Enclosure A

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

United States,
Appellee

v.

Zachary R. Braum,
Appellant

USCA Dkt. No. 25-0046/AF
Crim.App. No. 40434

O R D E R

On consideration of Appellant's petition for reconsideration of the decision issued by the Court, __ M.J. __ (C.A.A.F. 2026), it is, by the Court, this 3rd day of June, 2026,

ORDERED:

That the petition for reconsideration is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

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

Enclosure B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Zachary R. BRAUM, Captain
United States Air Force, Appellant

No. 25-0046
Crim. App. No. 40434

Argued October 8, 2025—Decided April 8, 2026

Military Judges: Mark F. Rosenow (pretrial) and Shad R. Kidd (trial)

For Appellant: *Scott Hockenberry*, Esq. (argued); *Daniel Conway*, Esq. (on brief); *Captain Samantha M. Castanien*.

For Appellee: *Captain Heather R. Bezold* (argued); *Colonel Matthew D. Talcott*, *Lieutenant Colonel Jenny A. Liabenow*, *Major Jocelyn Q. Wright*, and *Mary Ellen Payne*, Esq. (on brief).

Amicus Curiae for Appellant: *Vivian Bolen* (law student) (argued); *John J. Korzen*, Esq. (supervising attorney) (on brief) — Wake Forest University School of Law Appellate Advocacy Clinic.

Judge SPARKS announced the judgment of the Court, in which Judge MAGGS joined. Judge HARDY filed a separate concurring opinion, in which Judge JOHNSON joined. Chief Judge OHLSON filed a dissenting opinion.

Judge SPARKS announced the judgment of the Court.

This appeal concerns whether the military judge erred in finding the government can properly refuse to disclose evidence it has physical possession, custody, or control over when it may not, as a matter of law, access that evidence. Resolution of this issue would require this Court to determine whether a victim's constitutional right to privacy under the Fourth Amendment supersedes an accused's statutory discovery rights under Rule for Courts-Martial (R.C.M.) 701.[1] And this issue also bears on whether denying an accused evidence on this basis violates his or her constitutional right to a fair trial.

However, we need not determine whether the military judge erred if we determine that the error, if any, was harmless beyond a reasonable doubt. Like the United States Air Force Court of Criminal Appeals (CCA), we hold that even assuming the military judge erred, any error was harmless beyond a reasonable doubt. *United States v. Braum*, No. ACM 40434, 2024 CCA LEXIS 419, at *17, 2024 WL 4458537, at *6 (A.F. Ct. Crim. App. Oct. 10, 2024) (unpublished). Therefore, we affirm the CCA.

I. Background

The Government charged Appellant with multiple offenses arising from his sexual abuse of his then fiancée BE[2] and related conduct. Appellant and BE engaged in "BDSM"[3] during their relationship. The defense's main theory at trial was that BE voluntarily consented to these BDSM activities. But this theory was largely unsuccessful, and a general court-martial composed of officer members convicted Appellant of three specifications of rape, three

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[1] All citations to the R.C.M. in this opinion refer to the *Manual for Courts-Martial, United States* (2019 ed.), unless otherwise noted.

[2] To preserve BE's privacy, this opinion presents her name as a pseudonym.

[3] "BDSM" is an abbreviation meaning "bondage, discipline, sadism, and masochism."

specifications of sexual assault, one specification of abusive sexual contact, and three specifications of domestic violence in violation of Articles 120 and 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 928b (2018).[4])

This appeal focuses on an issue which arose before trial: BE's meeting with the Newton Police Department (NPD) and the Air Force Office of Special Investigation (OSI) to report Appellant's misconduct. During this meeting, BE repeatedly referred to her phone while responding to questions. This led law enforcement to ask BE whether she would consent to their extracting limited location-related data from her phone. An "NPD officer explained that the entire contents of the phone would be downloaded but that the search would be limited to the location-related information, in accordance with BE's consent." BE agreed, and NPD kept the complete extraction of her phone on a flash drive.

The Government later provided the defense with the limited location-related data that BE had authorized law enforcement to access. It did not turn over the full extraction. The defense moved to compel the Government to turn over the entire extraction under R.C.M. 701(a)(2)[5]

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[4] Appellant was also convicted of one specification of reckless operation of an aircraft in violation of Article 113, UCMJ, 10 U.S.C. § 913 (2018). The members found Appellant guilty by excepting the language "on divers occasions" for one of the domestic violence convictions and made findings by exceptions and substitutions for another domestic violence offense. The language "on divers occasions" was excepted by the military judge pursuant to R.C.M. 917 for one of the sexual assault convictions. Appellant was found not guilty of two specifications of sexual assault and two specifications of assault consummated by battery.

[5] R.C.M. 701(a)(2)(A)(i) provides, in part, that "the Government *shall*," upon defense request, "permit the defense to inspect any books, papers, documents, *data*, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is *within the possession, custody, or*

because the extraction was in the Government's physical "possession, custody, or control," or in the alternative, to produce the entire extraction under R.C.M. 703(e)(1)[6] as it was "relevant and necessary" to Appellant's defense. Specifically, Appellant possessed ninety-one pages of text exchanges between him and BE from his own phone "in which BE sent pictures of women in bonds, sexual paraphernalia, and messages indicating willing participation in the use of that paraphernalia." According to the defense, the full extraction was thereby necessary to corroborate these messages and contradict BE's anticipated testimony that she never requested or sought BDSM activities with Appellant, and relatedly, did not purchase sex toys or BDSM items to engage in said activities.

The Government responded, arguing that R.C.M. 701(a)(2) did not apply because although it physically possessed the full extraction, it was not legally "within the control of military authorities, as accessing that data would be a violation of [BE's] Fourth Amendment constitutional rights." As to the defense's R.C.M. 703(e)(1) contention, the Government averred that production of the full extraction was unnecessary for the defense to "hunt through all of the data on [BE's phone] for potential ammunition," because the defense "offere[d] no factual basis or analysis of any kind" to support its assertion that BE's remaining phone data contained exculpatory evidence.

The military judge began with the defense's R.C.M. 701(a)(2) argument and observed that this "issue turns on whether physical possession, custody, or control suffices [under R.C.M. 701(a)(2)(A),] or if 'legal' possession, custody, or control, though not stated in [R.C.M.] 701(a)(2)(A), is necessarily implied." The military judge determined it was the latter and found the Government's

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control of military authorities and . . . the item is relevant to defense preparation." (Emphasis added.)

[6] R.C.M. 703(e)(1) states that "[e]ach party is entitled to the production of evidence which is relevant and necessary."

discovery obligations under R.C.M. 701(a)(2)(A) were not triggered because it could not "legally" access any data beyond BE's consent.

The military judge then turned to the defense's R.C.M. 703(e)(1) argument, opining this "issue turns on whether the evidence exists and whether it is relevant and necessary." In pertinent part, the military judge explained that:

> The defense argues that access to the parts of BE's phone to which she did not consent being searched is necessary because the pictures BE purportedly sent must have come from somewhere on BE's phone, reasoning the phone would contain evidence of receipt of, searches for, or downloads of the images. The evidence provided by the defense does not establish that such evidence exists in the copy of BE's phone, though it does suggest it might. More importantly, the defense has not demonstrated this evidence is necessary. The defense already has evidence that BE had the pictures, sent them to [Appellant], and sent the messages to [Appellant]. Evidence that BE sent the pictures carries with it the logical inference, as the defense argues, that she had them on her phone, from which it can be argued that they were sent to her or sought and downloaded by her. Additional evidence of how BE obtained the pictures that may or not be on the forensic copy of the phone adds little, if anything, to the effect of the evidence the defense already has with regard to undermining or contradicting BE's claims of lack of consent, that she never requested sex toys or BDSM items, and that she never requested BDSM activities and never brought it up with [Appellant].

Accordingly, the military judge denied Appellant's request to produce the complete extraction, finding that the defense had not shown it to be relevant and necessary.

In relevant part, Appellant appealed to the CCA arguing that the military judge erred in denying his motion to compel under R.C.M. 701(a)(2). *Braum*, 2024 CCA LEXIS 419, at *15, 2024 WL 4458537, at *5. Appellant did not appeal the military judge's R.C.M. 703 determination. The CCA avoided the question of whether the military judge properly interpreted and applied R.C.M. 701(a)(2)(A) and found that even assuming the military judge erred, any error was harmless beyond a reasonable doubt. *Id.* at *17, 2024 WL 4458537, at *6. In reaching this conclusion, the CCA found that it was "highly speculative" the full extraction contained "helpful information" considering the defense "already had the evidence that was likely to be found on the phone that would be helpful to them in the form of the pictures and the 91 pages of text messages exchanges" in addition to the limited location-related data. *Id.*, 2024 WL 4458537, at *6.

This Court then granted review of the following issue:

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

United States v. Braum, 85 M.J. 370, 370-71 (C.A.A.F. 2025) (order granting review).

II. Discussion

The granted issue highlights the tension between a victim's constitutional right to privacy under the Fourth Amendment and the accused's statutory right to discovery under the R.C.M. And while not argued in this case, we are cognizant that "in the military justice system, both the right to a trial that is fair, and the right to a trial that is objectively seen to be fair, have constitutional dimensions sounding in due process." *United States v. Boyce*, 76 M.J. 242, 249 n.8 (C.A.A.F. 2017). Had it been raised, the granted issue may also present the tension between a victim's constitutional right to privacy and an accused's constitutional right to a fair trial. This appeal presents an open and unresolved question of whether, or when, a victim's constitutional privacy rights may supersede an accused's discovery rights and, potentially, his constitutional right to a fair trial. While we recognize the significance of the granted issue, we resolve this case on the narrower grounds of harmless error.

"Our review for prejudice is de novo." *United States v. Sigrah*, 82 M.J. 463, 467 (C.A.A.F. 2022) (citing *United States v. Clark*, 79 M.J. 449, 455 (C.A.A.F. 2020)). This Court has established two categories of disclosure error: (1) "cases in which the defense either did not make a discovery request or made only a general request for discovery"; and (2) cases in which the defense made a specific request for the undisclosed information. *United States v. Roberts*, 59 M.J. 323, 326-27 (C.A.A.F. 2004). Because Appellant requested the cell phone extraction, the second category applies to this case.[7] "[And f]or cases in the second category, [this Court] appl[ies] the heightened constitutional harmless beyond a reasonable doubt standard." *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (citations omitted). Under this standard, the Government has the burden to show that any error made was harmless beyond a reasonable doubt. *United States v. Gonzalez*, 62 M.J. 303, 306 (C.A.A.F. 2006).

"Harmless beyond a reasonable doubt is a high standard, but it is not an impossible standard for the Government to meet." *Id.* The failure to "disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *Coleman*, 72 M.J. at 187. This Court's prejudice determination is based on the entire record. *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1999).

We agree with the CCA that any error was harmless considering the defense "already had the evidence that was likely to be found on the phone that would be helpful to them in the form of the pictures and the 91 pages of text messages." *Braum*, 2024 CCA LEXIS 419, at *17, 2024 WL 4458537, at *6. As a party to the communications

[7] The parties also agree this case falls into the second category.

Appellant possessed the evidence necessary to contradict BE's claims that she never sought out BDSM activities and paraphernalia. And at trial, the defense effectively cross-examined BE using these pages of text message exchanges and pictures to make this very argument. Thus, the evidence Appellant sought was cumulative and would have only reinforced what the members already knew. Put differently, the full extraction was merely cumulative of other impeachment evidence—substantial in volume and weight—already available to the defense.

Appellant takes the position that he was prejudiced because having access to the full data on BE's phone could have cast doubt on her general credibility and shown that she actively participated in BDSM activities. As noted in Appellant's brief:

> Having the complete extraction of BE's phone might have demonstrated the text messages presented by the defense were not inaccurate or misleading, supporting the defense case that BE was a much more active participant in the charged activities than she represented in her accusations, and lessoning [sic] BE's credibility by undercutting her attempt to explain away her inconsistent actions by accusing Appellant and his defense counsel of manipulating evidence.

We are not persuaded. To be sure, impeachment evidence or evidence otherwise undermining the credibility of the Government's key witness is more likely to be material than that related to other witnesses. But the evaluation of whether potential evidence might have affected the trial outcome must be based on the entire record and not merely assumed. *Morris*, 52 M.J. at 197. In this case, the full extraction would not have provided the members with a substantially different basis for assessing BE, as the defense effectively cross-examined her using evidence that was qualitatively the same.

Moreover, it ignores that the defense made inroads in challenging BE's credibility, and more broadly, her character for truthfulness. Indeed, BE's character for truthfulness was undermined by even a friendly witness—her best friend—who testified BE was "untruthful." When considered in the context of the entire record, the marginal effect of additional impeachment or evidence merely reinforcing other evidence already presented by the defense is relatively small and unlikely to have affected the outcome of trial.

Appellant also argues that he was prejudiced by not having access to the data on BE's cell phone because "BE's testimony cast doubt on the veracity of the text messages BE sent to Appellant" and because the Government magnified the harm when it "criticized the defense in closing for asking BE to provide her phone data as evidence." However, we disagree with Appellant's characterization of the record. In our view, BE's testimony did not directly challenge the veracity of the entirety of the text messages presented by the defense when considering the questions asked by trial defense counsel. And the vagueness of the brief remarks she did make belie any claim that they affected the outcome of the trial. Moreover, the point of trial counsel's closing argument was not to criticize the defense for seeking her phone records but instead to encourage the panel members to consider whether BE had a motive to lie. Accordingly, we find these arguments are without merit.

At most, what Appellant speculates would have been on the full extraction amounted to largely cumulative impeachment evidence that would have added little weight to the defense's attack on BE's credibility. The marginal effect of additional impeachment is relatively small and unlikely to have affected the outcome.

III. Conclusion

We conclude that even if the military judge erred, the error was harmless beyond a reasonable doubt. The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judge HARDY, with whom Judge JOHNSON joins, concurring in the judgment.

The question presented in this case is whether the military judge erred when he denied Appellant's motion to compel the Government to produce all the extracted data from the victim's (BE's) cell phone under Rule for Courts-Martial (R.C.M.) 701. As Judge Sparks notes in his opinion, this Court has long held that when the government erroneously fails to provide information pursuant to a specific defense request, that error implicates the accused's Fifth Amendment due process right to prepare a defense. *United States v. Hart*, 29 M.J. 407, 409-10 (C.A.A.F. 1990) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). Because such an error is constitutional in nature, this Court assumes that the error materially prejudiced the substantial rights of the accused and will grant relief unless the government can prove that the error was harmless beyond a reasonable doubt. *Id.* at 410; *see also United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).

Like the United States Air Force Court of Criminal Appeals (AFCCA) below, Judge Sparks assumes—without deciding—that the military judge erred by denying Appellant's motion to compel and concludes that no relief is warranted because the error was harmless beyond a reasonable doubt. I agree that Appellant's finding of guilt and sentence should be affirmed, but I come to that conclusion because I do not believe that the military judge erred. Accordingly, I agree that the AFCCA should be affirmed.

I. Appellant's Motion to Compel

During the Government's investigation into the criminal allegations lodged by BE against Appellant, law enforcement agents asked BE if they could review the data from her cell phone to corroborate her statements. A special agent from the Air Force Office of Special Investigation (AFOSI) and an officer from the local civilian police department presented BE with a consent form that—in its original and unaltered form—would have granted law enforcement BE's consent to search her cell phone "including any or all digital content therein." BE refused to consent to the search of all the data on her cell phone but agreed to provide law enforcement with location-related information. BE and the agents modified the consent form, crossing out the words "including any and all digital content therein" and replacing them with "location information." A police officer explained to BE that the entire contents of her cell phone would be downloaded but that the Government's search would be limited to the location-related information in accordance with her signed consent form. Accordingly, another police officer extracted the data from BE's cell phone and returned the cell phone to BE. The police officer copied the extracted data to a flash drive that the police retained as evidence.

Prior to trial, Appellant's defense counsel and the Government engaged in a lengthy discovery process. During that process, the defense requested production of any extracted cell phone data. The Government eventually disclosed the existence of the extracted data from BE's cell phone. The Government declined, however, to provide the defense with all the data from BE's phone, and instead only provided the defense with the location data. The Government justified the limited production by explaining that BE's consent was restricted to location data and that the Government's review of the extracted data was similarly restricted to location data.

Seeking production of all the data from BE's cell phone, Appellant filed a motion to compel the Government to provide the defense with all the extracted data. Appellant primarily argued that the Government was obligated to produce the cell phone data under R.C.M. 701, because the data was "squarely within the possession of the government." Appellant later clarified in a supplement to his motion that if the military judge determined that all of the extracted data from B.E.'s cell phone was not in the possession or control of the Government, the defense moved for production of that data under R.C.M. 703 because the data was relevant and necessary to the preparation of Appellant's defense.

The military judge denied Appellant's motion to compel. In his ruling, the military judge conceded that BE's cell phone data was within the "physical" possession, custody, or control of the Government, but he concluded that R.C.M. 701 did not apply because the cell phone data was not within the Government's "legal" possession, custody, or control. The military judge acknowledged that the requirement for "legal" possession, custody, or control was not stated in the text of R.C.M. 701(a)(2)(A), but he concluded that it was "necessarily implied." The military judge reasoned that because BE had "specifically and explicitly limited the consent she gave to location data," she had not waived her privacy interests or legal protections for the remaining data from her cell phone. For these reasons, the military judge held that the remaining data was not discoverable by the defense under R.C.M. 701(a)(2)(A).

Turning to R.C.M. 703, the military judge concluded that Appellant failed to establish that the evidence was relevant and necessary to his defense. The military judge first noted that Appellant already had access to any text messages or pictures sent from BE to Appellant from Appellant's own cell phone. The military judge described Appellant's arguments about other evidence from BE's cell phone as speculative and concluded that—even if that evidence did exist—Appellant had failed to demonstrate that it was necessary considering the other evidence available to the defense.

Before the AFCCA, Appellant challenged the military judge's ruling with respect to R.C.M. 701, but not with respect to R.C.M. 703, arguing that the Government could not "refuse to disclose relevant, non-privileged data in its possession, custody, or control on the basis that the witness who provided the data gave limited consent with respect to its use." The AFCCA declined to determine whether R.C.M. 701 required the Government to produce all the extracted data from BE's cell phone, concluding instead that—even assuming error—the nondisclosure of that data was harmless beyond a reasonable doubt.

II. Standard of Review

The interpretation of a provision of the Rules for Courts-Martial is a question of law that this Court reviews de novo. *H.V.Z. v. United States*, 85 M.J. 8, 13 (C.A.A.F. 2024). This Court reviews a military judge's discovery rulings for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). An abuse of discretion 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).

III. Discussion

R.C.M. 701 governs discovery in courts-martial, including the handling of electronic data collected from cell phones. As relevant in this case, R.C.M. 701(a)(2)(A) requires the Government, upon request of the defense, to permit the defense to inspect and copy data that "is within the possession, custody, or control of military authorities," if that data is relevant to the preparation of the accused's defense. The novel issue presented by this case is what to do when the Government has relevant cell phone data within its possession, custody, or control, but has no legal authority to search that data because the owner of the data withheld her consent.

The military judge resolved this issue by concluding that R.C.M. 701(a)(2)(A) only applies when the government has "legal" possession, custody, or control of the data. The military judge acknowledged that the text of the rule imposes no such requirement, but he concluded that it was "necessarily implied" and was needed to protect BE's Fourth Amendment privacy rights. Although I agree with the military judge's ultimate conclusion, I arrive at that result through slightly different reasoning.

First, I agree with the military judge that BE preserved her Fourth Amendment rights over the non-location data on her cell phone. In the initial ruling on Appellant's motion to compel, the military judge found: (1) that BE "specifically and explicitly" limited her consent to search her cell phone to location data; and (2) that the law enforcement officers had agreed that their search would be "limited to the location-related information, in accordance with BE's consent." Based on these findings, the military judge concluded that BE had not waived her privacy interests in her remaining cell phone data or waived the legal protections over that data.

That conclusion was indisputably correct. Imagine if law enforcement had disregarded the signed consent form and the assurances that they provided to BE, searched the remainder of BE's cell phone data, found evidence of a crime, and brought charges against BE based on that evidence. There can be no doubt that evidence would have been suppressed as an illegal search that violated BE's reasonable expectations of privacy. In *United States v. Black*, this Court recognized that the owner of a cell phone can restrict her consent to specific parts of the phone when she gives a third-party access to the phone, rejecting the argument that the owner has assumed the risk that the third party will access the entire phone. 82 M.J. 447, 452-53 (C.A.A.F. 2022). So too here. BE granted the Government access to her location data, but "specifically and expressly" refused to give the Government access to the remainder of her data.

Appellant argues that BE waived or extinguished her Fourth Amendment rights when she allowed the Government to download the data from her cell phone and that she could no longer maintain a reasonable expectation of privacy in the data when the Government had access to it. This argument disregards the fact that the "touchstone of the Fourth Amendment is reasonableness." *Florida. v. Jimeno*, 500 U.S. 248, 250 (1991) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)). The standard for measuring the scope of consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange with law enforcement? *Id.* at 251 (internal quotation marks omitted) (citations omitted). Given the signed consent form and the police officer's assurances to BE that the Government's search of her cell phone data would be restricted in accordance with her consent, it would be completely reasonable for BE to believe that her non-location data was legally protected. Conversely, it would be completely unreasonable for the Government to believe that it could unilaterally disregard those assurances and disclose BE's data to a third party without judicial approval.

Second, I agree with the military judge that the extracted data from BE's cell phone was in the Government's "physical" possession, custody, or control. As noted by Appellant, the data was sitting on a flash drive presumably in a police evidence locker. This case is unlike *United States v. Secord*, where the government had physical possession of a locked cell phone but no ability to access any of the electronic data that might have been on the phone. 86 M.J. 56, 58 (C.A.A.F. 2025). Here, Appellant is correct that the Government had the ability (if not the legal right) to search and distribute the entire digital contents of BE's cell phone.

My agreement with the military judge on these two points underscores the novel legal issue presented by this case: the Government had possession, custody, or control of the data from BE's cell phone, but that data was still protected by BE's Fourth Amendment rights. The military judge resolved this issue by concluding that R.C.M. 701 did not apply because the Government did not have "legal" possession, custody, or control of the extracted data. Here, I part ways with the military judge because I agree with Appellant that R.C.M. 701 imposes no such requirement. In my view, R.C.M. 701 applied to the extracted data from BE's cell phone because that data was in the Government's possession, custody, or control.

I would resolve this apparent conflict between what the plain language of R.C.M. 701(a)(2) required (disclosure of all the extracted data to Appellant) and what the Fourth Amendment prohibited the Government from doing (searching and disclosing the remaining data from BE's cell phone) by applying the hierarchy of laws. When a Rule for Courts-Martial conflicts with the requirements of the Constitution, the rule must yield. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) (recognizing the Constitution as the "fundamental and paramount law of the nation"). Even when exercising the authority delegated from Congress via Article 36, UCMJ,[1] the President does not have the power to promulgate a procedural rule that orders law enforcement officers to violate a civilian's Fourth Amendment rights without seeking authorization to use compulsory process from a judge.[2] *Cf. United States v. Scheffer*, 523 U.S. 303, 311 n.7 (1998) (noting that it would be an odd inversion of our hierarchy of laws if the interpretation of a military rule of evidence worked a corresponding change in the meaning of the Constitution). Accordingly, despite the plain language of R.C.M. 701, the military judge did not err when he concluded that Appellant was not entitled to production of all the extracted data from BE's cell phone.

Of course, this does not mean that Appellant had no recourse or alternative means of obtaining relevant evidence that was necessary for the preparation of his defense. Even when R.C.M. 701 does not apply, R.C.M. 703(a) grants both the government and the defense an equal opportunity to obtain evidence, including the benefit of compulsory process. Thus, even if BE's Fourth Amendment rights prevented the Government from unilaterally providing Appellant with BE's cell phone data, the military judge had the authority to grant Appellant access to that data under R.C.M. 703(e) *if* Appellant could establish the relevance of the data and its necessity to his defense.

But in his order denying Appellant's motion to compel, the military judge expressly ruled that the defense had failed to demonstrate that the evidence was necessary, particularly considering the evidence already available to the defense. Appellant declined to appeal this aspect of the military judge's ruling, either before the AFCCA or before this Court. Thus, we need not consider whether the military

[1] *See* 10 U.S.C. § 836 (authorizing the President to prescribe procedural rules for courts-martial).

[2] Of course, there are many exceptions to this general statement that might apply in specific circumstances, but Appellant does not argue that any such exceptions apply here.

judge abused his discretion in denying Appellant's request for production under R.C.M. 703.

IV. Conclusion

The military judge did not abuse his discretion when he denied Appellant's motion to compel the production of all the extracted data from BE's cell phone pursuant to R.C.M. 701. Because the military judge did not err, I agree that the decision of the United States Air Force Court of Criminal Appeals should be affirmed.

Chief Judge OHLSON, dissenting.

The lead opinion concludes that any error committed by the military judge in this case was harmless beyond a reasonable doubt.[1] I disagree. For the reasons stated below, I conclude that the Government failed to meet its heavy burden under this onerous standard of review and that this Court should therefore set aside the findings and sentence. Because the lead opinion reaches a different result, I respectfully dissent.

Appellant, an Air Force pilot, and the complainant, BE, had a long-term relationship that included marriage plans. The day after their relationship soured, however, BE went to local law enforcement in Kansas and accused Appellant of sexually assaulting her. Specifically, BE alleged that on a number of occasions Appellant forced her to participate in BDSM (bondage, discipline, sadism, and masochism) activities without her consent. Appellant was court-martialed, convicted of a number of sexual offenses and physical acts of domestic violence involving BE, and sentenced to forfeiture of all pay and allowances, dismissal, a reprimand, and a total of nine years of confinement.

At trial, Appellant did not contest that he and BE had engaged in BDSM activities. Rather, he argued that the sexual acts were consensual or at least that he reasonably believed they were consensual. In support of his position, the defense introduced material from Appellant's cell phone seemingly demonstrating BE's acquiescence to the acts. For example, BE sent Appellant explicit images depicting women in sexually submissive positions with a man. Further, when Appellant texted a reference to a Snapchat photo by saying, "I didn't see that snap coming," BE texted back, "I got tired of waiting, I wanted to try the butt plug." Moreover, BE's own Amazon account reflected the purchase of an "anal hook," a stuffed leather gag, "butt

[1] The lead opinion declines to substantively address whether the military judge erred in this case. Instead, the lead opinion assumes without deciding that there was error and then proceeds to a prejudice analysis. Because of the approach taken by the lead opinion, I too shall focus on the prejudice issue rather than on the underlying granted issue.

plugs," and rope. In fact, BE texted Appellant a screenshot of the Amazon listing for the anal hook on the same day of the purchase. And when Appellant made a reference to using the back door to BE's home, BE texted back that her "back door" was for "hooks and clubs only." In addition, the defense produced as a witness BE's former best friend who testified that BE had a reputation for not being truthful.

When the defense confronted BE with the material from Appellant's cell phone prior to trial, BE sought to deflect the questions and to minimize the import of the material by claiming that the text messages being shown to her were "incomplete" and "cherry picked" and therefore "misleading." This situation played out in the following manner at trial:

> Q: Ma'am, when I asked you about these text messages, and I said, "What are these," you said, "I do not remember them." That's all of my question.
>
> A: Yeah, I was having a hard time remembering the full conversation because it feels like this is very choppy and cherry picked.

When the defense sought to obtain from BE *her* cell phone's version of the materials, however, BE refused to grant access to them. And when Appellant moved to compel their production, the military judge denied the defense motion.

The lead opinion takes the position that because the defense was able to cross-examine BE using the materials retrieved from *Appellant's* phone, the evidence from *BE's* phone "was cumulative and would have only reinforced what the members already knew." *United States v. Braum*, __ M.J. __, __ (8) (C.A.A.F. 2026) (plurality opinion). I respectfully suggest, however, that this misses the point.

To be sure, in typical cases, text messages of this nature would indeed be cumulative. But what was unusual about the instant case was that the victim refused to turn over her copy of the texts because she indicated she wanted to "shield" her privacy interests, but then she used the defense's need to rely solely on Appellant's version of the texts as a "sword" to allege that the defense was misleadingly cherry-picking those texts. In essence then, BE was allowed to convey to the panel members that they should discount what the text messages showed about her willing participation in the BDSM activities because the defense was confronting her with a supposedly incomplete set of texts—but the only way the defense could rebut BE's claim was to have access to BE's copy of the text messages, which BE herself blocked. The colloquial term for BE's approach is "chutzpah"; the legal term for the military judge's denial of the defense motion to compel production of BE's text messages is "prejudicial."

At bottom, this case hinged on BE's credibility. And as the lead opinion itself concedes, the evidence impeaching BE's credibility was "*substantial in volume and weight*." *Id.* (emphasis added). Moreover, the lead opinion goes on to note that "the defense made inroads in challenging BE's credibility, and more broadly, her character for truthfulness. Indeed, BE's character for truthfulness was undermined by even a friendly witness—her [former] best friend—who testified BE was 'untruthful.' " *Id.* at __ (8-9).

By pointing to the evidence adduced at trial that amply demonstrated BE's lack of credibility, the lead opinion implicitly acknowledges just how tenuous Appellant's conviction really was. And in *United States v. Coleman*, this Court held that the failure to "disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." 72 M.J. 184, 187 (C.A.A.F. 2013). Here, BE used her leverage over the text messages to buffer the impact of the defense's cross-examination. If the military judge had properly allowed the defense to obtain access to BE's version of the text messages, BE's allegations against the defense would have been prevented or rebutted, thereby making the defense's cross-examination of BE even *more* effective. In light of these circumstances, I cannot agree that the Government has met its burden of demonstrating that any error made by the military judge in this case was harmless beyond a reasonable doubt. *See id.*

I conclude that the findings and sentence in this case should be set aside. Because this Court reaches a different result, I respectfully dissent.

Enclosure C

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40434

UNITED STATES
Appellee

v.

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

Appeal from the United States Air Force Trial Judiciary

Decided 10 October 2024[1]

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

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

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

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

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

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

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

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

MASON, Judge:

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

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

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

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

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

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

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

I. BACKGROUND[5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. DISCUSSION

A. Defense Motion to Dismiss or Compel Disclosure or Production

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

1. Additional Background

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

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

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

2. Law

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

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

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

59 M.J. at 326.

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

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

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

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

Id. (internal quotation marks and citations omitted).

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

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

3. Analysis

a. Dismissal

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

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

b. Disclosure or Production

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

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

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

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

Furthermore, the military judge found,

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

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

B. Factual Sufficiency

1. Law

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

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

2. Analysis

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

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

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

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

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

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

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

C. Ambiguous Conviction

1. Law

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

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

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

"A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." *Id.* (citing *United States v. Griffin*, 502 U.S. 46, 49–51 (1991)) (additional citation omitted).

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

2. Analysis

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

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

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

D. Trial Counsel Argument

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

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

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

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

1. Law

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

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

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

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

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

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

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

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

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

2. Analysis

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

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

Appellant relies on our decision in *United States v. Carter*, No. ACM 35027, 2003 CCA LEXIS 257 (A.F. Ct. Crim. App. 17 Oct. 2003) (unpub. op.), where we held that the trial counsel's repeated characterization of the evidence as "uncontradicted" and "uncontroverted" was an improper comment upon Appellant's exercise of his right to remain silent. This case is significantly distinguishable from *Carter*. Here, trial counsel's singular use of the word "uncontroverted" was not a comment—directly, indirectly, or by innuendo—on the fact that Appellant did not testify. BE's testimony as well as the seizure by investigators of items associated with this type of sexual activity provided a factual basis for trial counsel's argument. Furthermore, forms of evidence besides Appellant's testimony could have rebutted Government's characterization of his sexual proclivities. For example, testimony from Appellant's previous partners, any other findings related to these interests (*e.g.*, web searches, purchase histories from Appellant's accounts) could have been presented by the Government or the Defense to undermine or support these assertions. Thus, we find trial counsel's comment on the state of the evidence in this particular case was not improper.[11]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There were no specific measures adopted to cure trial counsel's improper arguments. The military judge did instruct the members that each counsel's argument is not evidence and that it was the members' responsibility to judge the credibility of the witnesses. Trial defense counsel did not object to the arguments. The record does not reflect whether this was a tactical decision to not object in order to enable his continued expression of the theory that BE was lying. Nevertheless, the lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comments. *Gilley*, 56 M.J. at 123.

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

E. Lawfulness of Consecutive Confinement Terms

1. Law

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

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

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

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

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

2. Analysis

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

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

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

A more appropriate way to read this provision is to merely give effect to the plain language, "when each specification involves the same victim and the same act or transaction." R.C.M. 1002(d)(2)(B)(i).[14] The presence of the language "on divers occasions" may, when all of the occasions do not coincide with other transactions encompassed in other specifications, remove the obligation to adjudge concurrent confinement terms for these specifications.[15]

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

F. Timely Appellate Review

1. Additional Background

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

2. Law

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

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

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

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

3. Analysis

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

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

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

III. CONCLUSION

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

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

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court