed to properly serve that legitimate objective by failing to comply with R.C.M. 305, and the military judge provided appropriate relief. We conclude the military judge did not abuse his discretion when he found Appellant was not entitled to Article 13, UCMJ, relief in the absence of either an intent to impose pretrial punishment on Appellant or unusually harsh conditions of confinement.

## **B. Speedy Trial**

### **1. Law**

#### ***a. R.C.M. 707***

In general, “[t]he accused shall be brought to trial within 120 days after the earlier of: [p]referral of charges; [t]he imposition of restraint . . .; or [e]ntry on active duty under R.C.M. 204.” R.C.M. 707(a). However,

[i]f a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required . . . at the time of the first session under R.C.M. 803.

R.C.M. 707(b)(3)(D) (emphasis added).

“All . . . pretrial delays approved by a military judge or the convening authority shall be . . . excluded” for purposes of “determining whether the [120-day] period . . . has run.” R.C.M. 707(c); *see also United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022) (quoting R.C.M. 707(c)). R.C.M. 707 does not prohibit after-the-fact approval of delays nor ex parte requests for excludable delay. *Guyton*, 82 M.J. at 151 (quoting *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997)); *United States v. Heppermann*, 82 M.J. 794, 803 (A.F. Ct. Crim. App. 2022).

We review alleged R.C.M. 707 violations de novo. *Guyton*, 82 M.J. at 151 (citations omitted); *Heppermann*, 82 M.J. at 803 (citation omitted). However, “[w]e give substantial deference to findings of fact made by the military judge and will not overturn such findings unless they are clearly erroneous.” *United States v. Fujiwara*, 64 M.J. 695, 697 (A.F. Ct. Crim. App. 2007) (citations omitted). We review a decision to approve a delay and exclude time from the 120-day period pursuant to R.C.M. 707(c) for an abuse of discretion. *See United States v. Lazauskas*, 62 M.J. 39, 41–42 (C.A.A.F. 2005). “Abuse of discretion occurs when the military judge: (1) bases a ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles in a clearly unreasonable way; or (4) does not consider

important facts.” *United States v. Ramirez*, 84 M.J. 173, 176 (C.A.A.F. 2024) (citing *United States v. Comisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be ‘arbitrary, fanciful, clearly unreasonable,’ or ‘clearly erroneous.’” *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

“A failure to comply with [R.C.M. 707] will result in dismissal of the affected charges, or, in the case of a sentence-only rehearing, sentence relief as appropriate.” R.C.M. 707(d)(2); *see also United States v. Becker*, 53 M.J. 229, 232 (C.A.A.F. 2000) (explaining that in the case of a sentence-only rehearing, dismissal of charges is not an appropriate remedy for an R.C.M. 707 violation).

***b. Article 10, UCMJ***

Article 10(b), UCMJ, provides in pertinent part: “When a person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken [ ] to inform the person of the specific offense of which the person is accused[ ] and [ ] to try the person or to dismiss the charges and release the person.” 10 U.S.C. § 810(b). “[T]he factors from *Barker v. Wingo*[, 407 U.S. 514 (1972),] are an apt structure for examining the facts and circumstances surrounding an alleged Article 10[, UCMJ,] violation.” *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (citations omitted). Accordingly, “our framework to determine whether the Government proceeded with reasonable diligence includes balancing the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant.” *Id.* at 129 (citing *Barker*, 407 U.S. at 530) (additional citation omitted). In this context, the “three recognized interests of prejudice are (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired.” *Cooley*, 75 M.J. at 262 (citing *Mizgala*, 61 M.J. at 129). However, these factors are not “talismanic” and “must be considered together with such other circumstances as may be relevant.” *United States v. Wilson*, 72 M.J. 347, 351 (C.A.A.F. 2013) (quoting *Barker*, 407 U.S. at 533).

“Article 10, UCMJ, does not demand constant motion but does impose on the Government the standard of ‘reasonable diligence in bringing the charges to trial.’” *Cooley*, 75 M.J. at 259 (quoting *Mizgala*, 61 M.J. at 127, 129). “Short periods of inactivity are not fatal to an otherwise active prosecution.” *Mizgala*, 61 M.J. at 127 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). We evaluate “the proceeding as a whole and not mere speed.” *Id.* at 129 (citation omitted).

We review de novo whether an appellant was denied the right to speedy trial under Article 10, UCMJ. *Cooley*, 75 M.J. at 259 (citation omitted). We are bound by the military judge’s findings of fact unless they are clearly erroneous. *Id.* (citation omitted). “A finding of fact is clearly erroneous when ‘there is no evidence to support the finding’ or when ‘although there is evidence to support it, the reviewing court on the evidence is left with the definite and firm conviction that a mistake has been committed.’” *United States v. Harrington*, 81 M.J. 184, 189 (C.A.A.F. 2021) (quoting *United States v. Criswell*, 78 M.J. 136, 141 (C.A.A.F. 2018)).

In general, “[t]he remedy for an Article 10[, UCMJ,] violation [is] dismissal with prejudice of the affected charges.” *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). However, “dismissal of the charges with or without prejudice . . . is not appropriate in the case of an accused whose guilt has already been determined, and affirmed on appeal, and where the only remaining determination is the sentence.” *Becker*, 53 M.J. at 232. The CAAF has explained that in such cases, a servicemember’s Article 10, UCMJ, rights may be protected by tailoring the remedy to the harm suffered, “such as an appropriate sentence credit or, in a case where the delay has interfered with the defense’s ability to receive a fair hearing, a sentence to no punishment at all.” *Id.*

## **2. Analysis**

Appellant contends the Government violated both his R.C.M. 707 and Article 10, UCMJ, speedy trial rights. We address each contention in turn.

### ***a. R.C.M. 707***

First, Appellant contends the military judge miscalculated the length of the pretrial delay from 20 July 2022, rather than 30 June 2022. Reiterating his argument from issue (1), *supra*, Appellant contends this court’s opinion in *Martinez II* setting aside the Article 80, UCMJ, conviction and the sentence ceased to be inchoate on 30 June 2022, at which point the R.C.M. 707 “clock began to run.” However, R.C.M. 707(b)(3)(D) provides that in the case of a rehearing, “a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.” The military judge found the convening authority received the record and opinion on 20 July 2022, a finding which is not clearly erroneous. Accordingly, we find no error in this respect.

Next, Appellant contends the military judge erred by excluding the delay from 17 November 2022—the Defense’s stated ready date—until 21 November 2022—when Appellant’s sentencing rehearing began. Appellant argues “[a]ny delay incurred after the defense ready date could not be counted against [Appellant], even if the [D]efense benefited from it in some way.” Therefore, Appellant argues, even if the military judge did not err by beginning to count the

120 days from 20 July 2022, the length of the delay attributable to the Government should have been 122 days, rather than 119 days.

We do not find the military judge abused his discretion in excluding the delay from 17 November 2022 until 21 November 2022. In reaching his conclusion, the military judge explained the record indicated the Defense had previously repeatedly agreed to the exclusion of time between 21 October 2022 and the scheduled rehearing date. On 15 November 2022, the Government submitted a revised docketing request to the trial court “indicating both parties request the rehearing be set for 21 November 2022.” On the same day, at the parties’ request, the military judge set the rehearing for 21 November 2022. Also on 15 November 2022, trial defense counsel “represent[ed] to the [G]overnment that due to the date of service, the [D]efense [now] only agree[d] . . . on the exclusion of time from the speedy trial calculation from 15 November 2022 until the [D]efense’s stated ready date of 17 November 2022.” However, despite having “the opportunity to request a docketing conference and press for the rehearing to begin on its stated ready date,” the Defense “agreed with the [G]overnment on setting the rehearing to begin on 21 November 2022,” and the date was set in reliance on that agreement. Under these circumstances, we find the military judge’s exclusion of time was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *See McElhaney*, 54 M.J. at 130. Accordingly, Appellant is not entitled to relief under R.C.M. 707.

***b. Article 10, UCMJ***

Appellant contends the military judge erred by concluding the Government did not violate Appellant’s Article 10, UCMJ, right to a speedy court-martial. We find Appellant is not entitled to relief.

***i. The Military Judge’s Ruling***

As stated in Section I, *supra*, the military judge evaluated the Defense’s allegation of an Article 10, UCMJ, violation by applying the four-factor *Barker* test. *See Mizgala*, 61 M.J. at 127. The military judge found the first three factors weighed in favor of the Defense. He found the length of the delay was facially unreasonable, and in particular that the Government’s “blatant failure” to comply with R.C.M. 305 pretrial confinement procedures “significantly outweigh[ed]” considerations favoring the Government, such as the seriousness of the offenses and the Prosecution’s need to determine “the availability of proof” for the Article 80, UCMJ, attempted sexual assault charge.

As to the reasons for delay, the military judge found the Government had not acted with the intent to hamper the Defense, and some periods of delay appeared “legitimate,” such as the need to determine whether the alleged victim of the Article 80, UCMJ, offense was willing to participate in a rehearing. However, the military judge found other periods of delay, such as that from 20

July 2022 until 9 September 2022, when the VWAP coordinator began contacting the victim’s counsel, were “largely unexplained by the [G]overnment.” Moreover, the military judge found “no legitimate reason” why the Government should have been unaware Appellant remained confined at Miramar. On the whole, the military judge “weigh[ed] this factor against the [G]overnment, but does not weigh it as heavily as it would had the [G]overnment’s delay [been] an attempt to hamper [Appellant’s] defense.”

The military judge noted the Defense did demand speedy trial on 1 November 2022. However, he found several circumstances undermined how much this factor weighed in the Defense’s favor. For example, at the time of the demand, trial defense counsel had indicated she was not available until 30 November 2022, and the Defense later agreed with the Government on a 21 November 2022 start date. Ultimately, the military judge found “this factor weighs very slightly against the [G]overnment.”

However, the military judge further found that Appellant suffered no actual prejudice from the delay to the three “recognized interests” identified in *Barker*, 407 U.S. at 532. With regard to prejudice, the military judge explained:

The court concludes the evidence before the court demonstrates no actual prejudice to [Appellant]. While the court recognizes [Appellant] should have been released from confinement immediately after 20 July 2022 or ordered into pretrial confinement if deemed appropriate, the evidence before the court does not indicate the accused suffered oppressive conditions while held in pretrial confinement. The record also does not demonstrate any particularized anxiety and concern outside of the normal anxiety associated with the appellate process. Finally, and most importantly, the evidence in the record does not demonstrate that [Appellant’s] ability to prepare and defend himself at this sentence-only rehearing w[as] impaired. The court recognizes that [Appellant] experienced difficulties with making phone calls anytime he wanted, but the record does not demonstrate that [Appellant’s] defense has been affected in any[ ]way by these logistical hurdles.

Because the military judge found the absence of prejudice outweighed the other factors, he “found no violation of [Appellant’s] Article 10[, UCMJ,] right to a speedy trial,” nor a violation of any constitutional right to speedy trial.

Appellant argues the military judge erred in finding no prejudice, and that in fact Appellant was prejudiced with respect to all three recognized interests. We address each argument in turn.

***ii. Oppressive Pretrial Incarceration***

With respect to oppressive pretrial incarceration, Appellant contends he was “illegally confined” and “treated the same as inmates that were sentenced,” a violation of his “due process rights” that was “inherently prejudicial.” However, Appellant does not identify any specific condition that rendered his confinement “oppressive.” We agree Appellant’s continued confinement was “illegal” in the sense that it was not implemented in accordance with R.C.M. 305, and the military judge reasonably recognized this failing as an R.C.M. 305 violation and awarded relief accordingly on that basis, as described *supra* with respect to issue (1). However, we are not persuaded that pretrial confinement without the procedures required by R.C.M. 305 is inevitably “oppressive” for purposes of an Article 10, UCMJ, *Barker* analysis.

We recognize that that the total amount of confinement credit the military judge awarded Appellant for confinement served (1,418 days) exceeded the amount of confinement the military judge imposed in the rehearing sentence (46 months).<sup>5</sup> In other words, had the Government not unreasonably delayed the rehearing, Appellant might have spent less time confined at Miramar. Although not an argument specifically advanced by Appellant, one might argue that Appellant’s pretrial confinement was therefore oppressive due to its duration, if not due to specific conditions of confinement. Surely Appellant had a significant interest in his physical freedom, and in *Barker* itself the Supreme Court spoke not only of the “societal disadvantages” but the “detrimental impact on the individual” of lengthy pretrial incarceration. 407 U.S. at 532.

However, we cannot say the military judge’s finding of no oppressive pretrial incarceration was clearly erroneous in this respect. *See Cooley*, 75 M.J. at 259. First, the CAAF has clearly implied that pretrial confinement that exceeds the adjudged sentence is not necessarily prejudicial in terms of a *Barker* analysis. *United States v. Danylo*, 73 M.J. 183, 188 (C.A.A.F. 2014) (“[W]e have never held that pretrial confinement which exceeds an adjudged sentence is per se prejudicial.” (citation omitted)). In addition, at the time the military judge made his oral ruling, Appellant’s sentence was yet to be determined and the adjudged term of confinement might potentially have exceeded the amount of confinement credit. Moreover, the excess confinement credit could be, and ultimately was, used to offset other elements of the sentence—specifically adjudged forfeitures. Under these circumstances we do not find clear error.

### ***iii. Anxiety and Concern***

Appellant contends he “faced particularized anxiety that was unique from that typically experienced by pretrial detainees because he was illegally

---

<sup>5</sup> As stated *supra*, the military judge applied excess confinement credit against Appellant’s adjudged total forfeiture of pay and allowances.

confined without an adjudicated sentence.” We note that the military judge’s written findings of fact included that “[f]rom the time [Appellant] was initially informed about the original [ ] opinion [of this court] until his release from confinement, [Appellant] was confused, anxious, and despondent. He was also upset with the Government for forgetting about him.” Nevertheless, the military judge concluded “[t]he record . . . does not demonstrate any particularized anxiety and concern outside of the normal anxiety associated with the appellate process.” Another judge might have reasonably disagreed with this conclusion as to what constitutes “normal anxiety.” Nevertheless, given the deference we afford the military judge’s determinations regarding the existence of anxiety and concern, we do not hold the military judge’s conclusion was clearly erroneous. *See Cooley*, 75 M.J. at 259 (citation omitted).

***iv. Impairment of the Defense***

As to impairment of the defense, Appellant cites “a series of technical failures and staffing issues” at Miramar, as described in Appellant’s declaration to the trial court, which “prevented him from being able to work on his case.” However, on appeal as at trial, Appellant does not identify any specific adverse impact these logistical difficulties had on the Defense at the rehearing. The record supports the military judge’s conclusion that Appellant’s ability to prepare and defend himself at the rehearing was not materially impaired.

***v. Conclusion as to Article 10, UCMJ***

Accordingly, we do not find the military judge’s findings with respect to the prejudice prong of his *Barker* analysis were clearly erroneous. In addition, we do not find the military judge erred in holding the absence of prejudice outweighed the first three *Barker* factors which, on balance, did not heavily favor the Defense. Viewing the circumstances as a whole, although the Government’s processing of this case was “not stellar,” *Mizgala*, 61 M.J. at 129, in the absence of prejudice we do not find the military judge erred in concluding there was no Article 10, UCMJ, violation. *Cf. United States v. Laubach*, No. ACM 39396, 2019 CCA LEXIS 245, at \*30 (A.F. Ct. Crim. App. 7 Jun. 2019) (unpub. op.) (“We note Appellant has failed to identify any decision by the CAAF or by this court finding a violation of Article 10, UCMJ, in the absence of some finding of prejudice to the accused.”).

## **C. Post-Trial Delay**

### **1. Additional Background<sup>6</sup>**

#### ***a. Pre-Docketing Delay***

Appellant’s rehearing concluded on 22 November 2022. On 22 December 2022, trial defense counsel submitted Appellant’s post-trial matters to the convening authority prior to the convening authority’s decision on action. Trial defense counsel requested the convening authority not approve the adjudged total forfeiture of pay and allowances. In part, trial defense counsel contended this relief was warranted because Appellant had accrued 164 days of “good conduct time” while serving his original sentence to confinement from the 2019 court-martial which, when added to confinement credit awarded by the military judge at the rehearing, resulted in 295 days of confinement credit in excess of the 46 months of confinement adjudged at the rehearing. On 23 January 2023, the convening authority approved the adjudged sentence in its entirety.

The court reporter certified the transcript on 30 January 2023. On 22 February 2023, the military judge contacted trial counsel and trial defense counsel by email, identifying an issue relating to the convening authority’s action and soliciting their views on whether the Defense had waived its opportunity to challenge the convening authority’s decision. After further communication, on 2 March 2023 the Defense submitted a post-trial motion requesting the military judge “correct” the confinement sentence credit in light of Appellant’s earned good conduct time from his original sentence to confinement. The Government opposed the motion on 8 March 2023, and the Defense submitted a reply brief on 21 March 2023. The military judge issued a written ruling on the motion on 8 May 2023, concluding Appellant was entitled to good time credit and ultimately awarding “a total of 182 days credited against the portion of the adjudged sentence to total forfeiture of all pay and allowances.”

The military judge then signed a first corrected copy of the Statement of Trial Results (STR) on 12 May 2023, and then a second corrected copy of the STR on 18 May 2023, before signing the entry of judgment on 31 May 2023. The court reporter certified the record on 1 June 2023. On 23 June 2023, the convening authority indicated he would not modify his decision on action in light of “the new post-trial documents.” However, copies of the record were not delivered to Appellant and trial defense counsel until 18 and 21 September

---

<sup>6</sup> The following information is drawn from the record as well as from declarations and chronologies from the Fairchild AFB Deputy SJA, which the Government moved this court to attach to the record. We conclude we may consider the declaration and chronology in order to “resolv[e] issues raised by materials in the record.” *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

2023, respectively. The record was docketed with this court on 12 October 2023, 324 days after sentencing.

***b. Post-Docketing Delay***

After docketing, Appellant requested and was granted ten enlargements of time before he filed his assignments of error on 21 October 2024. The Government filed its answer brief on 14 November 2024. On the same date, the Government moved to attach several documents to the record, including, *inter alia*, four appellate exhibits it had “discovered” were “missing” from the record. Specifically, these missing exhibits consisted of the Defense’s post-trial motion, the Government’s opposition, the Defense’s reply, and the military judge’s ruling from March and May 2023 described above. On 26 November 2024, this court ordered the Government to show good cause as to why the court should not return the record for correction with respect to the missing exhibits. On 9 December 2024, the Government responded that remand was unnecessary.<sup>7</sup> Nevertheless, on 16 December 2024 this court remanded the record for correction pursuant to R.C.M. 1112(d) to account for the missing exhibits, “and any other portion of the record that is determined to be missing or defective hereafter.”

On 6 January 2025, the military judge signed a certificate of correction inserting the four previously identified documents in the record as appellate exhibits, as well as an additional appellate exhibit consisting of certain email traffic between the military judge and parties. The record was re-docketed with this court on 5 February 2025. Appellant requested and was granted another enlargement of time before submitting an additional brief on 6 June 2025. The Government filed its answer on 14 July 2025.

**2. Law**

“[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.” *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay “where the action of the convening authority is not taken within 120 days of the completion of trial,” “where the record of trial is not docketed by the [CCA] within thirty days of the convening authority’s action,” or “where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA].” 63 M.J. at 142. In *United States v. Livak*, this court adapted the *Moreno* standard for cases referred to trial on or after 1 January 2019 and established an

---

<sup>7</sup> In the meantime, Appellant submitted his reply to the Government’s answer on 2 December 2024.

aggregated 150-day standard for facially unreasonable delay from sentencing to docketing with the CCA. 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker*, 407 U.S. at 530: “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of the right to timely post-trial review: (1) oppressive incarceration; (2) “particularized” anxiety and concern “that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Independent of an appellant’s due process rights, the Courts of Criminal Appeals have authority to “provide appropriate relief if [an appellant] demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered . . . .” 10 U.S.C. § 866(d)(2); see *United States v. Valentin-Andino*, 85 M.J. 361 (C.A.A.F. 2025).

We review de novo an appellant’s entitlement to relief for post-trial delay. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

### **3. Analysis**

Appellant contends he is entitled to relief due to unreasonable post-trial delay at both the pre-docketing and post-docketing stages. We consider each stage in turn.

#### ***a. Due Process: Pre-Docketing Delay***

The 324 days that elapsed from Appellant’s sentencing to the initial docketing by this court exceeded the 150-day *Livak* standard by 174 days and was facially unreasonable. One notable period of delay was from 22 February 2023, when the military judge identified to the parties an issue with Appellant’s clemency request and the convening authority’s action, to 8 May 2023, when the military judge ruled on the Defense’s post-trial motion. We find this period of delay weighs little against the Government because it was evidently prompted and controlled by the military judge. However, a second notable period of delay, from the certification of the record on 1 June 2023 until Appellant and trial defense counsel were served with copies of the record on 18 and 21 September 2023, finds little explanation in the record and is attributable to the Government. The chronology supplied by the Government implies gaps in

leadership positions at the base legal office may have played some role, but this is neither specifically stated nor a sufficient explanation. However, the record provides no indication, and Appellant makes no claim, that he asserted his right to speedy processing and review prior to filing his assignments of error with this court.

Importantly, Appellant fails to demonstrate he was prejudiced by the delay. He asserts he suffered impairment to his grounds for appeal because he “was unable to petition this [c]ourt for relief sooner.” However, he fails to explain how his appeal might have been more successful or beneficial had it been filed earlier. Moreover, we note this court has not found in Appellant’s favor with respect to his other assignments of error. Appellant also asserts he “suffered severe mental hardship,” citing a declaration he has provided to this court.<sup>8</sup> However, the declaration primarily addresses Appellant’s time in confinement, which ended before the post-trial phase of his rehearing began. To the extent Appellant expresses that during the post-trial and appellate process he felt “overwhelmed,” “treated unfairly by the process throughout the legal proceedings,” and “unable to move on,” we are not persuaded Appellant experienced anxiety and concern materially “distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.” *Moreno*, 63 M.J. at 139.

The post-trial processing of Appellant’s court-martial left much to be desired. However, in the absence of cognizable prejudice, we do not find the delay from sentencing to docketing was so egregious as to impugn “the fairness and integrity of the military justice system.” *Toohey*, 63 M.J. at 362. We therefore find no due process violation.

***b. Due Process: Post-Docketing Delay***

More than 18 months have elapsed since Appellant’s record was docketed with this court on 12 October 2023; thus, there is a facially unreasonable delay under *Moreno*. We note this court is issuing its opinion approximately four months after receiving the Government’s final brief. The delay exceeds the *Moreno* standard by approximately seven months and is largely attributable to two notable factors. First, Appellant requested a total of 11 enlargements of time in which to file his assignments of error with this court—ten enlargements for the original brief, and one enlargement for the post-remand additional brief. Second, the record was remanded from 16 December 2024 until 6 February 2025 for correction due to several missing appellate exhibits, as described above. This latter delay is attributable to the Government, but accounts for a significantly shorter period of time than Appellant’s motions for

---

<sup>8</sup> We conclude we may consider Appellant’s declaration in order to “resolv[e] issues raised by materials in the record.” *Jessie*, 79 M.J. at 444.

enlargements of time. As noted above, Appellant did not demand speedy post-trial and appellate review until he filed his assignments of error on 21 October 2024.

With respect to prejudice due to delay during the post-docketing phase, Appellant does not significantly elaborate on the arguments addressed above with respect to the pre-docketing phase, which we found unpersuasive. However, in light of the need to remand the record to insert the missing exhibits, Appellant contends this court should grant him relief to address the Government’s “institutional neglect and gross indifference” toward post-trial processing. Specifically, Appellant requests this court set aside his reduction in rank and reduce his term of confinement. In response, the Government denies that its processing during the remand was unreasonable or that there was institutional harm or neglect in the handling of Appellant’s case.

Viewing the post-docketing phase as a whole, in the absence of prejudice to Appellant, and having carefully considered the reasons for delay, we do not find the delay so egregious as to adversely affect public perception of the fairness and integrity of the military justice system. *See Toohey*, 63 M.J. at 362. We again find no due process violation.

***c. Article 66(d)(2), UCMJ, Relief***

We have also considered whether to grant “appropriate relief” for “excessive delay” pursuant to Article 66(d), UCMJ, 10 U.S.C. § 866(d)(2), independent of any due process violation. Having considered the post-trial processing of Appellant’s rehearing as a whole, and particularly the baffling delay between the court reporter’s certification of the record on 1 June 2023 and delivery of the record to Appellant on 18 September 2023, we find it appropriate to partially disapprove the adjudged reduction in grade.

**III. CONCLUSION**

The findings of guilty were previously affirmed. We affirm only so much of the sentence as entered as provides for a dishonorable discharge, confinement for 46 months, total forfeiture of pay and allowances, and reduction to the grade of E-2. The sentence, as modified, is correct in law and fact, and no additional error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the sentence, as modified, is **AFFIRMED**.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>No. ACM 39903 (reh)</b>
<i>Appellee</i>	)	
	)	
<b>v.</b>	)	
	)	<b>ORDER</b>
<b>Jesus MARTINEZ</b>	)	
<b>Airman First Class (E-3)</b>	)	
<b>U.S. Air Force</b>	)	
<i>Appellant</i>	)	<b>Special Panel</b>

On 14 November 2024, the Government moved to attach several documents including:

- (1) a chronology of events from Appellant’s sentence rehearing on 21 November 2022 until the record of trial was mailed from Fairchild Air Force Base (AFB) to the general court-martial convening authority on 21 September 2023 (Chronology);
- (2) a declaration by Major (Maj) CP, the Fairchild AFB Deputy Staff Judge Advocate (DSJA), “certify[ing]” the accuracy of the chronology (Maj CP Declaration);
- (3) four appellate exhibits (AEs) the Government had “discovered” are “missing” from the record of trial which “explain some of the delay in post-rehearing processing” (AEs XVI, XVII, XVIII, and XIX); and
- (4) a declaration by Lieutenant Colonel (Lt Col) JM, the Fairchild AFB Staff Judge Advocate (SJA), “certify[ing]” the four appellate exhibits as “authentic copies” from the legal office’s “records” (Lt Col JM declaration).

The four appellate exhibits include a post-trial defense motion to “correct the sentence credit [Appellant] received,” dated 2 March 2023 (AE XVI); the Government’s response to the defense motion, dated 8 March 2023 (AE XVII); the Defense’s reply to the Government’s response, dated 21 March 2023 (AE XVIII); and the military judge’s ruling on the motion, dated 8 May 2023

(AE XIX).<sup>\*</sup> The Government’s 14 November 2024 motion to attach asserts, “The declarations of the SJA and DSJA for Fairchild AFB address the post-trial processing of Appellant’s case and are, thus, relevant and necessary to resolve and disprove Appellant’s claim that the United States deprived him of speedy post-trial processing.” See *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding the Courts of Criminal Appeals may “consider affidavits . . . when doing so is necessary for resolving issues raised by materials in the record”).

On 21 November 2024, Appellant responded and requested this court deny the motion to attach. Specifically with regard to the “missing” exhibits, Appellant contends “[t]he Government’s failure to include all appellate exhibits is a substantial omission that renders the [record of trial] substantially incomplete and warrants remand for a correction.”

On 26 November 2024, this court issued an order to the Government to show good cause as to why the court should not return the record for correction. The Government filed its response on 9 December 2024. The Government contended, *inter alia*, the omission of AEs XVI–XIX was not prejudicial to Appellant, who was not raising the military judge’s post-trial ruling as an error, and this court could complete its Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, review without returning the record for correction.

“A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut.” *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). “Omissions are quantitatively substantial unless ‘the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.’” *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Rule for Courts-Martial (R.C.M.) 1112(b) provides, *inter alia*, the “record of trial in every general and special court-martial shall include . . . [e]xhibits . . . .” R.C.M. 1112(d)(2) provides, in part:

A record of trial is complete if it complies with the requirements of subsection (b). . . . A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed

---

<sup>\*</sup> We note AE XIX, the military judge’s ruling, ordered the Defense “to affirmatively state whether or not it intends to submit any new matters to the convening authority in light of the [military judge’s] decision. The [D]efense’s statement will be marked at [sic] Appellate Exhibit XX.” The record does not contain such a statement marked as Appellate Exhibit XX.

correction to all parties and permit them to examine and respond to the proposed correction. . . .

We are not persuaded the Government has rebutted the presumption of prejudice arising from the substantial omission of AEs XVI–XIX from the record.

Accordingly, it is by the court on this 16th day of December, 2024,

**ORDERED:**

The Government’s Motion to Attach dated 14 November 2024 is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted with respect to the Chronology and the Maj CP Declaration identified above; it is denied with respect to Appellate Exhibits XVI, XVII, XVIII, and XIX and the Lt Col JM Declaration identified above.

The record of trial in Appellant’s case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for Appellate Exhibits XVI, XVII, XVIII, and XIX, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66, UCMJ, 10 U.S.C. § 866.

The record of trial will be returned to the court not later than **24 January 2025** unless a military judge or this court grants an enlargement of time for good cause shown.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

## APPENDIX B

### UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

---

No. ACM 39903 (f rev)

---

UNITED STATES

*Appellee*

v.

**Jesus MARTINEZ**

Airman First Class (E-3), U.S. Air Force, *Appellant*

---

Appeal from the United States Air Force Trial Judiciary

*Upon Further Review*

Decided 31 May 2022<sup>1</sup>

---

*Military Judge:* Christopher M. Schumann; Andrew R. Norton (remand).

*Sentence:* Sentence adjudged on 30 August 2019 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 18 October 2019 and reentered on 22 June 2021: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

*For Appellant:* Major Jenna M. Arroyo, USAF (argued); Major Rodrigo M. Caruço, USAF; Allison R. Weber, Esquire (argued).

*For Appellee:* Lieutenant Colonel Matthew J. Neil, USAF; Major Alex B. Coberly, USAF; Major Brian E. Flanagan, USAF; Major John P. Patera, USAF (argued); Mary Ellen Payne, Esquire.

Before JOHNSON, KEY, and ANNEXSTAD, *Appellate Military Judges*.

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

---

---

<sup>1</sup> The court heard oral argument in this case on 10 December 2021.

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

---

KEY, Senior Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault, in violation of Articles 120 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 880.<sup>2</sup> The court-martial sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority has approved the sentence as adjudged.<sup>3</sup>

Appellant has raised 11 issues, one of which asserts an error in the post-trial processing of Appellant's court-martial: that the convening authority erred by not taking action on Appellant's sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.) (2016 MCM)). In an earlier opinion, this court agreed with Appellant and remanded his case to the Chief Trial Judge, Air Force Trial Judiciary, for corrective action. *See United States v. Martinez*, No. ACM 39903, 2021 CCA LEXIS 250, at \*7–8 (A.F. Ct. Crim. App. 21 May 2021) (unpub. op.). The convening authority subsequently approved Appellant's sentence, resulting in a new entry of judgment. With this error having been corrected, we now turn to Appellant's remaining ten issues, along with a supplemental issue raised subsequent to our first opinion on this case.

---

<sup>2</sup> References to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise specified, all other references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

<sup>3</sup> On 31 March 2022, we issued an unpublished opinion in this case. *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 202 (A.F. Ct. Crim. App. 31 Mar. 2022) (unpub. op.). On 29 April 2022, Appellant moved for reconsideration of this decision with respect to whether the military judge abused his discretion by failing to recuse himself. On 2 May 2022, the Government moved for reconsideration with respect to our decision to set aside of the finding of guilty as to the Specification of Charge II, and suggested this court consider the case *en banc*. On 20 May 2022, we granted both motions for reconsideration, but we denied the Government's *en banc* suggestion after a unanimous vote against such request. After reconsideration, we withdraw the court's 31 March 2022 opinion and substitute this opinion.

The assignments of error Appellant has raised through counsel are: (1) the military judge should have recused himself from Appellant’s trial; (2) the military judge failed to take appropriate action with respect to a witness who refused to disclose contact information for another witness; (3) the military judge erred in reconsidering an earlier ruling; (4) the evidence is legally and factually insufficient to support Appellant’s attempted sexual assault conviction; (5) the military judge should have granted a motion for a finding of not guilty with respect to the attempted sexual assault specification; (6) the military judge failed to instruct the members on the overt acts forming the basis for the attempted sexual assault offense; (7) the record of trial is defective and incomplete; (8) Appellant’s record was not docketed with this court within 150 days of his sentencing; and (9) the cumulative error doctrine requires relief. Appellant personally raised a tenth issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); (10) the military judge erred in a ruling under Mil. R. Evid. 412 which prohibited the Defense from cross-examining a victim on a particular matter.<sup>4</sup>

Regarding Appellant’s sixth assignment of error, we conclude the military judge’s instructions with respect to the attempted sexual assault offense were erroneous, and we dismiss this specification without prejudice. As a result, Appellant’s fourth and fifth assignments of error are moot, and we defer his eighth assignment of error until the record is returned to this court for completion of our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

Appellant also personally raises as a supplemental eleventh issue his claim that the Constitution guarantees him the right to a unanimous verdict, a right not reflected in the current court-martial framework. We have carefully considered this issue as well as Appellant’s ninth assignment of error and find neither warrants further discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).<sup>5</sup>

---

<sup>4</sup> We granted oral argument on the first two of Appellant’s assignments of error. We further directed oral argument on two specific issues: whether we were permitted to consider matters from another court-martial in assessing whether the military judge should have recused himself; and whether the military judge erred in not ordering the production of the witness whose contact information was not disclosed in Issue (2).

<sup>5</sup> Appellant raises this claim under *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), along with both the Fifth and Sixth Amendments. U.S. CONST. amend. V, VI. However, our superior court has held “there is no Sixth Amendment right to trial by jury in courts-martial.” *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citations omitted); *see also United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986) (noting that “courts-

## I. BACKGROUND

In August 2018, while stationed at Fairchild Air Force Base, Washington, Appellant met Ms. KT—a civilian college student who lived about 90 minutes away—through an online dating application. A few days after meeting Appellant online, Ms. KT drove to Appellant’s off-base house and spent the weekend with him, during which time the two embarked upon a fast-moving and sexually intimate relationship. Ms. KT returned home Monday morning, and she and Appellant made plans to see each other the following weekend, with Ms. KT making the trip back to Appellant’s house that Friday evening. Appellant and Ms. KT engaged in consensual sexual intercourse Sunday night, but at some point after Ms. KT had fallen asleep, Appellant woke her up in order to initiate further sexual conduct. Despite telling Appellant “no” and physically trying to prevent his advances, Appellant penetrated Ms. KT’s vagina with his penis until he ejaculated; he did not use a condom.

Ms. KT spent the following day with Appellant until early in the afternoon when she drove back to her house. Before she left, the two went shopping for an emergency contraceptive, which Appellant purchased for Ms. KT. After a few days passed, she reported to civilian law enforcement that Appellant had assaulted her, and military authorities were subsequently notified. In the ensuing investigation, Air Force Office of Special Investigations agents interviewed Ms. ES—Appellant’s then-wife who was seeking a divorce from Appellant. Ms. ES disclosed that Appellant had attempted to sexually assault her in the middle of July 2018, an offense which she had not previously reported.<sup>6</sup> Appellant was charged with, and convicted of, sexually assaulting Ms. KT and attempting to sexually assault Ms. ES. He was also charged with, but acquitted of, committing abusive sexual contact on Ms. ES.

---

martial have never been considered subject to the jury-trial demands of the Constitution”). The United States Supreme Court similarly concluded neither the Fifth Amendment nor the Sixth Amendment creates a right to a jury in a military trial in *Ex parte Quirin*, 317 U.S. 1, 45 (1942). *See also Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (“The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. . . . The constitution of courts-martial . . . is a matter appropriate for congressional action.”); *Ex parte Milligan*, 71 U.S. 2, 123 (1866); *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, at \*56–57 (A.F. Ct. Crim. App. 25 Mar. 2022) (unpub. op.) (concluding *Ramos* does not create a requirement for unanimous court-martial verdicts).

<sup>6</sup> Appellant and Ms. ES had divorced by the time of Appellant’s court-martial.

## II. DISCUSSION

### A. Military Judge Recusal

Appellant argues the military judge was biased against the lead trial defense counsel, and the military judge should have therefore recused himself from Appellant’s court-martial. Appellant argues as a second basis for relief that the military judge should have recused himself based upon the appearance of bias on the military judge’s part. As a remedy, Appellant asks us to set aside the findings and sentence. In support of his argument, Appellant cites to a number of events occurring both before and during his court-martial; we only address the most significant events raised.

#### 1. Additional Background

##### *a. Motion for Recusal*

Appellant’s court-martial began with a two-day-long motions hearing on Thursday, 22 August 2019. The trial itself started Monday, 26 August 2019, with Appellant being represented by a circuit defense counsel as lead counsel along with a more junior area defense counsel. The military judge had previously issued a scheduling order in April 2019 which set a deadline of 22 July 2019 for filing motions.

On 15 July 2019—one week before that deadline and more than a month before the motions hearing—the Defense asked the military judge via email for permission to delay filing a motion “pertaining to charging defects” until trial, because making the motion sooner “would simply allow the Government the opportunity to correct the defects.” Alternatively, the Defense sought permission to file the motion *ex parte*. Less than ten minutes later, the military judge sent a reply email to both parties in which he denied both the Defense’s request to file the motion late and the request to file the motion *ex parte*. That same day, the Defense submitted a written motion asking the military judge to reconsider his ruling. The Defense argued the military judge’s scheduling order was in conflict with the Rules for Courts-Martial insofar as the order set deadlines in advance of those found in the rules.<sup>7</sup> The Government opposed reconsideration, and, on 20 July 2019, the military judge sent the parties an email in which he said he had reconsidered his ruling on the Defense’s motion for relief from the scheduling order deadline, and he was again denying the Defense’s motion as well as the proposed alternative relief of an *ex parte* filing.

---

<sup>7</sup> Under R.C.M. 905(b)(2), a motion asserting a failure to state an offense may be resolved at any time during a court-martial. The Defense proposed serving their motion on the Government “after arraignment or empanelment, and the court can recess for however long is necessary to provide the trial counsel the opportunity to respond on the merits.”

The next day, the Defense submitted a motion to dismiss the attempted sexual assault charge under the theory that the charge’s specification failed to state an offense. The tenor of the motion was that the specification did not provide Appellant adequate notice because it did not explain either how Appellant attempted to sexually assault Ms. ES or why he was unable to complete the offense. The Defense implied in the motion that by being compelled to submit the motion earlier than required by the Rules for Courts-Martial, there may be an appearance of the Defense “attempting to assist the Government perfect their case.” The Government opposed this motion, arguing it had no obligation to allege specific acts which “amount to an attempt.” Trial counsel also added in their motion this line: “General gripes about the Government’s charging in this case may be therapeutic to express in a motion, but they do not give rise to the requested remedy. Had the Defense requested in a Bill of Particulars this information, it would have been theirs.”<sup>8</sup> Trial counsel did not comment on the Defense’s claim regarding the timing of the motion.<sup>9</sup>

During the week of 12 August 2019—that is, the week before the motions hearing—the Air Force’s circuit trial and defense counsel, along with all the military trial judges, participated in the Air Force Circuit Advocacy Training workshop at Joint Base Andrews, Maryland. During the workshop, the Chief Trial Judge of the Air Force Trial Judiciary conducted a session with the circuit defense counsel in which he asked the counsel for their feedback with respect to the Air Force trial judges. Afterwards, the Chief Trial Judge held another session with just the trial judges, all of whom are subordinate to, and in the rating chain of, the Chief Trial Judge. In that session, the Chief Trial Judge explained that one of the circuit defense counsel had raised a concern about a military judge requiring defense counsel to disclose details of a particular motion earlier than required by the *Manual for Courts-Martial*. The military judge detailed to Appellant’s court-martial participated in this session and concluded that the defense counsel in question was the circuit defense counsel in Appellant’s case, and that the motion being referenced was the one he had denied a few weeks earlier. When the session concluded, the military judge approached the Chief Trial Judge and explained that the motion pertained to an ongoing court-martial and that, as a result, he was “probably going to mention it on the record.”

---

<sup>8</sup> The Defense had submitted a request for a bill of particulars, but trial counsel contended it did not specifically request information pertaining to the conduct underlying the attempt specification.

<sup>9</sup> The military judge later denied the motion after the motions hearing but before trial on the merits began. He concluded that Appellant was on adequate notice of the offense he was to defend against.

After the workshop, but before the motions hearing, the military judge issued a written ruling on the Defense's reconsideration motion seeking relief from the scheduling order. The military judge's ruling denying the Defense motion was largely rooted in the prohibition of using *ex parte* communications for the purpose of gaining a tactical advantage over the other party. Because the Government would be able to withdraw defective specifications and then re-refer them to a new court-martial, the military judge reasoned that permitting the Defense to untimely file their motion would have little practical impact other than either delaying Appellant's trial or subjecting Appellant to a second court-martial. The military judge further rejected trial defense counsel's contention that they may "violate a potentially invalid modification of the [Rules for Courts-Martial] by directly ignoring a now direct requirement from this court to file the motion and serve all parties." In doing so, the military judge posited that it was a routine practice of military judges to set deadlines earlier than those found in the Rules for Courts-Martial in order to promote efficiency in the trial process. The military judge then noted that while he could not prevent the Defense from raising a motion alleging a failure to state an offense outside the time period specified in his scheduling order, he had "other potential remedies available," such as "addressing the alleged conduct on the record during trial" and holding counsel in contempt.

At the outset of the first day of motions, and apparently without advance notice to the parties, the military judge explained on the record what had happened at the workshop. He characterized the episode as the Chief Trial Judge "inform[ing] the group that a defense counsel had specifically complained that a military judge had issued a scheduling order and provided an additional, more specific order requiring the defense counsel to disclose the details of a defense motion." The military judge went on to state on the record that he found "expressing dissatisfaction to the Chief Trial Judge regarding a specific ruling issued by a military judge" was "problematic, to say the least," as it "may impact that military judge's independent judicial decision-making process in that case or future cases." Discussing rulings by our court and our superior court, the military judge said that "the process for expressing displeasure with

the military judge’s ruling” do not include “raising the complaint to that military judge’s supervisor.”<sup>10</sup> He also told the parties that “[e]xpressing dissatisfaction with the military judge’s ruling in a specific case to that military judge’s supervisor is strictly prohibited.”<sup>11</sup>

The military judge went on to explain that “[s]uch conduct could call into question the military judge’s decision to reconsider or not reconsider a particular motion issue out of fear of reprisal from his judicial supervisor” or, alternatively, “that the military judge’s judicial independence is in question because a decision on a motion issue has been influenced by a supervisory judge.” He said doing so “places the military judge in an undesirable position of having his impartiality called into question through no fault of his own because a counsel disagrees with a judicial decision and chooses to raise that concern with the military judge’s direct supervisor.” The military judge explained various options for counsel to address his rulings, ultimately advising them that “[c]ontacting the military judge’s supervisor to express dissatisfaction with an adverse ruling in an ongoing case is not an appropriate remedy.”

After providing the foregoing guidance, the military judge described the circuit defense counsel’s comments at the workshop as “an unfortunate misstep on the part of counsel” but which were “immaterial on the merits of this case.” He explained that at the time he learned of the comments, he had ruled and already drafted—but not yet provided to counsel—his written ruling on the scheduling-order matter. He noted the Chief Trial Judge had not sought to influence the court with respect to any rulings related to Appellant’s trial. He told the parties he “ha[d] no concerns with his impartiality going forward and [was] confident that his fairness cannot be reasonably questioned” and that he “will not be improperly influence[d] by this particular matter.” The military judge explained he raised the matter of the workshop out of his duty to ensure

---

<sup>10</sup> The military judge cited *United States v. Hutchinson*, No. ACM 38503, 2015 CCA LEXIS 269 (A.F. Ct. Crim. App. 29 Jun. 2015) (unpub. op.). That case, however, dealt with government attorneys contacting a judge’s supervisor regarding the judge’s scheduling decisions and whether, by doing so, the attorneys’ conduct created the appearance of unlawful command influence.

<sup>11</sup> Although not entirely clear, the military judge seemed to derive this premise from *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976), a case which dealt with claims that The Judge Advocate General—not a defense counsel—improperly scrutinized a judge’s sentencing decisions. In *Ledbetter*, the Court of Military Appeals held “official inquiries . . . which question or seek justification for a judge’s decision” were barred “unless such inquiries are made by an independent judicial commission established in strict accordance” with a 1972 American Bar Association standard—a standard which no longer appears to exist.

the fairness of Appellant’s trial as well as his concern for “absolute transparency with regard to an issue that has at least some potential to call into question the impartiality” of the court. The military judge then asked the parties if they had any questions or desired to challenge him, and circuit defense counsel answered: “No questions and no challenges.”

The military judge proceeded to hear motions over the rest of the day and the next day, Friday, 23 August 2019, including a defense motion to compel the assistance of a computer analyst who could review data the Government had extracted from Appellant’s cell phone. The Government had previously made a hard drive containing the extracted data available to the Defense, but trial defense counsel asserted they had no ability to access the contents of the drive, much less review the data. At some point after the court recessed on Friday, the military judge granted this motion and the analyst began his review. This analysis continued over the weekend with the Defense periodically providing newly discovered information to trial counsel.

On the morning of Monday, 26 August 2019, the military judge and the parties discussed proposed voir dire questions, and about ten minutes before the members were scheduled to be brought into the courtroom, trial defense counsel provided the military judge with 13 affidavits from people who had attended the advocacy workshop earlier in the month. In essence, the affidavits suggested Appellant’s circuit defense counsel had not been referring to any particular case during the meeting with the Chief Trial Judge and that the comments were not so much a “complaint” as they were the catalyst for a discussion. Circuit defense counsel then asked to voir dire the military judge and to call the Chief Trial Judge as a witness “to determine if there’s an attempt to create bias of the military judge, if the trial judge is biased against defense counsel, or if there’s been [an] attempt made to chill the role of defense counsel in this case.”

The military judge agreed to answer defense questions, and during the ensuing voir dire, he explained the Chief Trial Judge had never mentioned a particular counsel or a particular case, but he concluded the Chief Trial Judge was referring to Appellant’s case and the detailed circuit trial counsel based upon what the Chief Trial Judge had said about the issue. The military judge further explained he felt obligated to disclose the fact the matter came up out of concern for the possible perception that he might be reviewing his decisions based upon comments made to his supervisor, even though the Chief Trial Judge had not told him to do or not do anything with respect to the court-martial. The military judge asserted he “will not be influenced by anybody” and that he “hold[s] absolutely no animus towards any counsel, ever,” noting that he was “retirement eligible” and “not going to be a general officer.”

The military judge did concede he might “get a little bit fired up when it comes to issues” and perhaps had been “hypersensitive” about circuit defense counsel’s comments at the workshop and added, “in the future, I would love counsel, even in an academic setting, to not raise issues that are pending before any court.” At one point, circuit defense counsel posed the following question:

Noting that we sit in the same building when we’re not on the road, and we never discuss ongoing cases in *ex parte* fashion. You’ve always had an open door to me. Our families have socialized at holiday parties. You’ve always invited me to sit down for conversations about the Air Force, about officership, and been a mentor to me in those things. Has any of that changed as a result of this?

The military judge answered, “No, I hope not. I hope not from your perspective.” Circuit defense counsel then commented, “It hasn’t.”

After questioning the military judge for about 30 minutes, circuit defense counsel made an oral motion for the military judge to recuse himself from the court-martial. Circuit defense counsel essentially argued there was an appearance of unfairness based upon the military judge’s concession of being “perhaps hypersensitive” and having concluded counsel had “complained” at the workshop, although circuit defense counsel also said, “I want to put on the record, based on the military judge’s responses, and based on the affidavits, there appears to be no actual bias in this case.”<sup>12</sup> The military judge verbally denied the motion, and the rest of the day was spent selecting court members. Once that process was complete, the members were told to report back at 0830 hours the following morning.

When the court convened the next day, Tuesday, 27 August 2019, the military judge placed his written decision on the recusal motion on the record. His ruling indicated he found that “no persuasive connection has been drawn between the military judge’s raising on the record the manner in which a pending matter was addressed to the [Chief Trial Judge] and a reasonable inference of partiality.”

#### ***b. Opening Statement Slides***

At 0830 hours, after placing his recusal ruling on the record, the military judge asked the parties if there were any other matters to take up before calling the members for opening statements. At that point, trial counsel told the military judge the Government had just received a copy of the slides that the Defense intended to use in their opening, and said those slides contained

---

<sup>12</sup> Circuit defense counsel did not renew his earlier request to have the Chief Trial Judge called to testify.

“screen shots of things that are not in evidence” such as text messages between [Ms. ES] and Appellant, which trial counsel asserted had not been previously disclosed to the Government. The military judge turned to trial defense counsel and said,

Once again, [five] minutes after the time I told the members to be here that we would get started, I’m dealing with another last minute issue. I’m just—I’m curious defense. What did you think was going to happen when you presented these slides to the [G]overnment this morning? What did you think the outcome would be? . . . What did you think was going to happen? Did you think that we were going to just roll right into the court members or did you think that they might have a concern about some of the content to [sic] this?

Trial defense counsel confirmed the text messages in the slides had been discovered in their expert’s analysis over the weekend of the data the Government had seized from Appellant’s phone, leading the military judge to ask,

Did we or did we not discuss two or three days ago when the court granted your expert to allow you to gain access to that extraction, that there might be some issues with regard to discovery? For example, if you found anything in there that certainly you intended to introduce at trial or use at trial, you had disclosure obligations to the [G]overnment under the discovery rules under [Rule for Courts-Martial (R.C.M.)] 701, right? It’s not a one-way street. It’s not they have to provide you with everything and then you get to come in seven [ ] minutes after we told the members to be here and say, “Here’s some stuff that we found. We’re just going to give it to you now.” Do you understand that?<sup>[13]</sup>

---

<sup>13</sup> During the motions hearing regarding the Defense’s motion to compel expert assistance, circuit trial counsel argued that if the Defense found “something on the phone that they wish to use, that will create additional discovery obligations” which could result in a trial delay. The military judge asked the Defense, “Have you contemplated the implications of what will likely happen through the course of the appointment of an expert[?] You go beyond the scope of what the [G]overnment searched in that extraction, what that means as far as your obligations under discovery and potentially your obligations to provide information to the United States [G]overnment that comes off of your client’s phone?” Trial defense counsel replied, “Absolutely. That has been fully considered.” The military judge then said, “They’re going to want to look as deeply as you want to look. Do you understand that?” Trial defense counsel responded affirmatively.

After more discussion of the matter, the military judge said,

All right. I've heard enough. Government, how much time do you need? I'll give you as much time as you need. I'm not going to operate this trial on the fly and do things because they just keep dropping in my lap. I haven't—I haven't offered recesses yet to deal with these surprise issues but now we're going to start doing it because I'm just not going to deal with these on the fly.

The court reconvened shortly before noon, and the military judge said the Defense had, in fact, complied with their discovery obligations regarding the text messages. However, he concluded the Defense's use of the text messages in the opening slides "would amount to publishing an exhibit to the court members before an evidentiary ruling can be provided," and that he felt it would be "improper" to show the members the messages "without any further instruction as to how the members can consider the specific messages." As a result, trial defense counsel removed the text messages from their slides and did not reference them in the Defense's opening statement.

***c. Mil. R. Evid. 412 Ruling and Opening Statements***

The preceding Friday, the military judge had heard arguments on a defense motion to admit evidence under Mil. R. Evid. 412 related to Ms. KT, and he provided the parties a written ruling on Saturday.<sup>14</sup> One part of this motion was the Defense's request to be able to reference the specific number of times Appellant and Ms. KT allegedly had sex during their relatively short relationship, a number which we need not repeat here. The Defense's theory, as we understand it, was that Appellant and Ms. KT had rapidly escalated the intensity and intimacy of their relationship and were frequently engaged in sexual activity such that Appellant may have had a valid mistake of fact defense as to Ms. KT's consent during the assault. An alternative defense theory was that Ms. KT was unnerved by the speed of the relationship—in which she and Appellant were discussing marriage by their second weekend together—and she falsely claimed she had been assaulted in order to extricate herself from the relationship.<sup>15</sup> Trial counsel specifically objected to the admission of this evidence, arguing that the number of times the two had sex was irrelevant and it

---

<sup>14</sup> The pretrial motions and the transcript of the related hearing were sealed by the military judge. This opinion contains discussion of sealed material only as necessary for our analysis.

<sup>15</sup> This theory also relied on the fact Ms. KT and Appellant bought an emergency contraceptive for Ms. KT to use before she returned home at the end of the second weekend. The Defense sought to characterize this as a "pregnancy scare." Ms. KT described

was being offered simply to paint Ms. KT as being promiscuous.<sup>16</sup> Ms. KT's special victims' counsel said he thought it was "completely fair" for the Defense to "ask if it was multiple times or if it was more than one time," but noted Ms. KT did not agree with the number the Defense proposed.<sup>17</sup> In his written ruling, the military judge ruled that the Defense *could* present evidence regarding the specific number of times the Defense alleged Appellant and Ms. KT had sex because—according to the military judge—there had been no objection from either trial counsel or the special victims' counsel.<sup>18</sup> The military judge ruled the Defense *could not* present evidence either that Appellant and Ms. KT talked about having sex before they met or that they had sexual intercourse just a few hours after they did meet.

The Defense also made a motion to admit evidence under Mil. R. Evid. 412 regarding Ms. ES, Appellant's ex-wife. The military judge's ruling on that motion permitted trial defense counsel to admit evidence that Ms. ES and Appellant had been in a sexual relationship for five years, but prohibited eliciting "testimony regarding the frequency of intercourse or specific sexual acts."

In the Defense's opening statement, trial defense counsel began explaining the origins of Appellant's relationship with Ms. KT, telling the members, "They immediately start moving from [an online dating application] to talking on text message and things ramp up and intensify, intensify considerably very quickly. They get to know each other with a deep, personal, intimate level and no topic

---

it as a precautionary measure following the assault, because Appellant had not worn a condom.

<sup>16</sup> Trial counsel's written response to the Defense's motion was more ambiguous on this point; they wrote: "The Government has no objection to the admission of evidence that [Appellant] and [Ms. KT] had consensual sex before the charged incident. That said, detailed testimony as to the frequency of the pre-assault consensual sex or an implication that it formed the whole basis of the relationship quickly risks running afoul of [Mil. R. Evid.] 412 and [Mil. R. Evid.] 403." The written motion did not address the specific number of times the two had sex that trial defense counsel alleged in their Mil. R. Evid. 412 motion.

<sup>17</sup> However, Ms. KT's special victims' counsel's written response said Ms. KT "does not object" to admission of evidence that she and Appellant had sex the specific number of times alleged by the Defense.

<sup>18</sup> In paragraph 27 of the military judge's ruling, he wrote that "the Defense identified the following matters for admission . . . (e) Between on or about 17 Aug and 27 Aug 2018 [Ms. KT] and [Appellant] had consensual sex approximately [X] times." Immediately following the heading of "Admissible Without Objection," paragraph 28 states the information in paragraph 27(e) is admissible based on the absence of objection from the Government and based on the information being "relevant to the issues of consent or mistake of fact as to consent . . . and may be constitutionally required."

is off conversation.” Trial counsel objected, saying, “[w]e have litigated this issue,” and the military judge sustained the objection, telling the members to disregard trial defense counsel’s “last statement.” Moments later, trial defense counsel told the members about the first weekend Ms. KT spent with Appellant: “They go out on the town, they’re drinking, they go to coffee shops, he shows her Spokane, and they have consensual sex on multiple occasions the first week.” Trial counsel objected again, saying, “We have litigated this issue. Your ruling was clear.” As a result, the military judge excused the members and convened an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session outside their presence. This session was closed to spectators other than the parties, Ms. KT, and Ms. KT’s special victims’ counsel.

In the session, trial counsel re-raised the first objection and said, “I don’t know what exactly the defense counsel was trying to do. If he’s trying to pull something over the [c]ourt; if he’s trying to infer something; if it’s bad faith; or just bad lawyering.” Trial counsel further indicated the Government might need to evaluate whether new members would be required if the Defense “continue[d] to flaunt” the military judge’s ruling. Trial counsel argued that by saying “no topic is off conversation,” the Defense had violated the military judge’s ruling regarding how soon Appellant and Ms. KT first had sex. Regarding the second objection, trial counsel pointed to the military judge’s ruling prohibiting evidence of Appellant’s and Ms. KT’s pre-meeting discussions about having sex.<sup>19</sup> This led the military judge to turn to the Defense and say,

Okay. Defense, so we had pretty extensive motions practice under [Mil. R. Evid.] 412, I’ve given you an 11-page ruling that was pretty detailed—I thought—with regards the left and rights, with regards to what you could and couldn’t get into. I’m being as patient as I can with these types of issues that keep sort of popping up as if there’s no recollection of the discussions that we’ve had in the past on these types of issues.

The military judge next incorrectly asserted the Defense had told the members Appellant and Ms. KT had sex just a few hours after meeting and claimed the Defense had also violated the ruling regarding Appellant and Ms. KT talking about having sex before they had met. He asked trial defense counsel, “Why are you talking about that in light of the [c]ourt’s ruling on [Mil. R. Evid.] 412?” Trial defense counsel denied he made either of those statements and argued the opening statement had been consistent with the military judge’s ruling. The military judge responded,

---

<sup>19</sup> We presume trial counsel unintentionally reversed which part of the military judge’s ruling pertained to which objection.

What are you implying there with regard to “all topics, nothing was off-limits?” Do you mean baseball, weekends in the park? What are you talking about when you say—what’s the implication that you’re trying to lead with the court members when you say, before they met, they talked about all topics. Nothing was off-limits. Because, you know, we are all adults here, right? What was the implication of that? What are you trying to imply?

The Defense explained they were trying to show how quickly the relationship between Appellant and Ms. KT formed, describing that as “an incredibly crucial component to this case.” The military judge said,

I’m just trying to—I don’t want to believe that you’re just being clever and that you’re going to scrape up against the line from an implication standpoint, sort of “wink-wink, nod-nod,[ ] hey members, they talked about everything. All topics were on the table.[”] I’m hoping you’re not doing that. I really want to believe that that’s not what’s going here. [sic] But I share the [G]overnment’s concern because in a matter such as this, when I’ve already ruled on the issue, when counsel sort of try to push the envelope on an issue that I’ve already ruled on to the point where I’m concerned it’s going to leave an impression with the members, that causes me concern because I’ve already ruled on it. And now it’s—I don’t even need his objection because I’ve ruled on something and somebody goes against that ruling, well I kind of wonder what happened to the part where I ruled on it. Do people not care what my rulings are if they’re going to sort of go around them?

The military judge turned to the objection regarding the Defense’s statement that Appellant and Ms. KT had sex on multiple occasions, and he stated on the record that he would take a moment to read his written ruling. The military judge paused and then announced, “Okay, listen. I’m going to overrule the second objection.” This led trial counsel to say that the Government and the Defense seemed to have “a fundamental misunderstanding” about the ruling, and that trial counsel were not asking for the military judge to reconsider his ruling, but that they would like to ask for “additional guidance or a supplemental ruling” regarding sexual conduct between Appellant and Ms. KT. In explaining this “misunderstanding,” trial counsel pointed to the ruling regarding Ms. ES in which the Defense was prohibited from eliciting the “frequency of intercourse” between Ms. ES and Appellant.

The military judge then embarked on a lengthy explanation about how an existing sexual relationship—but not necessarily specific details of the rela-

tionship—is relevant to the issue of mistake of fact as to consent. He acknowledged his ruling did permit the Defense to elicit the number of times Appellant and Ms. KT had sex and then—somewhat mid-stream—he said, “consider this a reconsideration of the ruling to provide a little bit more clarity,” and “[t]o the extent that is in-artfully drafted, consider it artfully drafted at this point forward.” He then said that “no questions, no testimony, no statements regarding frequency or any implication that Ms. [KT] is a promiscuous person sexually” would be permitted. He said that although his ruling had permitted the Defense to elicit the number of times Appellant and Ms. KT had sex, he did not intend to permit an “inference that frequency of sex mattered, if that makes sense.”

Before concluding the Article 39(a), UCMJ, session, the military judge said he was sustaining both of the Government’s objections, in spite of his earlier ruling. However, when the members returned to the courtroom, the military judge neglected to inform them what his ruling was on the second objection.

***d. Examination of Witnesses***

As discussed in greater detail below in Section II.B. of this opinion, *infra*, Ms. KT declined the Defense’s requests for a pretrial interview. As a result, trial defense counsel periodically indicated during trial that they were surprised by portions of her testimony. At one point during her direct examination, trial counsel elicited that the morning after the assault, Appellant attempted to initiate sexual conduct again, and Ms. KT told him “no.” Trial defense counsel objected based on lack of notice and the military judge sustained the objection. Despite having objected to this evidence, circuit defense counsel elicited the exact same evidence during his cross-examination of Ms. KT and obtained her agreement that when she told Appellant “no” on this occasion, Appellant “just respected [her].” After five questions and answers on the topic, trial counsel said, “Your Honor, I understood that the [G]overnment was precluded from asking these questions.” The following colloquy ensued in front of the members:

MJ [military judge]: Yeah, I don’t understand. I sustained an objection, didn’t I?

CDC [circuit defense counsel]: It was very important to the members, Your Honor, so I think—

MJ: No it wasn’t. When I sustain an objection that means it’s not before the members. That means I sustained the objection. It means to disregard the question and the answer. Did I not sustain an objection on that issue?

CDC: You . . . You—I agree. So, Your Honor,—understand. So I’m asking about now as [sic] something I just learned about as

part of my expanded cross and having not had the opportunity to interview this witness.

MJ: Well, this is no surprise because you heard it in the direct examination and then you objected to it and I sustained the objection.

CDC: Yes. So I think it's fair game to talk about it—and this is by which [sic] I discovered it. I'm hearing her say it for the first time. And so had I known about it before certainly would have wanted to ask.

This led the military judge to move the discussion into an Article 39(a), UCMJ, session outside the members' presence at the end of which the military judge called the members back in and told them he had overruled the objection. Trial defense counsel then proceeded to ask Ms. KT about her telling Appellant “no” that morning after the assault and how Appellant respected her wishes.

Appellant contrasts this reaction by the military judge with an objection raised by the Defense during Ms. ES's direct testimony after trial counsel asked her if she had “made any additional allegations against [Appellant] to try to get back at him for some reason.” Ms. ES answered, “No. I have not,” and trial defense counsel objected. In the Article 39(a), UCMJ, session that followed, trial defense counsel reminded the military judge that he had denied the Defense's pretrial motion to be allowed to elicit evidence that Ms. ES *had* accused Appellant of other sexual offenses—most of which the Government had not charged Appellant with. Regarding one offense the Government had charged Appellant with, Ms. ES apparently admitted the sexual conduct in question was, in fact, consensual, and the Government withdrew that specification before trial. Thus, trial defense counsel argued, the Government had violated the ruling—or at least created a situation wherein the only way the Defense could rebut Ms. ES's claim of not making any other allegations was to cross-examine her on matters the military judge had disallowed. After a lengthy discussion, the military judge overruled the Defense's objection and refused the Defense's request for permission to question Ms. ES on the matter.

The military judge explained his ruling on the objection as being for Appellant's benefit, insofar as it would avoid suggesting to the members that Ms. ES had, in fact, made other allegations against Appellant. Turning to trial counsel, the military judge cautioned them to “tread lightly” and to “be more careful than ever that you don't ask certain trigger questions that trigger discussions about things that this [c]ourt's already ruled on. Okay?” When the members returned to the courtroom, the military judge failed to tell them he had overruled the Defense's objection.

Appellant also highlights that, during the Defense’s cross-examination of Ms. KT, the military judge interrupted the questioning when Ms. KT and trial defense counsel began talking over each other. The military judge told trial defense counsel to “stop it,” and that if it happened again he would convene an Article 39(a), UCMJ, session and “do some other remedies.” The military judge then told trial defense counsel, “If you need to count to five—whatever trick you need to do to allow her to finish her answer, do it.”

During the direct examination of another witness, the Government offered as an exhibit one page of phone records, a large portion of which had been redacted. Circuit defense counsel objected, explaining that he wished to have the option to question the witness about some of the obscured calls. After some discussion, the military judge convened an Article 39(a), UCMJ, session. Circuit defense counsel attempted to explain why he thought some of the blacked-out information was relevant, leading the military judge to apologize if it appeared that he was “getting frustrated” because he did not understand the Defense’s argument as to the relevance. The following colloquy then occurred:

MJ: Okay. Do you have a copy of this prepared that’s un-redacted?

CDC: Not prepared because—

MJ: When did you get this?

CDC: I’ve had that for weeks, Your Honor.

MJ: You’ve had that for weeks, and you don’t have a copy that’s un-redacted?

CDC: Not printed with me.

MJ: Did you anticipate an objection when they gave this to you weeks ago and you thought they might use it and you didn’t anticipate an objection weeks ago? You just anticipated it right now?

CDC: I’ve never seen it in that form before right now.

MJ: Hold on, you just told me you had this. Did you have this? I asked you if you had this.

CDC: Oh, no. I’m seeing it for the first time a few minutes ago. Sorry.

MJ: Okay. So you don’t have—you didn’t have the redacted version of this? When did you get the redacted version of this?

CDC: It was as it arrived on my table today.

CTC [circuit trial counsel]: Your Honor—and I’m sorry to interrupt the [D]efense—I will take responsibility for not ensuring that this had been provided to the [D]efense. To the extent that there was a notice issue, I will take responsibility for that, Your Honor.

In the end, the military judge overruled the Defense’s objection, telling trial defense counsel that they could offer their own version of the call log into evidence if they felt such was warranted.

***e. Revisiting the Military Judge’s Mil. R. Evid. 412 Ruling***

Once the Government rested, the military judge convened an Article 39(a), UCMJ, session outside the presence of the members in order to hear several matters the Defense wished to raise, the first of which the Defense asserted was “just in an effort to protect the record for both the [G]overnment and the [D]efense.” Trial defense counsel pointed to trial counsel’s “bad lawyering” comment as accusing the Defense of providing Appellant with ineffective assistance and asked the military judge for “a finding of fact that no such ineffective assistance of counsel happened” based upon the Defense’s adherence to the military judge’s written ruling regarding Ms. KT.

In response, the military judge said he would “state a couple things for the record, sort of unscripted and unprepared kind of off the top of [his] head.” The military judge then described litigation as a “contentious” and “emotional” process in which “things often get heated.” He noted that “[c]ounsel are sometimes more well-behaved than old judges when it comes to keeping their cool” and “that sometimes we all say things or do things that we would like to grab back . . . particularly in the sort of heat of battle for lack of a better phrase.” The military judge said courts and parties “tend to be . . . particularly sensitive” about matters related to Mil. R. Evid. 412 and that he knows “it’s particularly difficult for counsel, [three] or [four] days later in the trial to kind of remember the left and rights of any particular given ruling.”

The military judge conceded his written ruling had contained

at least one finding of fact that made a specific reference to the number of instances. . . . But the [c]ourt recognized that while it wasn’t the intention of the court, one implication might be that that might open the door to issues such as frequency, et cetera, regarding prior sexual behavior, which was specifically not something that the court was permitting to get into based on the state of the law.

. . . .

So certainly once the [c]ourt recognized the inclusion of that particular reference certainly did provide at least some indication that at least discussing frequency or numbers, or however you want to characterize it, was somewhat on the table, I think we went through that, we clarified that, that frequency wasn't on the table, and we moved on from there.

Addressing trial counsel's "bad lawyering" comment, the military judge described it as "a momentary lapse of hyperbole, an emotion based on a contentious issue" and not "a formal allegation against the defense of being ineffective." The military judge went on to say he had not seen anything in the court-martial "remotely close to ineffective assistance," that he had "zero concerns with the quality of the defense services that have been provided to [Appellant]," and that trial defense counsel "very zealously" represented Appellant. He then said, "[S]o that it's clear for the record, regardless of any frustration or intemperate comments that may have come from any source in this courtroom, the court is absolutely convinced that ineffective assistance of counsel is not a concern."

***f. Closing Argument Slides***

Just before giving the Government's closing argument, while the members were present in the courtroom, circuit trial counsel said he would mark a copy of the slides he intended to use as an appellate exhibit, to which circuit defense counsel said, "I have not seen them Your Honor, but if there is a printed copy, I can give it a 30 second flip." The military judge asked trial counsel if they had a copy for the Defense, but trial counsel said they did not. It is unclear from the record what happened next in the courtroom, but circuit defense counsel announced "no objection," and trial counsel proceeded with closing argument.

***g. Motion for Mistrial***

The members announced their verdict in the evening of 29 August 2019. The next morning, the Defense asked the military judge to declare a mistrial under R.C.M. 915. The Defense advanced two grounds: (1) inadequate notice with respect to the specification alleging an attempted sexual assault on Ms. ES (and relatedly, a perceived incongruity between a conviction for that offense and an acquittal for abusive sexual contact arising out of the same conduct), discussed in greater detail in Section II.D., *infra*; and (2) disparate treatment of the parties by the military judge. With respect to the second ground, trial defense counsel asserted there were "countless examples" of such disparate treatment, but they specifically referred to three instances they believed supported their argument: (1) discovery related to opening and closing slides; (2) objections to the Defense's opening statement regarding the military judge's

Mil. R. Evid. 412 ruling; and (3) selective enforcement of the military judge's scheduling order.

As to the Defense's opening-statement slides, trial defense counsel said the military judge had "admonished" the defense team "for ambushing the trial counsel by surprise" and granted "a substantial three to four hour delay" in the court-martial. Conversely, trial defense counsel argued that just before closing argument, "trial counsel in live real time before the members went to start argument and play his PowerPoint slides through the computer without providing any notice to the defense counsel about what was in those slides and . . . what it may have contained." The Defense argued the military judge "did not treat that act in the same way [towards the Government] that the [D]efense absorbed admonishment" with respect to the Defense's opening slides. Responding to this claim, the military judge drew a couple distinctions, noting that the Defense's slides contained matters which "were part of the discovery issue" and that trial defense counsel said they had no objection to the Government's closing slides. The military judge also contended he "didn't admonish anybody in front of the members," although he conceded he "might have given [trial defense counsel] a little bit of a hard time."

Regarding the military judge's Mil. R. Evid. 412 ruling during the Defense's opening statement, trial defense counsel said trial counsel's objections resulted in "a considerable delay within the opening statement." Moreover, trial defense counsel argued, once the military judge realized the Defense had not, in fact, violated his ruling, the military judge still "strictly cautioned defense counsel from using surreptitious language that could connote the underlying prohibited conduct from the [Mil. R. Evid.] 412 ruling." Trial defense counsel then pointed to the re-direct examination of Ms. ES in which trial counsel asked about matters which the military judge had prohibited the parties from raising. Trial defense counsel said the military judge's reaction "was in stark contrast to how it was dealt with just a couple of days earlier."

With respect to the scheduling order, trial defense counsel argued trial counsel filed nearly all of their motions late and submitted their proposed voir dire questions on the first day of trial, none of which gave the military judge "any concern." Yet, when the Defense sought relief from the scheduling order, trial defense counsel claimed the military judge told them to consider the order "as a direct order from the court and from a superior commissioned officer to not violate it."<sup>20</sup> The military judge said the reason he denied the Defense's request was because he did not want to "let one side create a strategic advantage over the other." He continued:

---

<sup>20</sup> We are unable to locate in the record any instance of the military judge saying this.

I mean, if we want to re-litigate that motion then the truth of the matter is what you wanted to do was file a motion late because you mistakenly believed that they would be foreclosed from fixing an offense that failed to state an offense. It didn't[,] but you believed they would be foreclosed from fixing that offense and that you would therefore gain a tactical advantage. . . . I don't know where you all are getting this notion that you're being tactically disadvantaged by filing—by not being allowed to file a motion at the last minute. . . . [T]here's lots of things that didn't happen in this case that were not consistent with my scheduling order from both sides because I didn't enforce it the way I probably should have and maybe I will better in the future. But the denial was not based on preference. It was based on what you wanted to do in your motion. In my firm belief that it was going to be negative towards [Appellant] that he was going to face[—]potentially face a second trial.

Although trial defense counsel did not specifically allege the military judge was biased against the Defense, they did focus their argument on the claimed disparate treatment of the parties. The military judge reframed their argument: “I believe what you're essentially articulating is that the military judge should recuse himself because of bias.” He said the court would recess and gave the Defense an hour to brief the issue in writing, saying, “I think there's factual distinctions between the issues that you raised but in any event I'm not inclined to put myself in a position where I have to constantly defend myself against allegations that I'm biased.” Trial defense counsel subsequently submitted a written motion for a mistrial in which they stated:

In isolation, no decision or ruling by the Court would ever come close to requiring such mistrial, but the pervasive nature of such rulings over a two week litigated trial, in context with the issue put substantial doubt in the eyes of any reviewing authority or member of the public watching this trial.

Citing R.C.M. 915, the Defense further argued that “[s]ubstantial disparate treatment between the parties is evident throughout the entire recording [sic] of trial,” that “no amount of curative instructions could cure the irreparable harm of continued adverse ruling and admonishments to defense counsel in a way that so starkly contrasts how the trial counsel was treated in open court,” and “[t]his suggests bias in a way that for the integrity of the military justice system, this case should be declared a mistrial.”

In his written ruling, the military judge found as an “essential finding[ ] of fact” that he did not take any remedial action against the Government for their late filings “[b]ecause the Defense never raised any objections to the Court's

consideration of the Government [sic] late responses until today nor articulated any prejudice because of the Government's failures." With respect to the text messages the Defense wished to refer to in their opening statement slides, the military judge found as fact that "[n]o negative action was taken by the Court towards the Defense in response to this issue, other than addressing the matter on the record," and that he sustained the Government's objection to the slides "as it amounted to publishing exhibits to the members that were not yet admitted into evidence." The military judge ruled that he "remain[ed] unconvinced that a reasonable person knowing all the circumstances—including the various court rulings in this case that have been favorable to the Defense . . . would harbor doubt as to the Court's impartiality." The judge continued,

[T]his [c]ourt has granted several requests for reconsideration, has allowed for expanded argument on issues raised to include multiple additional argument on the same issue, has not precluded the Defense from raising any matter despite timeliness concerns, and has considered oral motions on potentially case or offense dispositive issues raised without written filings or accompanying legal authority.

He concluded that while some matters "and the manner in which they are raised" may "generate heated discussions," the exchanges in Appellant's trial were not so "extraordinary" that they called for either recusal or a mistrial.

The military judge ruled that the Defense had not "identified any particular ruling that indicated bias on the part of the Court," or shown that trial defense counsel were precluded from presenting any evidence or raising any objections due to timeliness concerns. He also ruled the Defense had not identified any examples of him doing something that could be perceived as assisting the Government "outside of citing anecdotal examples of interactions with counsel that the Defense argues differed in tone between the Defense and the Government, without acknowledging the context surrounding those various interactions." The military judge noted that "at no time during the course of this trial did [he] make any statement expressing concern or frustration with counsel and the manner in which they were presenting their case in front of the court members." He also pointed to his instruction to the members that they were to disregard any comment or expression suggesting his opinion as to Appellant's guilt.

#### ***h. Clemency Submission Addressing Military Judge Bias***

The Defense reiterated its complaint that the military judge demonstrated both implied and actual bias in a clemency submission written by trial defense counsel. In that submission, trial defense counsel contended that when the mil-

itary judge denied the Defense’s motion for recusal, “[t]here was an uncomfortable tension in the air, based on the language, tone, body language, and facial expressions of the military judge. All in the room could observe it. Several in the gallery commented on it after the trial.” Trial defense counsel argued the Defense “lost” nearly every motion submitted to the military judge and “lost objection after objection.” Trial defense counsel also reiterated that the Defense’s argument for recusal was based on public perception of the proceedings, and the argument for mistrial was additionally based on a claim of the military judge’s actual bias against the Defense.

***i. Post-Trial Matters Presented for Our Consideration***

Once this case was docketed with this court, Appellant again asserted the military judge was personally biased against circuit defense counsel. In support of this contention, Appellant moved to attach a portion of a transcript from another court-martial featuring the same military judge and circuit defense counsel in which the military judge, *inter alia*, threatened circuit defense counsel with contempt proceedings for not following the military judge’s directions. Appellant argues we should overlook the fact that the prior proceeding was not raised as evidence of bias at his court-martial under the theory that circuit defense counsel was not responsible for post-trial processing in the prior case, and—as a result—circuit defense counsel “would not have [had] access” to the transcript of the prior case.

**2. Law**

***a. Recusal of a Military Judge***

“An accused has a constitutional right to an impartial judge.” *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (first citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); and then citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). The validity of the court-martial system “depends on the impartiality of military judges in fact and in appearance.” *Hasan v. Gross*, 71 M.J. 416, 419 (C.A.A.F. 2012). Under R.C.M. 902(a), “a military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.” Moreover, a military judge is required to disqualify himself or herself if “the military judge has a personal bias or prejudice concerning a party.” R.C.M. 902(b)(1). Military judges “should broadly construe grounds for challenge but should not step down from a case unnecessarily.” R.C.M. 902(d)(1), Discussion. A motion to disqualify a military judge “may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.” *Id.*

When considering a challenge based on the appearance of bias under R.C.M. 902(a), we review the matter under an objective standard, “asking

whether a reasonable person knowing all the circumstances would conclude that the military judge’s impartiality might reasonably be questioned.” *United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015) (citing *Hasan*, 71 M.J. at 418). Once a military judge’s impartiality is challenged, we ask whether the “court-martial’s legality, fairness, and impartiality were put into doubt by the military judge’s actions,” taking the trial as a whole. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007) (quoting *United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001)). Recusal in such cases “is intended to ‘promote public confidence in the integrity of the judicial process.’” *Hasan*, 71 M.J. at 418 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)).

We recognize “a strong presumption that a judge is impartial,” as well as the premise that “a party seeking to demonstrate bias must overcome a high hurdle.” *Quintanilla*, 56 M.J. at 44 (citation omitted). When a military judge disclaims partiality, such a disclaimer “carries great weight.” *United States v. Harvey*, 67 M.J. 758, 764 (A.F. Ct. Crim. App. 2009) (citing *Foster*, 64 M.J. at 333) (additional citations omitted). Rulings and comments made by a judge “do not constitute bias or partiality, ‘unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.’” *Quintanilla*, 56 M.J. at 44 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

We review a military judge’s decision on a recusal motion for abuse of discretion. *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citation omitted).<sup>21</sup> Such a decision amounts to an abuse of discretion “if it is ‘arbitrary, fanciful, clearly unreasonable or clearly erroneous,’ not if [the reviewing court] merely would reach a different conclusion.” *Sullivan*, 74 M.J. at 453 (quoting *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013)).

If we conclude a military judge has abused his or her discretion in denying a recusal motion, we determine whether to reverse a conviction by reviewing the factors established by the Supreme Court in *Liljeberg*. *United States v. Uribe*, 80 M.J. 442, 449 (C.A.A.F. 2021) (citing *United States v. Martinez*, 70 M.J. 154, 159 (C.A.A.F. 2011)). These factors are: (1) what injustice was personally suffered by the appellant; (2) whether granting relief would foster more careful examination of possible disqualification grounds and their prompt disclosure; and (3) whether the circumstances of the case at hand would “risk undermining the public’s confidence in the military justice system” when viewed through an objective lens. *Id.* (quoting *Martinez*, 70 M.J. at 159).

---

<sup>21</sup> Our superior court, the United States Court of Appeals for the Armed Forces, has specifically rejected the de novo standard for judicial recusal decisions. *United States v. Butcher*, 56 M.J. 87, 90–91 (C.A.A.F. 2001).

***b. Consideration of Matters Outside the Record***

In conducting a review under Article 66, UCMJ, 10 U.S.C. § 866, military Courts of Criminal Appeals are generally limited to considering the “entire record,” which includes the record of trial, allied papers, and briefs and arguments presented by appellate counsel addressing matters found in either the record of trial or allied papers. *United States v. Jessie*, 79 M.J. 437, 440–41 (C.A.A.F. 2020). One exception to this rule covers matters submitted for the first time on appeal regarding issues “raised by materials in the record but not fully resolvable by those materials.” *Id.* at 445.

**3. Analysis**

***a. Post-Trial Matters Presented for Our Consideration***

We begin our analysis by declining to consider the portion of the earlier trial’s transcript submitted by Appellant as evidence of a claimed bias of the military judge against circuit defense counsel. Appellant’s defense team thoroughly litigated the issue of the military judge’s participation in Appellant’s court-martial from their pretrial recusal motion through their post-findings mistrial motion and clemency submission. In the Defense’s initial recusal motion, trial defense counsel focused solely on the appearance of bias, specifically stating, “there appears to be no actual bias in this case.” By the time of the mistrial motion, trial defense counsel had broadened their argument to include actual bias against the Defense, but even then, the claimed bias was towards the Defense generally, not against circuit defense counsel himself.

We also find unavailing Appellant’s claim on appeal that circuit defense counsel did not raise personal bias—as supported by portions of a transcript from proceedings in the prior court-martial—because this counsel was not responsible for handling Appellant’s representation for that court-martial’s post-trial processing. Whether or not circuit defense counsel possessed his own copy of the transcript from those earlier proceedings, he was indisputably present at those proceedings and therefore had personal knowledge of his interactions with the military judge. We see nothing in the record indicating circuit defense counsel intended to make a claim of personal bias, much less that he did not raise the matter because he had tried to obtain and was somehow denied access to a copy of the earlier proceedings. Given his statement disavowing any actual bias on the military judge’s part, we think the more correct assessment is that circuit defense counsel chose not to claim the military judge was personally biased against him, and—by extension—elected not to support such a claim with evidence derived from other courts-martial.

We acknowledge the matter of the appearance of the military judge’s fairness was called into question by the Defense, but that argument was never premised on the military judge’s interaction with circuit defense counsel in

other cases. Appellant may not raise this new theory for the first time on appeal. *See, e.g., United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (noting that appellate review of a motion is limited to the motion submitted to military judge at trial, not the motion which appellate counsel wished had been submitted).<sup>22</sup> By disavowing the claim of personal bias at trial, we conclude Appellant not only failed to raise this argument, but that he has waived it for purposes of appellate review. Although we have authority under Article 66, UCMJ, 10 U.S.C. § 866, to pierce an appellant’s trial waiver in order to correct a legal error, we decline to do so here. *See United States v. Hardy*, 77 M.J. 438, 443 (C.A.A.F. 2018). In any event, the fact this matter was not raised in the record means Appellant may not now supplement the record with transcript excerpts from unrelated proceedings under *Jessie*.

***b. Recusal***

On appeal, Appellant argues the military judge should have recused himself due to “actual bias and/or appearance of partiality” in order to “ensure public confidence in the judicial process.” While many aspects of the interaction between the military judge and trial defense counsel may be subject to valid criticism, we conclude the record does not support a conclusion the military judge abused his discretion in not recusing himself.

In their original recusal motion, trial defense counsel essentially disclaimed any actual bias on the military judge’s part. That, as explained above, changed by the time the Defense moved for a mistrial, and Appellant’s actual-bias argument is not entirely without basis. The record contains several instances where the military judge was squarely confrontational with trial defense counsel. One example was when the military judge admonished the Defense for disclosing text messages Monday morning that they discovered over the weekend—when the military judge had only granted the Defense’s request for expert assistance to look for the messages the preceding Friday. The military judge’s language speaks to his frustration, as he chastised the Defense for “another last minute issue,” asking them “[d]id we or did we not discuss” the matter and “[w]hat did you think was going to happen?” while complaining that issues “keep dropping in my lap.”

The military judge was also quick to lecture the Defense about following his rulings, asking rhetorically at one point, “Do people not care what my rulings are if they’re going to sort of go around them?” This question, of course,

---

<sup>22</sup> Having carefully reviewed the record in this case, we see no indication the theory Appellant now seeks to advance on appeal was apparent from the claims he made at trial. *See United States v. Toy*, 65 M.J. 405, 409 (C.A.A.F. 2008) (concluding an alleged error—while not raised at trial—was “apparent from the context” of an issue that was raised, and was therefore arguably preserved for appeal).

came in the middle of a longer critique of the Defense which had been initially spurred by the military judge's erroneous recollection of his own written Mil. R. Evid. 412 ruling. Rather than admit his error, the military judge suggested the ruling was just "inartfully drafted," *sua sponte* reconsidered the ruling "to provide a little bit more clarity," and sustained two of the Government's objections to the Defense's opening statement—even though that opening statement fell within the bounds of the military judge's original ruling. In the midst of Ms. KT's cross-examination, the military judge lectured the Defense on the meaning of an objection being sustained and asked, "Did I not sustain an objection on that issue?" Yet, once an Article 39(a), UCMJ, session was convened and emotions seemed to have calmed, the military judge ruled in the Defense's favor. During another Article 39(a), UCMJ, session, however, the military judge essentially cross-examined trial defense counsel about why they did not have an unredacted copy of phone records on hand—an interrogation that only ended when trial counsel interjected and told the military judge they were to blame for not having earlier provided the Defense with the document trial counsel wished to admit.

Government counsel, on the other hand, largely escaped unscathed. For example, when trial counsel suggested trial defense counsel had engaged in "bad lawyering"—a comment flowing from trial counsel's incorrect recollection of the military judge's written Mil. R. Evid. 412 ruling—the military judge charitably referred to the comment as "a momentary lapse of hyperbole, an emotion based on a contentious issue." When trial counsel defied the military judge's ruling prohibiting evidence of Ms. ES's prior allegations of sexual assault, the military judge not only allowed Ms. ES's arguably false answer to stand, but he simply told trial counsel to "tread lightly" and "be more careful than ever."

We are nonetheless mindful that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. The question is whether those remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* We find the matter of the training workshop telling in this case. The military judge's lengthy and sharp on-the-record critique of circuit defense counsel, punctuated by invocations of questionable—if not entirely inapplicable—legal standards, seems far out of proportion to the scale of the perceived "misstep" at issue. When the Defense re-raised the matter, the military judge conceded he might have been "a little bit fired up" and "hypersensitive" about the events at the workshop. This paints a picture not of a military judge who harbored a bias against the Defense, but instead of one who was acting somewhat impulsively on occasion rather than in the calm, temperate manner judges aspire to. Based upon our review of the record, we see scant support for the claim that

the military judge was actually biased against the Defense, and we will not conclude the military judge erred in not recusing himself on that ground.

The closer question is whether or not there was an appearance of bias—that is, whether the military judge’s impartiality might reasonably be questioned. In his ruling on the mistrial motion, the military judge claimed he had not made any statement expressing concern or frustration with counsel nor had he admonished them in front of the court members. Even if this statement were accurate, this is not the standard for determining a judge’s impartiality. The correct standard is “whether a reasonable person *knowing all the circumstances*” would question the military judge’s impartiality. *Sullivan*, 74 M.J. at 453 (emphasis added). Thus, we consider the military judge’s words and actions regardless of whether they occurred before the court members or even in the courtroom at all. This is so because the appearance of fairness is tied to the public’s confidence in our judicial system, a concern that reaches far beyond the deliberation room in Appellant’s court-martial.

Considering all the circumstances present in this case, we conclude the military judge did not abuse his discretion in not recusing himself, even under an “appearance of bias” standard. We arrive at this conclusion based on the fact that, notwithstanding caustic comments directed at trial defense counsel, the military judge’s conduct raised more questions about his patience than his partiality. For example, the military judge seemingly assumed the worst with respect to the events of the workshop and decided to suggest on the record that the circuit defense counsel had committed professional misconduct, rather than discuss the matter in an off-the-record R.C.M. 802 conference and provide more tailored commentary in open court. However, once the Defense re-raised the issue with the military judge, his demeanor changed, and he admitted he had perhaps been “hypersensitive” about the matter. Similarly, when trial counsel objected during the Defense’s opening statement, the military judge initially insinuated that trial defense counsel had intentionally flouted his ruling. When he revisited the matter, the military judge commended trial defense counsel for “very zealously” representing Appellant. That being said, the military judge also minimized trial counsel’s “bad lawyering” comment as “a momentary lapse of hyperbole,” when it was trial counsel’s misreading of the military judge’s written ruling and ensuing objection that gave rise to the lengthy excusal of the members in the middle of the Defense’s opening statement in the first place.

Other aspects of the military judge’s treatment of the Defense do give us pause. For example, the military judge’s summary conclusion that trial defense counsel were prohibited from showing text messages to the members during the Defense’s opening statement was seemingly untethered to the basis of the Government’s objection, even if within the military judge’s discretion. Notably,

the exchange over this issue—in which the military judge complained of “another last minute issue”—occurred just after the military judge issued his ruling on the Defense’s motion for his recusal. Later, when the Government elicited Ms. ES’s arguably false claim that she had not made any other allegations against Appellant—a matter which was the subject of a pretrial ruling adverse to the Defense—the military judge not only did not rebuke trial counsel, but he prohibited the Defense from challenging Ms. ES on that point. The military judge said he based this conclusion on his view that such a challenge would work to Appellant’s disadvantage. While one could chalk these instances up to debatable decisions, one could also legitimately ask whether a reasonable person might conclude the military judge’s impartiality could be questioned.

Contrary to Appellant’s argument, we do not place much stock in certain events he points to on appeal, such as the Defense’s last-minute review of the Government’s closing-argument slides. From our review of the record, trial defense counsel offered to quickly review the slides on the spot, and they did so. The Defense did not object or ask for an Article 39(a), UCMJ, session or seek any other remedy, so we see nothing that would illuminate our analysis of the military judge’s decision not to recuse himself. Similarly, the alleged “selective enforcement” of the scheduling order is insufficiently supported by the record before us. To the extent Appellant is trying to point to the Defense’s request to file their failure to state an offense motion only after trial commenced, we conclude the military judge was on firm legal footing and well within his discretion in denying that request.

While we may see indications of an annoyed or brusque military judge, we see less to support the notion of actual deep-seated antagonism towards the Defense. Reasonable observers could question whether this court-martial was carried out in an exemplary fashion, but we conclude that—on balance—the military judge’s conduct would not give rise to a reasonable person concluding his impartiality might reasonably be questioned. His conduct did not rise to the level that would undermine the court-martial’s legality and fairness, and we therefore decline to find the military judge abused his discretion in not recusing himself.

Even if we had concluded the military judge should have recused himself from Appellant’s court-martial, we would not grant Appellant relief based upon our analysis of the *Liljeberg* factors. First, Appellant points to only a few examples of injustice he personally suffered. Trial defense counsel were denied the ability to display text messages to the members during their opening statement, even after satisfying their discovery obligations. The Defense’s opening statement was also derailed for a period of time based upon trial counsel’s objection and the subsequent confusion over and discussion about the military judge’s written ruling. Beyond these examples, however, Appellant argues less

that he was personally prejudiced by adverse rulings and more that his trial might seem unfair to an outside observer. We may not endorse the tone of the entire court-martial, but even caustic comments towards counsel are qualitatively different from incorrect adverse rulings with prejudicial impacts. Our review of the record reveals comparatively few instances of the latter and no indication that the errors we do find were the result of this particular military judge's service on Appellant's court-martial.

Regarding the second *Liljeberg* factor, we see little indication that granting relief in this case would result in other military judges more carefully examining their own possible grounds for disqualification. We make this assessment based upon the fact that if the military judge here should have recused himself, he should have done so under an appearance of bias standard. Given the highly context-specific analysis that standard calls for, we are unconvinced that granting relief under the unique facts presented here would provide other judges with much useful guidance for assessing their own conduct in other cases. Instead, we believe military judges will be mindful of our above analysis and be vigilant for the appearance of bias even in the absence of Appellant being granted relief.

Finally, under the third *Liljeberg* factor, we see little risk of undermining the public's confidence in the military justice system for many of the same reasons we determine that a reasonable person is not likely to conclude the military judge's impartiality might reasonably be questioned. We think that while the public may rightfully have high expectations for the military justice system, the public must also recognize that it is an adversarial system comprised of imperfect human beings—one in which counsel and military judges will invariably debate and disagree with each other. Demonstrations of impatience or criticism by the military judge in this case are simply inadequate to give rise to an objective risk of undermining the public's confidence in the overall justice system.

## **B. Ms. KT's Refusal to Disclose Contact Information**

On appeal, Appellant argues the military judge abused his discretion by permitting Ms. KT to testify without first compelling her to either provide contact information for her mother or, alternatively, answer questions in support of the Defense's motion to compel her mother's production.

### **1. Additional Background**

One of the Defense's theories was that Ms. KT only alleged she had been sexually assaulted after she talked to her mother. Specifically, the Defense alleged that Ms. KT spent the weekend as well as the morning and early afternoon of Monday, 27 August 2018, with Appellant before driving back home. Over the course of several hours, Ms. KT continued to exchange affectionate

text messages with Appellant and discussed her plan to spend time with Appellant the upcoming weekend. That night, Ms. KT texted Appellant—apparently in response to an incoming phone call from him—stating that she was talking to her mother. The following morning, Ms. KT texted Appellant that she “just need[ed] time.” About three hours later, she texted him that she felt “super disrespected.” This led to a response from Appellant in which he said, *inter alia*, “I got carried away and I’m so sorry for what happened. . . . I regret everything. This is the biggest mistake I’ve ever made. . . . It’ll take time to heal and I know that. I don’t expect you to be over this right now.” Over the following days, Ms. KT expressed her frustration with Appellant and the impact his actions had on her, while Appellant made significant additional admissions about the assault.

The Defense postulated that it was after Ms. KT’s Monday-night conversation with her mother that Ms. KT’s attitude towards Appellant shifted dramatically. Ms. KT, however, refused to be interviewed by trial defense counsel prior to trial. The Defense requested Ms. KT’s mother’s contact information in discovery, but trial counsel maintained they did not have it. Upon receiving the Defense’s request, the Government sought the contact information from Ms. KT, but Ms. KT—through her special victims’ counsel—declined to provide it. Government agents attempted to assist the Defense in this endeavor by providing possible phone numbers for Ms. KT’s mother, but none of the numbers was valid. As a result, the Defense had little else other than the text message to confirm or refute their understanding of when Ms. KT spoke with her mother.

On 21 August 2018—the day before the motions hearing began—the Defense made a motion to compel the production of Ms. KT’s mother via subpoena and to abate of the proceedings until Ms. KT agreed to interview with the Defense.<sup>23</sup> During the hearing on this motion, trial defense counsel indicated they wished to call Ms. KT to testify. Circuit trial defense counsel also said he did not intend “to call her to interview her,” and that perhaps the military judge would “accept the proffer from her counsel that she won’t talk to [the Defense].” He continued: “So I don’t know if the [c]ourt needs to hear from her saying she won’t talk to me, but we have an issue in which—there some [sic] evidence in conversation with her mother happens [sic] both very approximate [sic] in time to the charged event.” After some discussion, the following colloquy occurred:

MJ: All right. But you don’t actually know what, if anything, she discussed with her mother?

---

<sup>23</sup> Nothing in the record indicates that the Defense requested the Government produce Ms. KT’s mother for trial prior to making this motion.

CDC: I don't. I haven't spoken with mother and I haven't spoken with [Ms. KT].

MJ: And so you want to call [Ms. KT] to find out what she talked about with her mother?

CDC: Yes.

MJ: And if she says on the stand, I never talked to my mother that night. I was lying to him.

CDC: Yes. And instead we have an impeachable statement, but it doesn't help me with producing the mother. You're right.

MJ: Sure. And it doesn't help—I'm not here to help build impeachable statements either. I mean, if we don't know what she's going to say, then we don't know if she's going to be helpful to me in the analysis of whether or not you've met your burden of production of mother. That's really what it's all about. But you haven't—I understand you haven't spoken to [Ms. KT] and that's another discussion. But I understand that you want to talk to someone to find out what that conversation was with mom but you have no idea what they are [sic] she talked about.

CDC: Well—

MJ: You're speculating that there was discussion post-alleged assault that then led to [Ms. KT] taking some certain action—breaking up with the accused, et cetera—and you believe that mother may have said something to [Ms. KT] that caused her to suddenly change her attitude towards the accused, but you don't know that for sure.

CDC: I have—well, I don't know for sure, but I have a very good faith basis to believe it because [Ms. KT's father] says, mom called me and told me that [Ms. KT]—something happened to her, and that's why you need to call her.

MJ: So the father said that the mother called him and said call her because she just told me something happened.

CDC: Yes, Your Honor. So that's my good faith basis, not just that this content was discussed but when it was discussed, because of where [Ms. KT's father]—what he says about the conversation and when he places it.

MJ: Okay. And you're being told that the contact information is—the family is not willing to provide you with the contact information?

CDC: Yes, Your Honor. . . .

. . . .

MJ: Okay. So the relevance is essentially—the defense theory is that it’s potential impeachment evidence. That’s the relevance of [Ms. KT’s] mother because there’s at least some indication that the alleged victim was in a certain positive frame of mind—however you want to characterize it—with the accused. Post-offense, she spoke to her mother then immediately thereafter, things turned. And the theory being is that something that mom said to her or implied to her caused her to change and then ultimately report an offense?

CDC: Yes, sir.

Before moving on to the next motion, the military judge asked, “Anything further on [Ms. KT’s] mother?” Trial defense counsel answered, “In terms of argument or evidence, Your Honor?” The military judge replied,

Just argument. I mean I think I’ve got the gist of the relevance. I think you do have a bit of a problem in that you don’t know what she’s going to say. So relevance, in the traditional sense, I’m not sure 100 percent that you’ve established relevance because you don’t know what she’s going to say. I get that that’s not your fault, but ultimately it is [a] factor to consider in the analysis. But I do believe you’ve raised a valid theory as to why she might be relevant on the issue of motive, bias, impeachment, et cetera. So I’ll consider all that, but ultimately I see this as a witness production issue [ ] so I’ll analyze that through that particular lens.

Although the Defense conceded the military judge had no authority to compel Ms. KT to submit to a pretrial interview, trial defense counsel argued the proceedings should be abated until Ms. KT agreed to a defense interview due, in part, to the fact Ms. KT had been interviewed by trial counsel. The military judge declined to abate the proceedings on this ground, finding there was no indication the Government had done anything to impede the Defense’s access to Ms. KT. The military judge did direct trial counsel to continue to encourage Ms. KT to interview with the Defense, and he said he would consider such remedies as allowing the Defense some period of time after her direct testimony to prepare for cross-examination as well as greater latitude in that cross-examination.

The military judge further ruled he would not order the production of Ms. KT’s mother, whom he treated as an unavailable witness. He invoked the standard for production of an unavailable witness under R.C.M. 703(b)(3),

which relates to witnesses deemed unavailable under the meaning of Mil. R. Evid. 804(a). Under this standard, a military judge shall grant relief when the testimony of an unavailable witness “is of such central importance to an issue that it is essential to a fair trial, and . . . there is no adequate substitute for such testimony.” R.C.M. 703(b)(3). The military judge said Ms. KT’s mother’s testimony was “being raised under an impeachment theory, and only to the extent that it would provide [Ms. KT] with a motive to fabricate or be some evidence of bias.” He concluded the Defense had not met the R.C.M. 703(b)(3) “central importance” standard, “even assuming [Ms. KT] did discuss the alleged assault with her mother and then changed her tone towards [Appellant] after that conversation.” He based this conclusion on the fact that in the text messages, Appellant was “apologizing for his conduct in a manner that could constitute consciousness of guilt;” that Ms. KT’s mother’s testimony would only be relevant for impeachment if Ms. KT denied speaking to her mother; and that Ms. KT’s mother’s testimony was unnecessary to establish motive or bias, because the Defense already had the text message. The military judge explained: “The timing of the text message reference to a conversation with her mother provides the [D]efense with the opportunity to explore this issue on cross-examination . . . to demonstrate on the part of [Ms. KT] a possible bias or motive to fabricate.” The military judge also concluded the Defense had failed to meet their burden “to provide the witness[']s name, contact information and a synopsis of her expected testimony” under R.C.M. 703(c)(2)(B)(i).<sup>24</sup>

Just before opening statements, the military judge returned to the issue of Ms. KT refusing to interview with the Defense and asked trial defense counsel for their “proposed remedies.” The Defense suggested a recess for Ms. KT to reconsider submitting to an interview; that the military judge personally encourage her to be interviewed; being afforded “expanded cross,” to include asking Ms. KT about her refusal to interview with the Defense and her “refusal to provide access to other witnesses in this case to include her mother;” and the military judge giving an instruction to the members on the matter.<sup>25</sup> The military judge said he would permit “a reasonable inquiry on cross examination into the fact that [Ms. KT] declined to submit to a pretrial interview and that she did not wish for her mother to meet with [the D]efense for an interview.” He further said he would entertain a request for a 30-minute recess after Ms.

---

<sup>24</sup> The military judge further said: “Defense has provided no legal authority, nor could the court find any legal authority to support the proposition that the [D]efense is entitled to the relief requested when they are unable to discover through their own reasonable efforts information sufficient to meet their burden under [R.C.M.] 703 when there is no evidence of government interference.”

<sup>25</sup> The Defense indicated a draft instruction would be prepared at a later point in time.

KT's direct testimony to permit the Defense to prepare for her cross-examination.

In the Defense's opening statement, trial defense counsel told the members the events regarding Ms. KT "turn[ed] from a misunderstanding to a criminal investigation" once Ms. KT talked to her mother after she returned home from visiting Appellant. Trial defense counsel said that it was after the call when "the tone changes" and "[i]t's no longer a mistake. Now it's an accusation." He told the members they would not be hearing from Ms. KT's mother.

When Ms. KT took the stand, her testimony ran counter to the Defense's theory about the timing of her call with her mother. Ms. KT testified on direct that she first talked to her mother and disclosed the assault as she drove home from Appellant's house and not at some later point, as the Defense had posited during their opening statement. On cross-examination, Ms. KT further testified she had lied to Appellant when she texted him that she was talking to her mother, and she was actually talking to a friend of hers at the time. She explained she felt Appellant was less likely to question her choosing to talk to her mother instead of him, versus than if she was merely talking to a friend. Ms. KT also conceded she hid her mother's contact information from the Defense and asked her father to do the same. Trial defense counsel did not ask Ms. KT to provide that contact information while she was on the stand, nor did they ask the military judge to direct Ms. KT to disclose it.

After the Government rested, the Defense moved to strike Ms. KT's testimony or, alternatively, to dismiss the specification alleging Appellant had sexually assaulted her. The Defense said their alternate request was rooted in an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Defense accused the Government of not revealing that Ms. KT had lied to Appellant in her text message when she said she was talking to her mother. The Defense also argued that even if the Government was unaware Ms. KT had lied to Appellant about whom she was talking to, the Defense was blindsided by this testimony, resulting in undue prejudice to Appellant because the theory the Defense advanced to the members in the opening statement had been squarely undermined. The Defense also suggested Ms. KT had been able to modify her testimony after hearing the Defense explain their theory during the motions hearing.

In discussing the matter with the military judge, trial defense counsel conceded they did not know whether or not trial counsel were aware that Ms. KT was not actually talking to her mother when she texted Appellant that she was. Trial counsel said they did not recall asking Ms. KT about the text message and were "not tracking that [they] even talked with her about that message, let alone knew that there was some dishonesty there." The military judge found there had been no violation of *Brady*, saying, "I don't believe the

[G]overnment specifically knew that the witness was going to say that[,] she may have just never been asked by anyone,” and that there was no evidence the Government withheld or failed to turn over any evidence.

The military judge reminded the Defense that he had no authority to compel Ms. KT to submit to a pretrial interview and that Appellant’s constitutional confrontation rights were satisfied by virtue of Ms. KT testifying. He then said that the Defense had approached their opening statement “with eyes wide open”—that is, they knew they had not been able to interview Ms. KT or her mother to confirm the two of them actually had a conversation at the time the Defense believed they had. Although the military judge said he recognized Ms. KT had undermined the Defense’s theory, such did not warrant striking her testimony—especially in light of the fact he had granted trial defense counsel additional time after the direct examination to prepare their cross-examination.

In the Defense’s closing argument, trial defense counsel told the members:

Reasons for reporting. We hear for the first time, she talked to her mom on the way home . . . she was trying to figure out what to do . . . . And she talks to her dad and there is an important intervening step that I hope you picked up her dad does not hear what happens. Dad gets a text from a mysterious, unheard from mother. And what it says is you need to talk to your daughter. And so this first version what happens, this first version of what she says, he never got to hear. The Government did not present it to you.

At this point, trial counsel said, “Objection, Your Honor, it is improper argument.” The military judge sustained the objection and told the members to recall his instruction that they “are to consider the evidence that is properly before [them] when considering whether or not the Government has met their burden in this case.” Trial defense counsel then continued, “And what you heard from [Ms. KT] is that she hid her. Among other things hid in this investigation, she hid her.”

## **2. Law**

### ***a. Discovery***

Under Article 46(a), UCMJ, “the trial counsel, the defense counsel, and the court-marital shall have equal opportunity to obtain witnesses and other evidence” pursuant to rules prescribed by the President. 10 U.S.C. § 846(a). One of those rules, R.C.M. 701(e), provides that each party shall have “equal opportunity to interview witnesses.” Even in the absence of a defense request, trial counsel must disclose “the existence of evidence known to trial counsel” which tends to be exculpatory, be evidence in mitigation or extenuation, or

“[a]dversely affect the credibility of any prosecution witness or evidence.” R.C.M. 701(a)(6). Trial counsel has the “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. “Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the [G]overnment’s case.” *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (citations omitted). Impeachment evidence “may make the difference between conviction and acquittal.” *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 470 (2009)).

#### ***b. Production***

An accused has the due process right under the Sixth Amendment<sup>26</sup> to compulsory process to obtain and present witnesses to establish a defense. *Washington v. Texas*, 388 U.S. 14, 18–19 (1967). Under the rules promulgated by the President, “[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.C.M. 703(b)(1). This includes “the benefit of compulsory process.” R.C.M. 703(a). An accused’s right to compel the production of witnesses for trial is not unfettered; rather, the right is tied to “consideration of relevancy and materiality of the expected testimony.” *United States v. Carpenter*, 1 M.J. 384, 385 (C.M.A. 1976) (citations omitted).

Under R.C.M. 703(c)(2)(A) and (B), the Defense is required to submit a written request for the production of witnesses to trial counsel, and that request “shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence” along with “a synopsis of the expected testimony sufficient to show its relevance and necessity.” Trial counsel then arranges for the production of such witnesses unless trial counsel contends production is not required—a contention the defense may challenge before a military judge. R.C.M. 703(c)(2)(D).

If the military judge grants a defense motion to produce a witness, trial counsel shall produce the witness. *Id.* The presence of civilian witnesses may be obtained by subpoena issued by trial counsel. R.C.M. 703(g)(3). When a subpoenaed witness neglects or refuses to appear, the military judge may issue a

---

<sup>26</sup> U.S. CONST. amend. VI.

warrant of attachment to compel that witness's attendance at a court-martial. R.C.M. 703(g)(3)(H).

In the event a witness is deemed "unavailable," the standard for relief is not simply that the witness's testimony is relevant and necessary, but that it "is of such central importance to an issue that it is essential to a fair trial, and . . . there is no adequate substitute for such testimony." R.C.M. 703(b)(3). The term "unavailable" is given the meaning found in Mil. R. Evid. 804(a). Under that rule, a witness is unavailable if he or she "is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure" the witness's attendance. Mil. R. Evid. 804(a)(5). Upon a showing that a witness both meets the "central importance" standard and is unavailable, "the military judge shall grant a continuance or other relief in order to attempt to secure the witness[s] presence or shall abate the proceedings . . . ." R.C.M. 703(b)(3). Unavailability is determined by asking "whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness." *United States v. Cabrera-Fratini*, 65 M.J. 241, 245 (C.A.A.F. 2007) (quoting *United States v. Cokeley*, 22 M.J. 225, 228 (C.M.A. 1986)). Government effort to produce a witness is a prerequisite to finding a witness to be unavailable. *Id.* (citing *Barber v. Page*, 390 U.S. 719, 724–25 (1968)).

We review a military judge's rulings on discovery and production matters, as well as a military judge's selection of remedies for violations, for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citations omitted) (reviewing military judge's ruling finding discovery violations); *United States v. Breeding*, 44 M.J. 345, 349 (C.A.A.F. 1996) (citation omitted) (reviewing military judge's denial of request for production of witnesses); *Cokeley*, 22 M.J. at 229 (citation omitted) (reviewing military judge's determination of witness availability). "The abuse of discretion standard calls for more than a mere difference of opinion." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (internal quotation marks and citation omitted). An abuse of discretion only occurs "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).

A military judge's denial of a witness request will not amount to an abuse of discretion unless we have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993) (internal quotation marks and citations omitted). In the context of witness-production issues, the factors to be considered in determining whether a

witness is necessary include: “the issues involved in the case and the importance of the requested witness to those issues; . . . whether the witness’s testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness.” *United States v. McElhane*y, 54 M.J. 120, 127 (C.A.A.F. 2002) (citations omitted). The timeliness of the defense’s request may also be considered. *Id.* (citations omitted).

If an appellant is entitled to the production of a witness, the erroneous denial of such production will not require relief if we are convinced the error was harmless beyond a reasonable doubt. *United States v. Shelton*, 62 M.J. 1, 3 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998)).

### **3. Analysis**

#### ***a. Compelling Ms. KT to Answer Questions***

The thrust of Appellant’s argument on appeal is that Ms. KT improperly withheld her mother’s contact information from the Defense and that the military judge erred in allowing her to testify without first disclosing that information. Appellant also argues that although Ms. KT was not a party to the court-martial, she “should be viewed as a party, or at the very least, a quasi-party, to the proceeding” based upon the rights afforded to crime victims—and she was therefore bound by discovery rules.

Analysis of Appellant’s allegation of error is complicated by the fact that Appellant does not precisely identify what the error was or who committed it. In his pleadings before this court, Appellant framed this assignment of error as the military judge erring by “failing to compel [Ms. KT] to answer relevant questions to remedy her obstruction of access to witnesses and evidence.” Yet, at no point during Appellant’s court-martial did the Defense ask the military judge to compel Ms. KT to answer any particular questions. When Ms. KT testified during the trial, she admitted she had withheld information from the Defense and that she had urged her father to do the same. But Ms. KT did not refuse to answer any questions put to her, nor did the Defense ask the military judge to compel her to answer any.

During the earlier motions hearing, the Defense sought two forms of relief regarding Ms. KT via written motion: (1) to abate the proceedings on the specification related to Ms. KT until Ms. KT agreed to be interviewed by the Defense, and (2) to order the Government to subpoena Ms. KT’s mother for trial. As to the first form of relief, the Defense’s argument was that Ms. KT had agreed to be interviewed by the Government while declining to be interviewed by the Defense, thereby depriving the Defense of the equal opportunity to interview witnesses. Despite conceding the military judge had no authority to

compel such an interview, the Defense asked him to abate the proceedings until she submitted to an interview. The motion did not, however, seek to require Ms. KT to divulge her mother's contact information or any other particular matter, nor did it indicate any particular topics the Defense wished to ask Ms. KT about in the interview.

With respect to the production of Ms. KT's mother, trial defense counsel asked to call Ms. KT to testify on the motion so that they could ask her about the substance of her phone call with her mother. Trial defense counsel did not, however, specifically indicate what information they intended to elicit from Ms. KT, much less whether they wished to ask her for the contact information while she was on the stand. The military judge declined to receive evidence on the motion, short-circuiting the Defense's effort to question Ms. KT at all, so we can only speculate about what specific questions trial defense counsel might have wanted to ask Ms. KT. The military judge did, however, expressly state the Defense would be permitted to cross-examine Ms. KT during the findings portion of the trial about the fact she did not want her mother to be interviewed by the Defense.

At the close of the Government's case—when the Defense asked the military judge to either strike Ms. KT's testimony or dismiss the sexual assault specification pertaining to Ms. KT—the Defense did not argue that Ms. KT had refused to answer any particular question or that the military judge should have compelled her to provide any information. Instead, the Defense's arguments were: (1) that the Government failed to disclose that Ms. KT lied to Appellant when she told him via text that she was talking to her mother, when in fact she was talking to a friend; and (2) that Ms. KT's refusal to be interviewed resulted in a "trial by ambush."

We are somewhat stymied by Appellant's claim that the military judge abused his discretion by not compelling Ms. KT to "answer relevant questions," because she never refused to answer any questions, and the Defense never asked the military judge to compel her to do so. During oral arguments in this case, Appellant asserted his claim of Ms. KT not being compelled to answer relevant questions should be read as an allegation the military judge erred by not allowing the Defense to call Ms. KT to the stand for the purposes of the motion.

Had the military judge simply permitted the Defense to present evidence on this motion by way of Ms. KT's testimony, we would actually know what questions Ms. KT did or did not answer, and we would have clearer understanding of the relevance of Ms. KT's mother's testimony. Instead, the military judge decided the motion based upon the proffers of counsel, even though the better practice is to permit counsel to call witnesses and present actual evi-

dence. *See, e.g., United States v. Stubbs*, 23 M.J. 188, 195 (C.M.A. 1987). Nevertheless, it is not necessarily an abuse of discretion to accept undisputed representations of counsel for purposes of deciding motions. *See, e.g., United States v. Vanderwier*, 25 M.J. 263, 266 n.3 (C.M.A. 1987). In the end, the only indication we have as to what exactly trial defense counsel wished to ask Ms. KT about—besides her declining to interview with the Defense—is trial defense counsel’s ambiguous statement that they “have an issue” regarding “evidence in conversation with her mother happens [sic] both very approximate [sic] in time to the charged event.” This statement is far too vague for us to determine what questions the Defense wanted to put to Ms. KT, and we see no basis for concluding the military judge abused his discretion by denying the Defense the ability to call her as a witness on the motion.

***b. Ms. KT’s Refusal to Submit to Pretrial Interview***

At trial and on appeal, Appellant has correctly conceded Ms. KT was under no obligation to submit to a pretrial interview. *See United States v. Morris*, 24 M.J. 93, 95 (C.M.A. 1987). Similarly, in the absence of evidence that trial counsel was involved in Ms. KT’s refusal to be interviewed by the Defense, there is no basis for finding an Article 46, UCMJ, violation. *Id.*; *see also United States v. Killebrew*, 9 M.J. 154, 160 (C.M.A. 1980) (citations omitted) (noting that a witness may refuse to answer defense questions as long as the Government did not induce the refusal). “No *party* may unreasonably impede the access of another party to a witness or evidence.” R.C.M. 701(e) (emphasis added). However, Ms. KT was a not a “party.” *See* R.C.M. 103(17) (defining “party” as the accused, defense counsel, trial counsel, and agents acting on their behalf).<sup>27</sup> We reach the same conclusion regarding her special victims’ counsel who represented not the Government, but Ms. KT herself. And given that Appellant has not alleged—and there is no evidence to support—that the Government possessed and failed to turn over the information Appellant sought, there has been no *Brady* violation.

***c. Ms. KT’s Withholding of Her Mother’s Contact Information***

As a result of the foregoing, we are left with a situation in which Ms. KT, a civilian victim, sought to prevent the Defense’s access to a witness—her mother. Because the Defense did not seek to compel Ms. KT to provide her mother’s contact information, the question becomes whether the military judge erred by not *sua sponte* compelling Ms. KT to disclose it. We conclude he did not. While military judges are not potted plants, they must remain impartial,

---

<sup>27</sup> Appellant asks us to consider Ms. KT to be a party or a “quasi-party” based upon the fact crime victims have been afforded certain rights with respect to courts-martial. Appellant cites no authority for this proposition, and we are aware of none. We decline to extend the definition of “party” beyond that found in R.C.M. 103(17).

and we see no error—plain or otherwise—in a military judge refraining from seeking discovery for one party’s benefit when that party has not requested the military judge’s help in securing it in the first place.

***d. Denial of the Defense’s Motion to Produce Ms. KT’s Mother***

In spite of Appellant framing this issue as one in which Ms. KT should have been compelled to provide her mother’s contact information, the more pertinent question seems to be whether the military judge erred in not ordering production of Ms. KT’s mother for trial pursuant to the Defense’s motion. We asked the parties to provide oral argument on this point.

We conclude that the military judge’s ruling was erroneous insofar as he determined Ms. KT’s mother was unavailable under Mil. R. Evid. 804(a). Under that rule, a witness is “unavailable” when she either refuses to testify about the subject matter *despite an order from the military judge to do so*; or when she is absent and her presence cannot be procured *by process or other reasonable means*. In this case, the military judge never ordered Ms. KT’s mother to testify, nor did he direct the Government to explore any means at all to secure her presence. Despite having the ready ability to require trial counsel to seek Ms. KT’s mother’s presence at trial, the military judge simply found that Ms. KT’s mother was unavailable without providing any explanation for how he reached that conclusion. Ms. KT’s desire that her mother not testify is inadequate to establish her mother’s actual unavailability; even if Ms. KT’s mother was reluctant to testify—which, of course, there is no direct evidence so indicating—the standard for unavailability would be that she *refused* to testify after being ordered to do so, she was not amenable to process, or her presence could not be procured by other reasonable means.

Because the military judge erred in finding Ms. KT’s mother “unavailable,” he thereby applied the wrong standard for deciding whether to order her production. Under R.C.M. 703(b)(1), Appellant had the right to the production of any witness whose testimony on a matter in issue would be relevant and necessary. Once a witness was deemed unavailable, however, Appellant was only entitled to relief upon meeting the heightened standard of demonstrating the witness’s testimony was “of such central importance to an issue that it [was] essential to a fair trial.” The military judge determined Appellant had not met this higher standard and was, therefore, entitled to no relief. By incorrectly finding Ms. KT’s mother unavailable, the military judge applied the wrong standard to analyzing the question of whether he should order Ms. KT’s mother’s production. That is, instead of correctly deciding Appellant’s motion to order the production of Ms. KT’s mother, the military judge erroneously analyzed whether Appellant was entitled to relief based upon Ms. KT’s mother’s purported unavailability.

In employing the incorrect standard regarding a witness who had not actually been shown to be “unavailable,” the military judge abused his discretion insofar as his analysis was predicated on an erroneous view of the law. This does not end our inquiry, as we next ask whether Appellant was entitled to Ms. KT’s mother’s production. Answering that question is difficult, as the military judge hobbled the Defense’s attempt to demonstrate the relevancy of her testimony when he declined to permit the Defense to call Ms. KT to testify about her conversation with her mother. Instead, the military judge largely decided the production motion not upon evidence, but upon the proffers of counsel—proffers which were vague in light of the fact the Defense had never been able to talk to either Ms. KT or—because of Ms. KT’s efforts—Ms. KT’s mother.

For the purposes of this appeal, we will assume, without deciding, that Ms. KT’s mother’s testimony would have been relevant and necessary on the merits, and Appellant was therefore entitled to have her produced. As a result, the issue becomes whether the military judge’s denial of her production was harmless beyond a reasonable doubt. We conclude that it was. Whatever Ms. KT’s mother might have said about influencing her daughter with regards to Ms. KT’s report of sexual assault, Appellant’s text messages largely corroborate Ms. KT’s testimony that Appellant in fact assaulted her. In those messages, Appellant said he “got carried away,” that he was “so sorry for what happened,” that he “regret[ted] everything,” and that it was “the biggest mistake [he had] ever made.” Two days later, he texted Ms. KT saying he had had time to think about “what [he] did,” that he “regret[s] it so much,” that he would “never do that again,” and that he “respect[s her] boundaries.” He wrote: “I wish it never happened. I wish I would have never did that.” Any ambiguity in those texts is removed by other texts in which Appellant responds to a question from Ms. KT asking him why he did “that”—he replied, “I think that in that moment I wanted to have sex with you again. And when it was happening it felt really good;” “I wasn’t listening in that point of time and I was being selfish as to how you felt. I should have stopped and listened to you;” and, “It’s your body and you have the right to say no.”

Based upon Ms. KT’s testimony about the assault and Appellant’s own words in the following days, we conclude the denial of Ms. KT’s mother’s production was harmless beyond a reasonable doubt. *See United States v. Hall*, 58 M.J. 90, 94–95 (C.A.A.F. 2003).

### **C. Reconsideration of the Mil. R. Evid. 412 Ruling**

As discussed above in Section II.A.1.c., *supra*, the military judge *sua sponte* reconsidered his ruling under Mil. R. Evid. 412 regarding Appellant’s and Ms. KT’s relationship in the midst of the Defense’s opening statement. Appellant asserts this reconsideration was erroneous, and he argues that he was prejudiced by the reconsideration insofar as it occurred while trial defense counsel

was delivering the Defense’s opening statement, thereby “disturbing the flow of information and impact” of that presentation. Appellant theorizes that “[t]he members were more than likely left wondering what had happened and what the Defense did wrong” to result in trial counsel’s objection and the ensuing 30-minute delay—in part because the military judge did not explain anything to them about trial counsel’s objection or the delay when they returned to the courtroom. The Government contends this is “pure speculation” and that the military judge’s as-reconsidered ruling was more appropriate than his original ruling. We note that trial defense counsel neither requested any particular instruction nor sought any other relief as a result of the ruling’s reconsideration.

Appellant does not argue that the military judge’s reconsidered ruling on the Mil. R. Evid. 412 motion was incorrect. Instead, he argues the military judge erred in deciding to reconsider the original ruling.

### **1. Law**

Under R.C.M. 905(f), the military judge may reconsider any ruling—other than one amounting to a finding of not guilty—either upon the request of a party or *sua sponte*. Military judges must be sensitive to the possibility that reconsidering an earlier ruling favorable to the defense may unduly prejudice an accused or otherwise raise the question of whether a mistrial is appropriate. *See United States v. Cofield*, 11 M.J. 422, 431 n.14 (C.M.A. 1981). We review a military judge’s decision to reconsider a ruling for abuse of discretion. *See, e.g., United States v. Newhouse*, No. ACM 38019 (recon), 2014 CCA LEXIS 660, at \*10 (A.F. Ct. Crim. App. 4 Sep. 2014) (unpub. op.) (“The fact that a ruling upon reconsideration differs from an initial ruling does not necessarily compel a finding that either was an abuse of discretion.”).

### **2. Analysis**

Although the military judge’s handling of this matter left a great deal to be desired, he had the inherent authority to reconsider his original ruling at any point during Appellant’s court-martial. Because Appellant does not argue the military judge’s as-reconsidered ruling on the Mil. R. Evid. 412 issue was erroneous, our focus is on whether the military judge abused his discretion in electing to reconsider the motion or whether he unfairly prejudiced Appellant in doing so. We conclude he did neither.

At the point of trial counsel’s objection, trial defense counsel had just told the members that Appellant and Ms. KT had “consensual sex on multiple occasions the first week.” The military judge’s written ruling originally permitted the parties to elicit evidence as to a specific number of times Appellant and Ms. KT engaged in sexual intercourse, but his reconsidered ruling barred any evidence “regarding frequency.” Because trial defense counsel did not actually comment on the specific number of instances of sex prior to the objection, the

military judge's reconsidered ruling did not create the situation wherein the Defense promised to present evidence of a fact they would no longer be permitted to prove. Instead, the Defense's case was prospectively limited to a degree, although Appellant does not argue that his defense was prejudiced in any substantive way by the new ruling. Thus, we do not see any indication Appellant's presentation of his overall case was impacted by the substance of the reconsidered ruling, and we perceive no unfair prejudice from there being a reconsideration at all. That conclusion is further bolstered by the fact that the military judge never told the members that he had, in fact, sustained the Government's objection to the "multiple occasions" comment, which meant the members were never told to disregard or otherwise minimize trial defense counsel's comment.

We agree that the extended break during the Defense's opening statement likely left the members wondering what was going on, but that is generally true of all Article 39(a), UCMJ, sessions during which members are directed to leave the courtroom. As is typically done, the military judge in this case told the members in his initial instructions that there would be hearings outside of their presence, and he asked for their patience and understanding when those hearings occurred. This tells us the members were generally aware they would be asked to leave the courtroom on occasion in order for the military judge to resolve matters. Appellant has provided no evidence the members drew any conclusion adverse to his case based on this particular session, and we will not infer they did, especially in light of the fact that not only did this occur very early in the trial, but the military judge never informed the members he had ruled adversely to the Defense. Plainly, a better approach would have been to accurately establish the parameters of the allowable evidence prior to opening statements so that the parties had a degree of clarity on how to frame their respective cases, but we see no unfair prejudice to Appellant under the facts presented here. Thus, Appellant is entitled to no relief on this ground.

#### **D. Military Judge's Instructions on Attempted Sexual Assault**

On appeal, Appellant argues the military judge erred when he declined the Defense's request to specify in his instructions to the members which overt acts the Government needed to prove in order to establish Appellant had attempted to sexually assault Ms. ES as alleged in the Specification of Charge II. Although we disagree with Appellant's argument as he frames it, we conclude the military judge's instructions were incorrect and that Appellant's conviction on this specification cannot stand.

##### **1. Additional Background**

In July 2018, Ms. ES and Appellant had been together about five years and married for the last two of those years. The marriage, however, was not going

well, and the two had talked about divorcing. Ms. ES was also making arrangements to fly to her parents' home in California with no immediate plans to return to the house she shared with Appellant in Washington.

Although Ms. ES could not remember the exact date, she testified that one night in July 2018 she was laying on the couch when Appellant came home at the end of his typical mid shift—a shift which she said ended at 2200 hours.<sup>28</sup> According to her testimony, Appellant took off his uniform jacket and hat and then walked over to her, got down on his knees in front of the couch so that his waist was “probably on level with the couch,” and tried to kiss her despite her saying “no.” She testified, “And he kept trying to kiss me and he was touching me and I was telling him to stop.” She said Appellant then “grabbed [her] arms and held them together with one of his hands” while he “was touching [her] all over” as she was “asking him to stop.” Ms. ES said she was “struggling” with Appellant, but he was able to “move[ her] leg open so that he can get in between [her] legs,” while still touching and trying to kiss her. During the struggle, Ms. ES said she could feel Appellant’s erect penis on her vagina through their respective clothing. Ms. ES kept telling Appellant to stop, at which point Appellant “grabbed both of [her] arms” and said, “[N]o, you stop,” and then “shook” her, finally “[throwing her] leg to the side.” Ms. ES testified Appellant “shuffl[e]d back on his knees . . . to get out.” She “closed [her] legs,” and then Appellant said, “[Y]ou’re my wife so I can take it if I want to.” A photograph of a bruise on Ms. ES’s right forearm was admitted as evidence of an injury she sustained during the struggle.

A few days after the assault, Ms. ES called her brother, Mr. AK, and told him what had occurred. Mr. AK then called Appellant to hear his version of events. Mr. AK testified that during that call, Appellant admitted grabbing Ms. ES’s wrists, holding her down and trying to kiss her and said that “[h]e wanted to have sex with his wife to see if there’s anything still there emotionally.”

Based on these events, Appellant was charged with committing abusive sexual contact on Ms. ES by touching her vulva with his penis through their clothing with an intent to gratify his sexual desire, without her consent, and by causing her bodily harm by so touching her. He was also charged with attempting to sexually assault her with a specification which alleged Appellant “did . . . attempt to commit a sexual act upon [Ms. ES], to wit: penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis, without her consent.”

---

<sup>28</sup> One of Appellant’s co-workers, as well as his roommate, who was the shift lead, testified the mid shift ended at 2300 hours, not 2200.

Appellant was acquitted of the former and convicted of the latter. As discussed in Section II.A.1.a., *supra*, the Defense unsuccessfully sought the pre-trial dismissal of the attempted sexual assault specification under the theory that it did not provide Appellant with adequate notice of how he was being accused of attempting to commit the offense. Essentially, the Defense argued the Government had failed to allege in the specification what particular act Appellant had taken in furtherance of the attempt.

Once the Government rested, the Defense moved the military judge to enter a finding of not guilty for the attempted sexual assault specification. In this mid-trial motion, trial defense counsel argued the evidence was insufficient to show Appellant had taken a substantial step towards committing sexual assault, which had been charged as Appellant penetrating Ms. ES's vulva with his penis and causing her bodily harm by doing the same without her consent. The Defense's first argument was that—even accepting Ms. ES's testimony that Appellant had held her arms and kissed her—such conduct did not amount to a substantial step towards committing the charged conduct of attempting to penetrate Ms. ES's vulva with his penis, especially in light of the fact both Ms. ES and Appellant were fully clothed. The Defense's second argument was rooted in the notion that Appellant never intended to sexually assault Ms. ES because he did not try to penetrate her vulva with his penis, and not because he was thwarted by “unexpected intervening circumstances.” The Defense's hypothesis seemed to be that the most Appellant intended to do was touch Ms. ES with his penis, through their respective clothing.

The military judge denied the Defense's motion, finding that Ms. ES's testimony established that Appellant “initiated contact by getting on top of her, forcing her legs apart, kissing her, holding her wrist, touching her body, and trying to remove her clothing.”<sup>29</sup> He concluded this was “at least some evidence that would amount to more than mere preparation . . . and could be considered a substantial step towards the commission of the offense of sexual assault.” The military judge further noted Appellant's statement that he could “take it,” along with his comments to Ms. ES's brother, indicated Appellant's desire to engage in “sexual activity” with Ms. ES. Finally, the military judge found that Ms. ES's resistance to Appellant's advances was “at least some evidence of an intervening cause or circumstance that would prevent completion of the offense.”

---

<sup>29</sup> Ms. ES never testified that Appellant either got on top of her or tried to remove her clothing during the episode.

Although the specification did not allege a particular act committed by Appellant in furtherance of his attempt, the military judge proposed to instruct the members:

In order to find the Accused guilty of this offense you must be convinced by legal and competent evidence beyond a reasonable doubt, 1) That at or near Spokane, Washington, on or about 18 July 2018, the Accused did a certain act, that is: attempt to commit a sexual act upon [Ms. ES], to wit penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent; 2) That the act was done with specific intent to commit the offense of sexual assault; 3) That the act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense; 4) That such act apparently tended to bring about the commission of the offense of sexual assault, that is the act apparently would have resulted in the actual commission of the offense of sexual assault except for an unexpected intervening circumstance which prevented completion of that offense.

In defining preparation, the military judge proposed:

To find the Accused guilty of this offense you must find beyond a reasonable doubt that the Accused went beyond preparatory steps and his acts amounted to [a] substantial step [and] a direct movement toward the commission of the intended offense. A “substantial step” is one that is strongly corroborative of the Accused[s] criminal intent and is indicative of his resolve to commit the offense. Proof that the offense of sexual assault actually occurred or was completed by the Accused is not required, however it must be proved beyond a reasonable doubt that at the time of the acts the Accused intended every element of sexual assault.

Trial defense counsel objected to the proposed instructions because they did not specify what the “certain acts” were that Appellant allegedly committed which tended to bring about the commission of the offense of sexual assault. Trial defense counsel further pointed to the instruction in the *Military Judge’s*

*Benchbook*<sup>30</sup> that calls for specifying such acts for the members. In the *Benchbook*, the model instruction employs the following template for an attempted offense:

(1) That . . . the accused did (a) certain act(s), *that is: (state the act(s) alleged or raised by the evidence)*; (2) That the act(s) (was) (were) done with the specific intent to commit the offense of (state the alleged attempted offense); (3) That the act(s) amounted to more than mere preparation, that is, (it was) (they were) a substantial step and a direct movement toward the commission of the intended offense; and (4) That such act(s) apparently tended to bring about the commission of the offense of (state the alleged attempted offense), (that is, the act(s) apparently would have resulted in the actual commission of the offense of (state the alleged attempted offense) except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (\_\_\_\_\_) which prevented completion of that offense).

Department of the Army Pamphlet 27-9 at 177, *Military Judges' Benchbook* (10 Sep. 2014) (*Benchbook*) (emphasis added).

The Government opposed identifying any specific acts which might amount to a substantial step in the instructions. The military judge said the Defense's objection was "definitely noted," but that he would not modify his proposed instructions. He explained:

It is for the members to determine after considering all the evidence, whether or not the acts that constitute the attempted offense[,] i.e.[,] the substantial step toward the movement of that offense. Whether or not those acts actually meet that element or not is for them to decide and for the [c]ourt to essentially sit down and plug in all of the evidence that may have come out during the trial that the [c]ourt anticipates the Government may argue constitutes evidence of a substantial step. I think would be[,] number one would be somewhat improper for the [c]ourt to plug that in there because of the suggestion that the [c]ourt[]'s dictating to the members the scope of the evidence that they can consider[ a]s evidence amounting to a substantial step, but again I do not want to intrude on their ability to decide on their own based on the evidence presented and how [c]ounsel characterize

---

<sup>30</sup> Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* (10 Sep. 2014) (*Benchbook*).

and argue that evidence[, w]hat actually constitutes more than a mere preparation or substantial step.

And so therefore, and based on samples and examples that I have reviewed in the past. [sic] While there may be a circumstance depending on the type of offense charged where it is drafted differently in this particular offense. [sic] I am comfortable plugging in the attempt, the actual nature of the offense that has been attempted. And then leave it to the parties to characterize with regard to elements two and three, excuse me three really, three and four, whether or not the evidence presented meets those elements.

The military judge gave the members the instructions as he had originally proposed. In the Government's closing argument, trial counsel argued, "You either believe that the Accused did a certain number of acts, kissing, and touching, and all that right, a substantial step toward having sex with Ms. [ES] or you do not. I do not know how much more I can say about it."

When the members returned their verdict acquitting Appellant of abusive sexual contact, but convicting him of attempted sexual assault, trial defense counsel moved the military judge to declare a mistrial, explaining that their

principal concern permeating all of this is that there were no specific acts pled in the Specification of Charge II. . . . [T]here was never any specific articulation in the pleading or otherwise that put [Appellant] on notice of the exact things that he would have done to contemplate or actually complete the attempt.

In addition to asserting Appellant was prejudiced by a lack of notice and that the members' findings were inconsistent, trial defense counsel said the military judge's instruction "caused confusion in such a way and did not properly guide the members on making findings of specific acts." In discussing the matter with counsel, the military judge said,

The act and I know it sounds inconsistent but I didn't see anything—any legal authority to say otherwise. The act is actually the effort to penetrate the vagina with the penis. That's the act. Whether or not he noticed [sic] substantial step towards completing that act, tried to take off clothes, kissed, held arms, et cetera, those are—that's all facts and circumstances that the members are free to consider when deciding whether or not there was a substantial step towards completion of the act. There is no requirement and we've been over this in the failure to state an offense motion. There is no requirement for the [G]overnment to plead all of that information . . . .

In their written motion for a mistrial, trial defense counsel argued that the military judge’s failure to specify particular acts raised by the evidence in his instructions amounted to “an abdication of the judicial role in a members findings case,” because doing so “essentially nullified the members having to find anything” with respect to the first element of the offense. In his ruling, the military judge indicated he relied upon *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014), to assess the sufficiency of his instructions to the members on the attempt charge, asserting the military judge in that case had instructed the members on the first element “identically” to how he had.<sup>31</sup> He also concluded that—because the Government was not required to allege the specific overt acts it intended to prove in order to establish an attempt charge—the Defense had not shown that a mistrial was “manifestly necessary in the interests of justice.”

## 2. Law

In charging an attempted offense under the UCMJ, it is not necessary to allege the overt act or the elements of the underlying predicate, or target, offense, as long as the accused is adequately on notice of the nature of the offense. *United States v. Norwood*, 71 M.J. 204, 206–07 (C.A.A.F. 2012) (citations omitted).

Military judges have a duty to provide instructions which deliver “an accurate, complete, and intelligible statement of the law.” *Behenna*, 71 M.J. at 232 (citations omitted). Instructions must be “clear and correctly conveyed.” *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). We review instructions given “to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence.” *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)). “Whether a panel was properly instructed is a question of law reviewed de novo.” *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019) (quoting *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)). Military judges are required to instruct members on the elements of charged offenses. R.C.M. 920(e)(1).

Instructional errors with constitutional dimensions are tested for prejudice against the standard of “harmless beyond a reasonable doubt.” *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2021) (citation omitted). “This standard is met ‘where a court is confident that there was no reasonable possibility that

---

<sup>31</sup> Contrary to the military judge’s statement, the military judge in *Payne* did instruct the members regarding what the “overt act” was in that case, as the overt act was charged in the pertinent specification. 73 M.J. at 24. The United States Court of Appeals for the Armed Forces concluded other aspects of the military judge’s instructions on the attempt specification in *Payne* amounted to plain error. *Id.* at 25.

the error might have contributed to the conviction.” *Id.* (citing *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019))).

### 3. Analysis

On appeal, Appellant concedes the Government was not required to allege any particular overt acts in its charging document, but he argues it was error for the military judge to not list any overt acts in his instructions. Appellant largely points to the *Benchbook* guidance that the military judge should specify the overt acts for the members to consider. The Government responds that the *Benchbook* is merely guidance, and it was within the military judge’s discretion whether to identify such facts for the members. The Government also notes that neither of the parties at trial proposed any specific overt acts for the military judge to incorporate into his instruction.<sup>32</sup>

We agree the military judge deviated from the model instruction in the *Benchbook* by not identifying any particular “certain acts” that the Appellant did with the specific intent to commit the offense of sexual assault, but Appellant cites to no authority requiring the military judge to specify these acts for the members in his instructions, and we are aware of none. The *Benchbook* may provide useful guidance to military judges, but military judges are not required to follow it. *See, e.g., United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003) (noting military judges are “not required to follow literally the non-binding examples” in the *Benchbook*). The fact the Government is not required to allege any specific act in its charging instrument somewhat undercuts Appellant’s argument that the military judge was required to identify such acts for the members. The members, however, were required to find that Appellant did do a certain act; that the act was done with the specific intent to commit an offense under the UCMJ; that the act amounted to more than mere preparation; and that the act tended to effect the commission of the intended offense. 2016 *MCM*, pt. IV, ¶ 4.b.

The flaw here is that—contrary to what he said to the parties at the time—the military judge *did* instruct the members what “certain act” they had to find. He told them they had to be convinced Appellant did the certain act of “attempt[ing] to commit a sexual act upon [Ms. ES], to wit penetrating her

---

<sup>32</sup> Considering the Defense had protested both in pretrial motions and throughout the duration of Appellant’s court-martial that the Government had failed to explain what overt acts were being offered to prove the attempted sexual assault offense, it is not particularly noteworthy that the Defense did not volunteer to fill that perceived void for the Government.

vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent.” He further told them that in order to find Appellant guilty, they must be convinced beyond a reasonable doubt that this act “apparently tended to bring about the commission of the offense of sexual assault.” Thus, the “certain act” identified by the military judge in the first element was the same as the “target” offense of sexual assault in the fourth element.<sup>33</sup> As a result, the military told the members they had to conclude Appellant committed the act of attempting to sexually assault Ms. ES, and that this attempted sexual assault tended to bring about the commission of the offense of sexual assault. In sum, the instructions set up the paradox of Appellant being convicted of attempting to sexually assault Ms. ES based upon Appellant taking the substantial step of attempting to sexually assault her.

Although the military judge was not obligated to identify in his instructions any particular overt act committed by Appellant in furtherance of the attempt, his decision to do so required him to give an instruction which amounted to “an accurate, complete, and intelligible statement of the law.” *Behenna*, 71 M.J. at 232. Here, the military judge’s instruction called for entirely circular reasoning, instructing the members to determine whether Appellant attempted to sexually assault Ms. ES when he carried out the act of attempting to sexually assault her. Moreover, in light of the requirement to prove Appellant specifically intended to sexually assault Ms. ES in the manner charged, it is entirely unclear how the members could follow the military judge’s instruction that they had to be convinced that Appellant attempted to sexually assault Ms. ES with the specific intent to commit sexual assault in the exact same manner he attempted to do so, and that the attempted sexual assault was a substantial step towards committing the same sexual assault. Compounding this issue, by defining the “certain act” as the charged offense, the military judge effectively relieved the members of their obligation to identify a certain act committed by Appellant in furtherance of his alleged intentional attempt to sexually assault Ms. ES—essentially reading an element entirely out of the offense.<sup>34</sup>

---

<sup>33</sup> The military judge himself appeared to acknowledge that he had instructed as such. When discussing the Defense motion for a mistrial, the military judge stated: “The act and I know it sounds inconsistent but I didn’t see anything—any legal authority to say otherwise. The act is actually the effort to penetrate the vagina with the penis. That’s the act.”

<sup>34</sup> To be clear, we do not hold military judges are required to identify particular overt acts in their instructions in every court-martial involving an offense alleged as an attempt. Rather, we hold that when a military judge elects to do so, he or she must ensure those instructions amount to an accurate, complete, and intelligible statement of law.

Finding error, we are confronted with the question of whether the error was harmless beyond a reasonable doubt. We conclude it was not. Unlike the situation in which a military judge omits an element which is fairly encompassed by the remainder of the instructions, the military judge here directed the members to an incorrect evidentiary burden. In instructing on the first element, the military judge identified the “certain act”—the predicate act for the attempt offense—as the ultimate offense. Significantly, each of the remaining three elements, as instructed by the military judge, related back to that certain act which the military judge had explicitly identified. For example, for the third element, the military judge told the members they must be convinced that the “certain act” amounted to a substantial step towards the commission of the intended offense. Because the intended offense was the same as the “certain act” under these instructions, the members were faced with either a tautology or an impossibility in evaluating this element. That is the case because a preparatory step is, by definition, an intermediate point along a path that terminates at the ultimate destination of the intended offense. Yet the members here were told the preparatory step was the same as the intended offense, entirely eliminating the notion of a preparatory step. The same is true of the second element, in which the certain act must be accomplished with the specific intent to commit the intended offense, as well as the fourth element, in which the same certain act must tend to bring about the intended offense.

The Government asserts that the evidence against Appellant was overwhelming in support of its argument that we should find any instructional error harmless. We are not so convinced. The evidence was strong in terms of proving Appellant struggled with Ms. ES while she lay on the couch, but evidence that Appellant specifically intended to penetrate her vulva *without her consent* is far from conclusive. We are also mindful of the fact the members acquitted Appellant of committing abusive sexual contact during this episode. In any event, we presume the members followed—or at least attempted to follow—the military judge’s instructions. *See United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). In doing so, if the members concluded Appellant committed the “certain act” of attempting to sexually assault Ms. ES, as the military judge explained was required for the first element, then the remainder of the elements would simply fall by the wayside as a result of their own internally circular reasoning. This would pave the way for a finding of guilty without careful analysis of each element.

We conclude the military judge’s instructions amounted to an erroneous statement of the law, and because we are not privy to what the members made of the instructions, we cannot be confident their verdict was not a product of this error. Therefore, we cannot find the error harmless beyond a reasonable

doubt. We will accordingly we will set aside Appellant’s conviction on this specification and set aside his sentence.<sup>35</sup>

## **E. Completeness of the Record of Trial**

Appellant argues his record of trial is defective and incomplete based on a variety of alleged deficiencies discussed in greater detail below.

### **1. Additional Background**

The court reporter detailed to Appellant’s court-martial was removed from his court-reporter duties a few weeks after Appellant was sentenced. Presumably due to the court reporter’s absence, the military judge certified the record of trial on 20 November 2019. On 7 January 2020, trial counsel certified the transcript stating he had reviewed the transcript in its entirety and that he determined “it is an accurate reflection of the proceeding of the court.” The memorandum also notes what software the originally detailed court reporter had used.

### **2. Law**

Whether a record of trial is complete is a question of law we review de novo. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Appellant’s charges were referred to a general court-martial on 12 April 2019, which is after the 1 January 2019 effective date of the Military Justice Act of 2016. *See* Executive Order 13,825, § 5. This act, *inter alia*, made substantial changes to the post-trial processing of courts-martial. Prior to 2019, a verbatim transcript would be prepared in any case with a sentence including either a punitive discharge or at least 12 months of confinement, and a record of trial was incomplete without such a transcript. R.C.M. 1103(b)(2)(B), 1103(b)(2)(D) (2016 *MCM*). In the event a verbatim transcript could not be prepared due to loss of recordings or notes or for some other reason, a convening authority had the option of either ordering a rehearing or only approving a sentence which included neither a punitive discharge nor more than six months of confinement. R.C.M. 1103(f) (2016 *MCM*). Once the record—to include the transcript—was prepared, the military judge would authenticate the

---

<sup>35</sup> We recognize that, in at least two other cases reviewed by this court, military judges gave similar instructions on attempt offenses. *See United States v. Brown*, No. ACM 39728, 2021 CCA LEXIS 414, at \*12 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.); *United States v. Little*, No. ACM 38338, 2014 CCA LEXIS 689, at \*10 (A.F. Ct. Crim. App. 19 Sep. 2014) (unpub. op.). Neither of those unpublished opinions addressed the propriety of the instructions’ identifying the predicate act as the same as the target offense. We note that both cases involved convictions for attempt as a lesser-included offense of a charged offense. For these reasons, those two cases provide little guidance for our resolution of Appellant’s case.

record prior to its service on the accused and transmission to the convening authority. R.C.M. 1104 (2016 *MCM*).

Under the rules which went into effect 1 January 2019, the contents of a record of trial initially compiled at the conclusion of a court-martial no longer include a transcript of the proceedings—instead, a “substantially verbatim *recording*” of the proceedings is called for, R.C.M. 1112(b)(1) (emphasis added), a copy of which the accused is entitled to, R.C.M. 1106(c). In addition to the recording, a complete record of trial includes such matters as the charge sheet, exhibits, the statement of trial results, and the judgment entered by the military judge. R.C.M. 1112(b), 1112(d)(2). The court reporter certifies the contents of the record of trial, but the military judge may certify the record if the court reporter is unable to do so. Art. 54(a), UCMJ, 10 U.S.C. § 854(a); R.C.M. 1112(c). If the record is found to be incomplete or defective prior to certification, the matter may be raised to the military judge for correction; after certification, the record may be returned to the military judge for correction. R.C.M. 1112(d)(2). Once the record of trial is certified, a copy is provided to the accused; however, sealed exhibits and recordings of closed sessions are omitted. Art. 54(d), UCMJ; R.C.M. 1112(e).

Under the rules now in effect, a certified verbatim transcript of a record of trial shall be prepared in any court-martial in which a punitive discharge or confinement for more than six months is adjudged. R.C.M. 1114(a)(1). The transcript is attached to the record of trial. R.C.M. 1114(d). This transcript, however, is not part of the original record of trial the court reporter certifies—instead, the transcript is attached to the record before the record is forwarded for appellate review. R.C.M. 1112(f)(1)(8). When such a transcript is prepared, the accused and his or her counsel may be provided a copy upon request. R.C.M. 1114(b), Discussion. A copy of the entire record and attachments, which would include the transcript, “shall be forwarded to a civilian counsel provided by the accused” upon written request of an accused. R.C.M. 1116(b)(1)(B).

Unlike the rules in place prior to 1 January 2019, the current rules have no provision granting sentence relief in the case of a defective record of trial. Moreover, these rules contain no provision regarding the correction of inaccurate or incomplete transcripts.

### **3. Analysis**

Appellant points to a number of purported deficiencies with the record of trial which we will address in turn.

First, Appellant contends the record of trial fails to include a video file which was never marked as an appellate exhibit or reviewed by the military judge. This video is discussed in greater detail below in Section II.F., *infra*. In short, the Defense sought permission in a Mil. R. Evid. 412 hearing to question

Ms. KT about the contents of a particular video. Trial defense counsel commented that the military judge did not have a copy of the video, and he asked the military judge: “Does the [c]ourt require that or is the [c]ourt willing to take the proffer[?]” The military judge said he did not need to see the video to rule on the motion and that the video would not be attached to the record as an appellate exhibit. The military judge then denied the Defense’s motion.

A record of trial includes “any evidence or exhibits considered by the court-martial in determining the findings or sentence.” R.C.M. 1112(b). Nothing in this rule requires inclusion of items never viewed or considered by a military judge on an interlocutory matter. We are aware of no rule, precedent, or other legal authority requiring the attachment of such items to a record, and Appellant cites none. Appellant’s claim on this point is without merit.

Second, Appellant notes there are several comments in the court reporter chronology—included in the record—suggesting “various instances of problems encountered” in the preparation of the record.<sup>36</sup> He highlights four particular entries—two entries indicate trial counsel located missing audio; the third states the audio and the “Log Notes” did not match; and the fourth says two of the days of transcript were reviewed “due to significant amounts of missing transcription.” Appellant, who has access to the original audio recording of his trial, does not contend the transcript is inaccurate in any way or that the final transcript omits any portion of the trial. Appellant does not explain the relevance, if any, of the comment about the audio and the notes not matching, and we see nothing in the record illuminating the matter. Even if Appellant were to demonstrate the transcript is inaccurate, the current Rules for Courts-Martial afford him no relief because it is the audio recording that is a component of the certified record of trial; the transcript is a matter attached for appellate review under R.C.M. 1112(f). While we can envision a transcript so inaccurate as to amount to prejudicial error, Appellant has not approached that threshold, and he is not entitled to relief based upon the four comments he identified in the chronology.

Third, although the military judge ordered numerous documents to be sealed during Appellant’s court-martial, many were not in fact sealed when the

---

<sup>36</sup> The Government’s answer and Appellant’s reply brief both reference chronologies which were included in the record of trial docketed with our court. The parties have not taken a position as to whether these chronologies are part of the “record” as defined in R.C.M. 1112(b), “attachments for appellate review” under R.C.M. 1112(f), matters that we may consider because both parties have referenced them in their briefs, without objection, or something we may not consider on appeal under *United States v. Jessie*, 79 M.J. 437, 440–41 (C.A.A.F. 2020). We assume without deciding that we may consider the chronologies, as neither party objected to them at any point. See *United States v. Stanton*, 80 M.J. 415, 417 n.2 (C.A.A.F. 2021).

record of trial was assembled. We are aware of this error, as we ordered the documents to be sealed once we discovered them in our review. According to Appellant, he received these documents, unsealed, when he received his record of trial in January 2020. While this was unquestionably an error denoting a lack of diligence in the preparation of the record of trial, Appellant has identified no prejudice he has suffered, and we are aware of none. As such, Appellant is entitled to no relief. Although we grant no relief, we pause to note that it was the military judge who certified this record of trial as being “accurate and complete” on 20 November 2019. The fact that he apparently did not notice the matters he ordered sealed were not actually sealed indicates his review was less than thorough.<sup>37</sup>

Fourth, Appellant states the second page of the Defense’s written motion for a mistrial is missing, having been replaced with an email. The record filed with this court, however, suffers no such infirmity—the second page of the motion in that record is the second page of the Defense’s motion. Without objection from Appellant, the Government has provided this court with a certificate of receipt in which Appellant’s military appellate defense counsel signed for receipt of “disc(s)” containing three items, one of which was the second page of the motion in question. The receipt is dated 13 April 2021, which was more than a month after Appellant filed his assignments of error. Appellant, however, submitted a reply brief on 27 April 2021 and did not revisit this asserted error, indicating to us a lack of prejudice. Having reviewed the page, we conclude Appellant was not prejudiced, especially since he possessed the transcript of the on-the-record discussion of the matter and the military judge’s ruling. Although Appellant’s copy of the record should have included the missing page, we are not inclined to find prejudicial error from a single errant page out of a ten-volume record, especially when his counsel had the ready ability to inspect the record filed with this court that included the correct page.

Fifth, Appellant states the first segment of a video file of Ms. KT’s law enforcement interview “does not play.” In response, the Government notes that in the court-martial transcript, trial defense counsel told the military judge which particular video program to use to play back the recording. The Government also avers it gave Appellant’s appellate counsel a new copy of the first segment of the interview on 13 April 2021. As with the missing motion page, Appellant did not readdress or attempt to demonstrate prejudice in his reply brief. We note that the recording in the record of trial docketed with this court

---

<sup>37</sup> We remind all involved with the preparation and certification of records of trial to approach these duties with the careful attention to detail which is warranted by the gravity of military justice proceedings. When matters filed under seal are subsequently released with no protection, the important policy reasons for sealing them are entirely compromised.

was readily viewable using the software trial defense counsel specified at trial. Based upon the matters before us, we are unable to determine if Appellant received a corrupted copy of the video file or if his counsel was utilizing incompatible software when attempting to view it. In any event, Appellant has not demonstrated prejudice to his case, and we will not strain to find any.

Sixth, Appellant alleges his copy of the record “does not contain any of the exhibits that were included in the [record] on disc.” He identifies one exhibit in particular: Appellate Exhibit XLII. This exhibit, however, is not an electronic exhibit at all; it is a paper copy of a single page of notes taken from the Air Force Office of Special Investigation’s report of investigation concerning Appellant’s charged offenses. The only electronic evidence in the record docketed with our court is the video recording of Ms. KT’s interview with law enforcement agents, and we know Appellant received that item, as he complained about his inability to play the first segment of it. Appellant identifies no exhibits he has not been provided on a disc or otherwise, and we are aware of none. To the extent Appellant is asserting he received copies of paper exhibits only in an electronic format, we would find no prejudice so long as he received the exhibits in either format.

Seventh, Appellant argues a court reporter was required “to attest to the accuracy and completeness of the record of trial.” He submits that trial counsel’s certification was insufficient because trial counsel “lacked personal knowledge of the specific equipment and versions of the software used” either by the originally detailed court reporter or the other court reporters involved in the transcription. We note as an initial matter Appellant has failed to demonstrate that trial counsel did not actually know what equipment or software the court reporters used. Appellant bases his argument that a court reporter, and not trial counsel, must certify the transcript, on a provision found in Air Force Manual (AFMAN) 51-203, *Records of Trial* (4 Sep. 2018, as amended by Air Force Guidance Memorandum 2019-01, 9 May 2019).<sup>38</sup> We assume, even though Appellant argues here that a court reporter must certify the record of trial, that he is actually referring to the transcript, as the provision he highlights calls upon the court reporters involved to “certify[ ] the quality, authenticity of the transcript or portion of the transcript, and method used to transcribe the proceeding.” AFMAN 51-203, ¶ 14.14. This AFMAN and the related Guidance Memorandum explain they were issued by order of the Secretary of the Air Force, and compliance with both is mandatory. Given that neither document purports to authorize trial counsel to certify a transcript of

---

<sup>38</sup> This was the version of the manual in effect at the time of Appellant’s court-martial. It has since been replaced by Department of the Air Force Manual 51-203, *Records of Trial* (21 Apr. 2021).

court-martial proceedings, trial counsel's certification here arguably ran afoul of their requirements. Appellant has identified no prejudice from this error, and we perceive none—especially because Appellant has access to the recording of his court-martial and he has not identified any transcription errors, let alone demonstrated how any such errors might have prejudiced him.

Lastly, Appellant argues that because of the foregoing claimed errors, “the entire record has been called into question,” and we should reassess his sentence “to a level not exceeding that permissible in a trial reported by a non-verbatim transcript.” Appellant relies on the rules in place before 1 January 2019 for this proposition, but as explained above, that sentence remedy for a non-verbatim transcript no longer exists. Our reading of the applicable rules is that the audio recording is now the primary record of the proceedings, and the written transcript of those proceedings is created to facilitate appellate review. A record of trial is complete if it includes the required items listed in R.C.M. 1112(b), and Appellant has not demonstrated any of those items are actually missing, with the exception of a single page of one motion in Appellant's copy of the record of trial—as opposed to the original record which contains no such omission—an error from which Appellant asserts no prejudice, and has, in any event, been remedied. Even if the record was incomplete or defective, the remedy would not be to grant Appellant sentencing relief, but rather, to return the record for correction. Because we *sua sponte* ordered the Government to seal the unsealed matters in the record, the sole remaining defect is the fact the transcript was certified by trial counsel rather than by the court reporters, as required by AFMAN 51-203. Finding no prejudice to Appellant flowing from this shortcoming, we grant no relief. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

#### **F. Military Judge's Ruling on Explicit Videos**

Appellant personally raises the claim that the military judge erred in ruling evidence regarding sexually explicit mobile phone videos was inadmissible under Mil. R. Evid. 412.<sup>39</sup>

---

<sup>39</sup> This issue was raised during a closed hearing, the transcript of which was sealed by the military judge. We limit our discussion of sealed material to that which is necessary for our analysis.

## 1. Additional Background

Prior to trial, the Defense sought permission, via written motion, to admit evidence that Appellant and Ms. KT had recorded their consensual sexual conduct the weekend of the charged assault.<sup>40</sup> The Defense offered four theories for the admissibility of the evidence. First, the Defense argued the fact Appellant and Ms. KT recorded their conduct—taken together with all other consensual conduct between the two—was evidence Ms. KT actually consented to the conduct forming the basis of the alleged assault, or that Appellant was reasonably mistaken as to whether she had consented or not. Second, the Defense postulated that one or more of the videos might be recordings of the alleged assault itself and would be evidence no assault occurred. However, pointing to the Government’s denial of the Defense expert computer assistance, trial defense counsel conceded they were unable to specifically determine when the recordings were made. Third, the Defense argued the videos would “serve two crucial impeachment functions” by demonstrating possible motives for Ms. KT to make a false allegation of sexual assault. In essence, the Defense suggested Ms. KT regretted participating in the recordings, and she might have accused Appellant of assaulting her in order to persuade Appellant to dispose of the recordings. The other theory advanced by the Defense was that one of the recordings depicted Ms. KT making a comment which could be interpreted as a desire to have unprotected sex with Appellant. Thus, the theory continued, when Ms. KT later came to regret having had unprotected sex with Appellant, and after she used an emergency contraceptive, she falsely accused him of sexually assaulting her.

Finally, the Defense argued the recordings should be available to Appellant to confront Ms. KT by challenging her credibility with prior inconsistent statements. The Defense asserted that during the investigation, Ms. KT discussed the videos with investigators, and she told them she did not agree to or assist in making the recordings. The Defense further asserted Ms. KT told investigators she took the phone away from Appellant when she realized he was using it to record the two of them. The Defense claimed that one video showed Ms. KT actively participated in the filming and argued that Ms. KT’s purportedly untruthful statements to the investigators implicated Appellant’s constitutional confrontation rights, insofar as they implicated Ms. KT’s credibility and the overall veracity of her allegations.

In their written motion, trial defense counsel offered conflicting statements about whether they wished to admit the videos themselves into evidence or to

---

<sup>40</sup> The parties alternated between referring to multiple videos and referring to just a single video. For purposes of our analysis, we will assume there was more than one video.

simply ask Ms. KT about them. At one point, the motion states, “To be clear . . . the Defense is not seeking to play this tape for members—but rather cross examine [Ms. KT] about its existence, content, and her state of mind when making it.” In the very next paragraph, however, the Defense argued the members “would be lost in the dark as to the true nature of the quickly-escalating sexual relationship between [Ms. KT] and [Appellant] if they do not get to observe the actual sex between the two.” In the next paragraph, the Defense stated, “at least cross examination about these videos should be permitted,” and only “the video of the charged event” should be admitted as substantive evidence or impeachment. When discussing the admissibility of the recording with the military judge, trial defense counsel said, “I apologize if I didn’t make that clear. I do not intend to play the video. We are asking for the [c]ourt’s permission to be able to ask questions about the video.”

Trial counsel objected to any discussion of the videos, arguing in their written response to the Defense’s motion that the fact Ms. KT and Appellant may have agreed to record sexual contact had “marginal probative value” but “an exceptionally strong risk of prejudice.”<sup>41</sup> The Government did not specifically address the Defense’s theories of admissibility of the videos.

During the motions hearing on Friday, 23 August 2019, the military judge expressed skepticism that the Defense should be allowed to impeach Ms. KT with respect to what she told the investigators about the videos. He told trial defense counsel,

You can’t just simply ask someone a question about something that you know they’re going to say something about that—that opens the door to be able to bring in extrinsic evidence of the falsity. The purpose about asking about this particular instance in the first place would have to satisfy, at a minimum, the relevancy standards necessary before you can even ask about this. If this is independently irrelevant, you don’t necessarily get to talk about it.

The military judge did not view the videos or have them marked as appellate exhibits. Nonetheless, the military judge made findings of fact regarding the contents of one video in his written ruling on the Defense’s motion. His description of the video’s contents largely tracked the Defense’s proffer of what the video depicted, thus indicating Ms. KT may not have been truthful to the investigators. He did not, however, make any findings of fact regarding Ms.

---

<sup>41</sup> Ms. KT, through her special victims’ counsel, objected to admission of the videos, but did not object to being questioned about whether she made inconsistent statements with respect to them.

KT's statements to the investigators. The military judge ruled evidence about the video was inadmissible under Mil. R. Evid. 412(b)(2) as it did not make it any more or less likely that Appellant had a reasonable mistake of fact as to Ms. KT's consent with respect to the charged assault. The military judge also ruled the evidence was not constitutionally required, but he did not explain his rationale for that conclusion. The military judge did not discuss at all trial defense counsel's desire to impeach Ms. KT with the purportedly false statement she made to the investigators about the recordings. Although the "law" section of the military judge's ruling set out the principles of impeachment by contradiction and an accused's constitutional right to confront witnesses, his "discussion" section did not address these matters with respect to the recordings.

## 2. Law

We review a military judge's ruling that excludes evidence under Mil. R. Evid. 412 for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citation omitted).

Under Mil. R. Evid. 412, evidence of an alleged victim's sexual predisposition and evidence that an alleged victim engaged in other sexual behavior is generally inadmissible. Mil. R. Evid. 412(a). The intent of the rule is to "shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions." *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (original alteration, internal quotation marks, and citations omitted). One exception to this rule is when evidence is offered to prove consent. Mil. R. Evid. 412(b)(2). A second exception is when exclusion of the evidence would violate an accused's constitutional rights. Mil. R. Evid. 412(b)(3). In order to show that the exclusion of evidence would violate an accused's constitutional rights, the accused must show that the evidence is relevant, material, and favorable to his defense, "and thus whether it is necessary." *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004) (internal quotation marks and citation omitted). The term "favorable" means the evidence is "vital." *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) (citations omitted). It is the defense's burden to demonstrate an exception applies. *Banker*, 60 M.J. at 223.

Evidence which is relevant under Mil. R. Evid. 412(b)(2) may be admissible if the military judge determines the probative value of such evidence outweighs the danger of unfair prejudice to the victim's privacy and otherwise outweighs the dangers of unfair prejudice under a Mil. R. Evid. 403 analysis. Mil. R. Evid. 412(c)(3). Evidence falling under the Mil. R. Evid. 412(b)(3) exception is not weighed against a victim's privacy and is instead only analyzed under Mil. R. Evid. 403. *Id.* Evidence challenging the credibility of key government witnesses may fall under this exception. *See, e.g., United States v. Williams*, 37 M.J. 352, 360–61 (C.M.A. 1993).

Under the Sixth Amendment, an accused has the right to confront the witnesses against him or her. This right necessarily includes the right to cross-examine those witnesses, which “is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974). However, judges “retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’[s] safety, or interrogation that is repetitive or only marginally relevant.” *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011) (alteration in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The test for determining whether an accused’s confrontation clause rights have been violated is whether a “reasonable jury might have received a significantly different impression of [the witness]’s credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.” *Id.* (alterations in original) (quoting *Van Arsdall*, 475 U.S. at 680).

Military judges may permit counsel to inquire about specific instances of a witness’s conduct on cross-examination if they are probative of the witness’s character for truthfulness or untruthfulness. Mil. R. Evid. 608(b). Extrinsic evidence of such is generally inadmissible. *Id.* Military judge’s rulings which limit cross-examination under Mil. R. Evid. 608(b) are reviewed for an abuse of discretion. *United States v. Stavelly*, 33 M.J. 92, 94 (C.M.A. 1991). However, when an error at trial is of constitutional dimensions, we assess de novo whether the error was harmless beyond a reasonable doubt. *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020).

### 3. Analysis

On appeal, Appellant argues the military judge did “not consider and analyze the facts presented to him regarding [Ms. KT’s] claim to [investigators] about the nonconsensual nature of the recording,” and therefore abused his discretion. The Government contends that Ms. KT’s statement to investigators was more ambiguous than the Defense claims, that the matter was collateral, and that, in any event, the military judge’s ruling was correct under Mil. R. Evid. 412.

As the sole witness to the charged assault, Ms. KT’s credibility was a critical issue in Appellant’s court-martial. *See, e.g., United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F. 2013) (noting, in a child sexual assault case, “[t]here is little question that . . . the credibility of the putative victim is of paramount importance”). Indeed, we would think it the rare and unusual case where an accused’s credibility is *not* an issue available for defense exploration at trial. We agree that to the extent Ms. KT made false statements to investigators in the midst of an interview about the charged offense, and about matters closely re-

lated to that offense, such would reflect poorly on her character for truthfulness. *See, e.g., United States v. Montgomery*, 56 M.J. 660, 667 (A. Ct. Crim. App. 2001) (“[W]hether or not an individual lies to a police officer is highly probative of that individual’s veracity.”). Given the significance of Ms. KT’s credibility, Appellant’s right to confront her by attacking that credibility was impaired by the military judge’s prohibition of the Defense’s proposed cross-examination.

Ordinarily, we would grant military judges deference with respect to rulings on such evidence, but the military judge here did not analyze this proposed use of the evidence at all; instead, he focused on whether the evidence was admissible under a theory of consent under Mil. R. Evid. 412(b)(2). Although he found that the evidence was not “constitutionally required,” this finding was made almost in passing in the middle of a longer discussion about whether the evidence related to consent or a mistaken belief of consent. The Defense, however, articulated that an alternate purpose of the evidence was to undermine Ms. KT’s credibility by cross-examining her about purportedly false statements she made about the evidence. As explained above, one of the Defense’s overarching theories was that Ms. KT fabricated the assault, and she possibly did so under the influence of her mother. Thus, the motive and desire to use the evidence to impeach Ms. KT’s character for truthfulness or to establish a character of untruthfulness was plainly articulated by the Defense. Because the military judge’s ruling did not address this theory of admissibility, the military judge likewise did not conduct a Mil. R. Evid. 403 analysis of the probative value of allowing the Defense’s proposed cross-examination to undermine Ms. KT’s credibility. Her credibility was a critical issue at trial, and upon our de novo review, we find the military judge erred in concluding the exclusion of apparently false statements made by Ms. KT during her interview with law enforcement would not violate Appellant’s constitutional rights.

Having found error related to Appellant’s constitutional right to confront one of the witnesses against him, we turn to our assessment of whether or not the error was harmless beyond a reasonable doubt. We conclude it was. For one, Ms. KT’s testimony—while important—was not the sole source of the evidence against Appellant. Post-assault text messages between Appellant and Ms. KT were admitted in evidence at trial. As discussed in more detail in Section II.B.3.d., *supra*, in those messages, Appellant made significant admissions—such as, “I should have stopped and listened to you.”

We are also convinced that permitting Appellant to question Ms. KT about her statements to law enforcement regarding the recordings would not have meaningfully undermined her credibility. Ms. KT did not deny to the investigators that the recordings existed, but rather, denied she actively participated in their creation. This was a rather fleeting aspect of a lengthy interview and

was not a subject either dwelled upon or returned to. Moreover, given the embarrassing nature of the topic, her apparent minimization of her role in recording sex acts between herself and Appellant does not render the remainder of her testimony any less believable. Thus, we conclude, a reasonable jury would not have received a significantly different impression of Ms. KT's credibility had the Defense been permitted to cross-examine her on this point. We further find, beyond a reasonable doubt, that the outcome of Appellant's trial with respect to the specification in which Ms. KT was a named victim would have been the same even with this cross-examination.

### III. CONCLUSION

The finding of guilty as to Charge II and its Specification is **SET ASIDE** and **DISMISSED WITHOUT PREJUDICE**. The sentence is **SET ASIDE**. A rehearing is authorized with regard to the dismissed charge and specification and the sentence. The remaining findings are correct in law and fact, and are **AFFIRMED**. Article 66(d), UCMJ, 10 U.S.C. § 866(d). The record of trial is returned to The Judge Advocate General. Article 66(f), UCMJ, 10 U.S.C. § 866(f). Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply. The court's earlier opinion of *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 202 (A.F. Ct. Crim. App. 31 Mar. 2022) (unpub. op.), is hereby withdrawn.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

---

**No. ACM 39903**

---

**UNITED STATES**

*Appellee*

**v.**

**Jesus MARTINEZ**

Airman First Class (E-3), U.S. Air Force, *Appellant*

---

Appeal from the United States Air Force Trial Judiciary

Decided 21 May 2021

---

*Military Judge:* Christopher M. Schumann.

*Sentence:* Sentence adjudged on 30 August 2019 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 18 October 2019: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

*For Appellant:* Major Jenna M. Arroyo, USAF; Major Rodrigo M. Caruço, USAF; Allison R. Weber, Esquire.

*For Appellee:* Lieutenant Colonel Matthew J. Neil, USAF; Major Alex B. Coberly, USAF; Major Brian E. Flanagan, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

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

Judge KEY delivered the opinion of the court, in which Chief Judge J. JOHNSON joined. Judge ANNEXSTAD filed a separate dissenting opinion.

---

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

---

KEY, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault in violation of Articles 120 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 880.<sup>1,2</sup> The specifications pertained to offenses Appellant committed in 2018. The members sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, Appellant raises eleven assignments of error, the eighth of which we reach here: whether the convening authority erred by not taking action on Appellant's sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860. Appellant proposes this court remand his case to the Chief Trial Judge, Air Force Trial Judiciary, to resolve this matter.

We agree with Appellant. As a result, we conclude remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate, and we do not reach his other ten assignments of error. Considering our resolution of Appellant's eighth assignment of error, we will defer addressing the remainder of his assignments of error until the record is returned to this court for completion of our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (*Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*)).

## I. BACKGROUND

The specifications in this case were referred on 12 April 2019, and Appellant was tried by members in August 2019. Afterwards, Appellant's trial defense counsel submitted a petition for clemency on 9 September 2019 in which he identified a number of alleged legal errors occurring during Appellant's court-martial and asked the convening authority to disapprove Appellant's adjudged reduction in grade. On 23 September 2019, the convening authority's staff judge advocate completed a written recommendation to the convening authority noting, *inter alia*, that he found the alleged legal errors to be without merit and that he recommended the convening authority "take no action on the findings or sentence in this case." Appellant did not submit additional matters in response.

---

<sup>1</sup> Unless otherwise noted, references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

<sup>2</sup> Appellant was acquitted of one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920.

On 11 October 2019, the convening authority signed a Decision on Action memorandum. In the memorandum, the convening authority stated: “I take no action on the findings in this case.” He further wrote, “I take no action on the sentence in this case.” The Decision on Action memorandum also directed Appellant to “take leave pending completion of appellate review” upon release from confinement. The memorandum contained no further indication as to whether any element of Appellant’s sentence was approved, disapproved, commuted, or suspended. On 18 October 2019, the military judge signed the entry of judgment, setting out the adjudged sentence. He included the Decision on Action memorandum as an attachment.

## II. DISCUSSION

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Interpretation of a statute and a Rule for Courts-Martial (R.C.M.) are also questions of law we review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

Executive Order 13,825, § 6(b), requires that the version of Article 60, UCMJ,

in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that Article 60: (1) requires action by the convening authority on the sentence; . . . or (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

*See* 2018 Amendments to the *Manual for Courts-Martial, United States*, 83 Fed. Reg. at 9890. The version of Article 60, UCMJ, in effect when Appellant’s offenses first occurred stated “[a]ction on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section.” 10 U.S.C. § 860(c)(2)(A) (emphasis added); *see also United States v. Perez*, 66 M.J. 164, 165 (C.A.A.F. 2008) (per curiam) (“[T]he convening authority is required to take action on the sentence . . .”). Article 60(c)(2)(B), UCMJ, further stated: “Except as [otherwise] provided . . . the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.” 10 U.S.C. § 860(c)(2)(B). The convening authority’s action is required to be “clear and unambiguous.” *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citation omitted).

This court addressed a similar situation in its en banc decision in *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App.

20 Nov. 2020) (en banc) (unpub. op.), *rev. granted*, \_\_\_ M.J. \_\_\_, No. 21-0126, 2021 CAAF LEXIS 389 (C.A.A.F. 4 Mar. 2021). In *Aumont*, the convening authority signed a memorandum stating that he took “no action” on the findings or sentence in a case involving offenses occurring prior to 1 January 2019. *Id.* at \*19. *Aumont* resulted in four separate opinions, reflecting four distinct positions among the judges on this court as to whether the convening authority’s statement that he took no action was erroneous and, if so, whether remand for correction was required. *Id.* (*passim*). A majority of the judges in *Aumont*—six of the ten judges—concluded the convening authority erred; four of those six judges, including the majority of the panel in the instant case, found the error required remand for corrective action without testing for prejudice, *id.* at \*89 (J. Johnson, C.J., concurring in part and dissenting in part).

We recognize that other panels of this court have applied different reasoning in cases decided before and after *Aumont*. See, e.g., *United States v. Cruspero*, No. ACM S32595, 2020 CCA LEXIS 427 (A.F. Ct. Crim. App. 24 Nov. 2020) (unpub. op.); *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.); *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.); cf. *United States v. Coffman*, 79 M.J. 820, 824 (A. Ct. Crim. App. 2020) (wherein our sister-service court found the convening authority’s failure to take action was harmless error). Nevertheless, we continue to adhere to the view that—in situations where the convening authority fails to take action on the sentence as required by Executive Order 13,825 and the pre-1 January 2019 version of Article 60, UCMJ—the convening authority has erred.

In cases involving a conviction for an offense committed prior to 1 January 2019, the convening authority is required to explicitly state whether the sentence is approved. R.C.M. 1107(f)(4)(A) (implementing the version of Article 60, UCMJ, applicable to Appellant’s case). “If only part of the sentence is approved, the action shall state which parts are approved.” *Id.* In this case, the convening authority explicitly stated he did not take action on the sentence. He implicitly referenced the adjudged punitive discharge by mentioning appellate leave, but he did not mention the confinement, reduction in grade, or forfeitures. The convening authority’s action was incomplete and ambiguous, and therefore deficient. See *Politte*, 63 M.J. at 26. The convening authority’s failure to take action on the entire sentence fails to satisfy the requirement of the applicable Article 60, UCMJ. See *United States v. Lopez*, No. ACM S32597, 2020 CCA LEXIS 439, at \*11 (A.F. Ct. Crim. App. 8 Dec. 2020) (unpub. op.).

Our superior court has mandated that when a Court of Criminal Appeals identifies an ambiguity in an action, it must return the case to the convening authority. *Politte*, 63 M.J. at 25–26 (applying the earlier versions of Articles 60

and 66, UCMJ, 10 U.S.C. §§ 860, 866 (2000), reasoning which we find applicable here). In requiring the deficient action to be returned to the convening authority, our superior court did not evaluate the deficiency for prejudice; the deficiency in the action *ipso facto* required its return. *Id.*; see also *United States v. Scott*, 49 M.J. 160, 160 (C.A.A.F. 1998). For the reasons set forth in the dissenting opinion in *Aumont*, we remand the record to the Chief Trial Judge, Air Force Trial Judiciary, to resolve the error. Unpub. op. at \*89 (J. Johnson, C.J., concurring in part and dissenting in part); see Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3) (2019 *MCM*).

### III. CONCLUSION

The record is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the convening authority's decision memorandum, as the action taken on Appellant's adjudged sentence was ambiguous and incomplete.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding consistent with Rule 29(b)(2) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

- (1) Correct the Statement of Trial Results;<sup>3</sup>
- (2) Return the record of trial to the convening authority or his successor to take action on the sentence;
- (3) Conduct one or more Article 66(f)(3), UCMJ (2019 *MCM*), proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839, sessions; and/or
- (4) Correct or modify the entry of judgment.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ.

ANNEXSTAD, Judge (dissenting):

---

<sup>3</sup> The Statement of Trial Results failed to include the command that convened the court-martial as required by R.C.M. 1101(a)(3) (2019 *MCM*). Appellant has not claimed prejudice, and we find none. See *United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at \*2-3 (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.).

I respectfully disagree with my colleagues' conclusion remanding this case to the Chief Trial Judge, Air Force Trial Judiciary, because the convening authority's action was ambiguous and incomplete. Consistent with our court's decision in *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at \*3 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.), I would find the convening authority's decision to "take no action on the sentence" was the equivalent of action. In coming to this conclusion, I note, as our court did in *Barrick*, that:

Air Force Instruction 51-201, *Administration of Military Justice*, Section 13D (18 Jan. 2019), correctly advises convening authorities to grant relief as circumscribed by the applicable version of Article 60, UCMJ, 10 U.S.C. § 860]. Additionally, it advises convening authorities to specify "no action" if not granting relief, which would include effecting "action" under the applicable version of Article 60, UCMJ.

*Id.* at \*3–4.

I also recognize that we can use surrounding documentation to interpret an otherwise unclear convening authority action, including looking outside the four corners of the action's language. See *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006) (citing *United States v. Loft*, 10 M.J. 262, 268 (C.M.A. 1981)).

In this case, the record demonstrates that Appellant submitted clemency matters to the convening authority on 9 September 2019. In his matters, Appellant asked the convening authority to "disapprove reduction in grade to E-1." On 23 September 2019, the convening authority's staff judge advocate completed a written recommendation to the convening authority recommending that he "take no action on the findings or sentence in this case." On 11 October 2019, the convening authority memorialized his decision to "take no action" on the findings and sentence in his Decision on Action memorandum to the military judge. Consistent with the advice from his staff judge advocate and Section 13D of Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, the convening authority expressed his decision to not grant relief as "no action." See AFI 51-201, ¶ 13.23 (18 Jan. 2019). Additionally, the convening authority directed Appellant to "take leave" pending completion of appellate review upon release from confinement—an action only necessary when a convening authority cannot or chooses not to disturb an adjudged punitive discharge. On 18 October 2019, the military judge signed the entry of judgment (EoJ), reflecting the sentence as adjudged. The convening authority's Decision on Action memorandum was attached to the EoJ.

I would find that the convening authority's decision met the legacy requirements of Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United*

*States* (2016 ed.)), requiring the convening authority to effectuate the sentence. I would also find the decision complied with the provisions of Rule for Courts-Martial (R.C.M.) 1109 of the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), requiring convening authority action only when affecting the sentence. In this case, the convening authority's decision to provide no relief at action was a "clear and unambiguous" determination to effectuate the adjudged sentence without modification. *See Politte*, 63 M.J. at 25–26 (footnote omitted). The action was consistent with the legal advice he was provided and there is no indication in the record that the military judge or the parties were confused as to the convening authority's decision to grant no relief. The sentence memorialized in the EoJ was the same as the sentence adjudged at trial, and neither party moved for correction of the Decision on Action memorandum or the EoJ. *See* R.C.M. 1104(b)(2)(B), (C) (2019 *MCM*). For these reasons, I would find no error in the convening authority's action and would not delay our review under Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019 *MCM*), by remanding the case to the Chief Trial Judge, Air Force Trial Judiciary.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court