UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman RODNEY B. BOYCE
United States Air Force

ACM 38673

24 March 2016

Sentence adjudged 15 March 2014 by GCM convened at Aviano Air Base, Italy. Military Judge: Christopher F. Leavey.

Approved Sentence: Confinement for 4 years and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Captain Michael A. Schrama and James Trieschmann, Esquire (civilian counsel).

Appellate Counsel for the United States: Major Thomas J. Alford and Gerald R. Bruce, Esquire.

Before

MITCHELL, MAYBERRY, and BENNETT
Appellate Military Judges

OPINION OF THE COURT

BENNETT, Judge:

At a general court-martial composed of officer and enlisted members, Appellant was convicted, contrary to his pleas, of rape on divers occasions and two specifications of assault consummated by a battery, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928. The court sentenced him to confinement for 4 years, reduction to E-1, and forfeiture of all pay and allowances. For the reasons explained below, the military judge ruled that the convening authority could not approve the reduction in grade. Accordingly,

the convening authority approved 4 years of confinement and forfeiture of all pay and allowances.

Appellant contends that (1) the military judge erred in admitting evidence of uncharged misconduct under Mil. R. Evid. 413; (2) the evidence is factually insufficient to sustain his conviction for rape; (3) the charges should be dismissed with prejudice because of apparent unlawful command influence (UCI); (4) the military judge improperly calculated the credit for previous nonjudicial punishment (*Pierce*[1] credit); (5) dilatory government post-trial processing delayed action until 173 days from the end of Appellant's trial, thus entitling him to relief; and (6) the military judge erred by not dismissing Additional Charge III because it is multiplicious with Additional Charge II.

We address these issues in a slightly different order than they were presented. As explained below, we affirm the findings and grant some sentence relief.

Background

Appellant and Senior Airman (SrA) DR, the victim in this case, were married in Las Vegas, Nevada. SrA DR testified that Appellant raped her shortly after the ceremony. Appellant was not charged for this crime because it occurred before he enlisted. SrA DR's testimony concerning this rape was the basis of Mil. R. Evid. 413 litigation at trial, and is also the basis of Appellant's first assignment of error on appeal.

Appellant and SrA DR were stationed at Aviano Air Base, Italy. The events underlying Appellant's convictions took place between on or about 1 October 2010 and on or about 21 September 2011. During that period of time, Appellant raped SrA DR by force and assaulted her on multiple occasions.

On one occasion in February 2011, after a night of drinking, Appellant and SrA DR had an argument. The argument escalated, and Appellant called SrA DR a variety of derogatory names and lodged other insults. He shoved her into a wall so hard that she bounced off, hit her eye on the corner of a dresser, and fell to the floor. While she lay on the floor disoriented, Appellant pinned her down so she could not move, called her more names, and raped her. SrA DR was so traumatized that she urinated on the floor. When Appellant noticed that SrA DR had lost control of her bladder, he remarked that he thought he had killed her.

SrA DR reported that she had been assaulted after she was confronted by a supervisor who noticed a bruise on her face. However, she did not mention the rape. SrA

[1] See *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), for a discussion on sentence credit for prior punishment under Article 15, UCMJ, 10 U.S.C. § 815.

DR did not mention being raped because she felt no one would believe her and she did not want to be involved in a criminal proceeding.

Appellant repeatedly raped SrA DR after the February 2011 incident. SrA DR testified that these rapes all followed a similar pattern: Appellant would want sex; she would, at times, say "no" and resist; Appellant would use force to pin her down; and then she would just lie there when resistance became futile. She testified that she was terrified of Appellant and did not want to make him angry.

By September 2011, SrA DR and Appellant were no longer living together. On or about 21 September 2011, Appellant returned to SrA DR's residence to collect personal items, and an altercation ensued. During this altercation, Appellant became angry and forced his way into the bedroom. SrA DR attempted to call the police, but Appellant pushed her onto the bed and covered her mouth and nose with his hand so that she could not breathe. Ultimately, SrA DR broke free and successfully calmed down Appellant. Appellant received nonjudicial punishment for the assault consummated by a battery. This assault consummated by a battery was also the basis for Specification 2 of Additional Charge III, giving rise to the *Pierce* credit issue.

SrA DR was interviewed by agents of the Air Force Office of Special Investigations (AFOSI) in May of 2013 because another Airman had alleged that Appellant had raped and assaulted her.[2] It was during this interview that SrA DR finally reported the rapes. She testified that she did so out of a sense of guilt for what allegedly happened to this other Airman; if she had reported the rapes, Appellant might have been stopped before he could have harmed anyone else.

Additional facts necessary to resolve the assigned errors are included below.

Military Rule of Evidence 413

In his first assignment of error, Appellant argues that the military judge abused his discretion by admitting evidence of uncharged misconduct, specifically SrA DR's testimony that Appellant raped her on their wedding night. Appellant argues that the military judge erred because this evidence failed the Mil. R. Evid. 403 balancing test and was uncorroborated and unbelievable. He also argues that the wedding night rape was substantially dissimilar to the rapes Appellant was convicted of and that this propensity evidence was the only evidence that supported the rape conviction. We disagree.

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176 (C.A.A.F. 2013) (citing *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010)). "The abuse of discretion standard is a strict one, calling

[2] Appellant was acquitted of the rape and assaults of this other Airman.

for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

Mil. R. Evid. 413(a) provides that "[i]n a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." This includes use to demonstrate an accused's propensity to commit the charged offenses. *United States v. Parker*, 59 M.J. 195, 198 (C.A.A.F. 2003); *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). "[I]nherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission." *United States v. Berry*, 61 M.J. 91, 94–95 (C.A.A.F. 2005).

Under Mil. R. Evid. 413, the following threshold requirements must be met before evidence of similar offenses may be admitted: (1) the accused must be charged with an offense of sexual assault; (2) the proffered evidence must be evidence of the accused's commission of another offense of sexual assault; and (3) the evidence must be relevant under Mil. R. Evid. 401 and 402. *Id*. at 95 (quoting *Wright*, 53 M.J. at 482). For the second requirement, the court must conclude that the members could find, by a preponderance of the evidence, that the offenses occurred. *Wright*, 53 M.J. at 483 (citing *Huddleston v. United States*, 485 U.S. 681, 689–90 (1988)).

Once these three initial requirements have been met, the military judge is constitutionally required to also apply a balancing test under Mil. R. Evid. 403. *Berry*, 61 M.J. at 95. This rule of evidence provides that, although relevant, evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. "The [Mil. R. Evid.] 403 balancing test should be applied in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible." *Wright*, 53 M.J. at 482 (citation and internal quotation marks omitted).

Under these circumstances, when conducting the Mil. R. Evid. 403 balancing test, the military judge should consider the following non-exhaustive list of factors to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice: (1) strength of proof of the prior act; (2) probative weight of the evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; (5) time needed for proof of the prior conduct; (6) temporal proximity; (7) frequency of the acts; (8) presence or lack of intervening circumstances; and (9) the relationship between the parties. *Id*. When a military judge properly conducts a Mil. R. Evid. 403 balancing test, the decision will not be overturned absent a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Less deference is owed by the appellate court when the military

judge fails to articulate the balancing test; no deference is owed if the military judge fails to conduct a balancing test. *See id.*

In the case at bar, over Appellant's objection, the Government sought to introduce SrA DR's testimony that Appellant raped her on their wedding night, evidence of uncharged misconduct, to prove that Appellant had the propensity to commit the rapes he was charged with committing.

Concerning this uncharged misconduct, SrA DR testified substantially as follows. SrA DR and Appellant were married in September 2009 before either came on active duty. After their wedding ceremony, Appellant and SrA DR went back to their hotel room which they were sharing with SrA DR's parents. SrA DR told Appellant she was uncomfortable and did not want to have sex with him because she was concerned that her parents might return to the room. Appellant became angry and threw her on the bed. Then he got on top of her and pinned her down. SrA DR resisted by telling Appellant "no" and "to get off of her." Appellant, in response, called her disparaging names and raped her. SrA DR remembered that Appellant used a lot of force to hold her down. She squirmed but she could not break free. She stopped resisting when she felt it was useless.

The military judge made detailed findings of fact, and he noted that the following factors favored permitting the Government to elicit SrA DR's testimony concerning the uncharged misconduct: (1) the strength of proof for the uncharged misconduct was high because SrA DR, as the victim, would be testifying under oath in front of panel members, while being subject to cross examination; (2) the evidence was probative as the uncharged and charged offenses were similar; (3) the risk of distraction was low; (4) the time needed to prove the prior act was limited as SrA DR was already going to testify; (5) the uncharged and charged offenses occurred relatively close in time to one another; and (6) the parties to these offenses were the same. Thus, the military judge found the probative value of the evidence outweighed the prejudicial impact.

After performing the analysis prescribed by our superior court in *Wright*, 53 M.J. at 482, and conducting the constitutionally required Mil. R. Evid. 403 balancing test, the military judge ruled that the Government could elicit testimony from SrA DR concerning the wedding night rape and that this evidence could be used as evidence of Appellant's propensity or predisposition to commit the charged rapes of SrA DR.

The military judge also gave a proper instruction for the permissible use of this evidence, including: (1) that the evidence of uncharged misconduct could only be considered during deliberations if the members first found that it was more likely than not that the uncharged rape occurred; (2) that they could only consider this evidence for its tendency, if any, to show Appellant's propensity or predisposition to engage in sexual assault; (3) that Appellant could not be convicted solely because the panel believed he committed the 2009 rape or solely because the panel believed he had a propensity to engage

in sexual assaults; and (4) the panel could not use this evidence to overcome a failure of proof for any elements of the charged offenses, all of which needed to be proven beyond a reasonable doubt.

There is striking similarity between the uncharged rape and the rapes Appellant was convicted of committing. The initiation of the misconduct (i.e., Appellant simply wanting sex), his violent reaction when SrA DR refused to have sex with him (including both physical and emotional abuse), and the method he employed to rape her (i.e., physically pinning her down such that her resistance became futile) demonstrate an obvious pattern of conduct. The military judge did not err when he ruled that the Government could elicit SrA DR's testimony concerning the uncharged misconduct. The military judge determined SrA DR's testimony about the prior uncharged misconduct was, in fact, believable when he properly conducted his analysis of this issue under Mil. R. Evid. 413 and 403, and, contrary to Appellant's argument, there is no requirement that Mil. R. Evid. 413 evidence be corroborated.

The military judge conducted the appropriate analysis and articulated it on the record. Moreover, the military judge gave the members an appropriate limiting instruction, and panel members are presumed to follow such instructions. *See United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000). His decision to permit the Government to introduce this propensity evidence and to limit its use was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *White*, 69 M.J. 236, 239 (C.A.A.F. 2010). Therefore, the military judge did not abuse his discretion in admitting this evidence.

Factual Sufficiency of Additional Charge II

Appellant argues the Government failed to prove beyond a reasonable doubt that he raped SrA DR on divers occasions. Appellant specifically avers that the Government failed to meet its burden, with respect to the rape charge, because it relied exclusively on the testimony of SrA DR—testimony he characterizes as unbelievable, unverified, and motivated by revenge. Appellant points out that SrA DR had numerous opportunities to report these rapes, including when she was interviewed by Air Force security forces special investigators about the February 2011 misconduct.

We review issues of factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.A.A.F. 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." *Washington*, 57 M.J. at 399.

SrA DR testified that she was scared of Appellant and embarrassed after being raped by her then-husband. She did not want to tell her story to strangers or get involved in criminal proceedings. Eventually, SrA DR did reveal that Appellant had raped her when she was interviewed by AFOSI special agents in relation to other allegations that Appellant had sexually assaulted another Airman. It was out of a sense of guilt that SrA DR finally spoke out. She believed that if she had reported the rapes earlier, Appellant might have been stopped. Under the circumstances, the fact that SrA DR did not report the rapes until she was contacted by AFOSI in May 2013 does not significantly diminish her credibility. By that time, she had left active duty, joined the reserves, remarried, and had a child. Her delay in reporting is not only understandable, it tends to negate Appellant's argument that SrA DR fabricated her testimony out of a desire for revenge.

SrA DR gave consistent testimony concerning the rapes she endured, both on cross and direct examination. She was unequivocal when she testified that Appellant, on more than one occasion, pinned her down using great force and penetrated her vagina with his penis without her consent. We have reviewed the record of trial, paying particular attention to the evidence and reasonable inferences that can be drawn therefrom. We have made allowances for not personally observing the witnesses, and we ourselves are convinced of Appellant's guilt beyond a reasonable doubt.

Multiplicity

On appeal, and for the first time, Appellant argues that Additional Charge III is multiplicious of Additional Charge II. Thus, Appellant contends that the military judge erred by not sua sponte dismissing Additional Charge III.

Additional Charge III consists of two specifications. The first alleges that Appellant, on or about 12 February 2011, unlawfully pushed SrA DR with his hands. The second alleges that Appellant, on or about 21 September 2011, unlawfully pushed SrA DR and covered her nose and mouth with his hands. The Specification of Additional Charge II alleges that Appellant, between on or about 1 October 2010 and on or about 30 September 2011, caused SrA DR to engage in sexual acts, to wit: sexual intercourse, by using restraint applied to her body, sufficient that she could not avoid or escape the sexual conduct. Each specification alleges that the misconduct occurred in Aviano, Italy.

"If an appellant has forfeited a right by failing to raise it at trial, we review for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009); *see also United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (citing *Olano*, 507 U.S. at 733–34)." At trial, Appellant did not raise the issue of multiplicity. Therefore, we review the military judge's inaction for plain error. "Under plain error review, [we] will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error

materially prejudiced a substantial right of the accused." *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011).

Multiplicity in violation of the double jeopardy clause of the Constitution occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Anderson*, 68 M.J. 378, 385 (quoting *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)) (emphasis omitted). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See United States v. Teters*, 37 M.J. 370, 376–77 (C.M.A. 1993); *United States v. Morita*, 73 M.J. 548, 564 (A.F. Ct. Crim. App. 2014), *rev'd on other grounds*, 74 M.J. 116 (C.A.A.F. 2015).

The Supreme Court has established the following "separate elements test" for analyzing multiplicity issues: "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). "Accordingly, multiple convictions and punishments are permitted . . . if the two charges each have at least one separate statutory element from each other." *Morita*, 73 M.J. at 564. Where one offense is necessarily included in the other under the separate elements test, legislative intent to permit separate punishments may be expressed in the statute or its legislative history, or "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376–77.

Of the two Article 128, UCMJ, offenses of which Appellant was convicted, only one was committed on the same date as one of the rapes of which Appellant was convicted. This was the assault consummated by a battery charged in Specification 1 of Additional Charge III; that is, the offense occurring on or about 12 February 2011. Since no rape was alleged to have occurred in conjunction with, or even on the same date as, the 21 September 2011 assault, we fail to see how it could be multiplicious with any rape conviction.[3] Therefore, the focus of our multiplicity analysis will be on whether the military judge committed plain error by not dismissing Specification 1 of Additional Charge III for being multiplicious with the Specification of Additional Charge II.

The elements of assault consummated by a battery under Article 128, UCMJ, are:

(1) That the accused did bodily harm to a certain person; and
(2) That the bodily harm was done with unlawful force or violence.

[3] SrA DR testified that she was able to free herself and calm Appellant down when he assaulted her on or about 21 September 2011. Afterwards, Appellant left, and she called for help.

Manual for Courts-Martial, United States, pt. IV, ¶ 54.b.(2) (2012 ed.).

As charged in the case at bar, a person subject to the UCMJ commits rape when they commit a sexual act upon another person by using unlawful force against that other person. Article 120(a)(1), UCMJ.

SrA DR testified that when she was raped, on or about 12 February 2011, she was first assaulted by Appellant when he shoved her into a wall, causing her to fall and hit her head on the corner of a dresser. Then, Appellant climbed on top of her, pinned her down, and raped her. The elements of both offenses, as charged, were satisfied by independent proof. The force element of the rape offense was proven by SrA DR's testimony that Appellant pinned her down rendering any resistance on her part futile. The assault and battery that preceded this were not part of the same criminal act.

We conclude that Specification 1 of Additional Charge III and the Specification of Additional Charge II are not multiplicious. These specifications required proof of separate elements. Moreover, the specifications of Additional Charge III are not necessarily included in the specification of Additional Charge II. Furthermore, there is no evidence that the Government intended to charge these offenses in the alternative. Simply put, the assault and battery and the rape occurring in February 2011 were two separate and distinct criminal acts, and they were appropriately charged as separate offenses. Since there was no error, there is no need to proceed any further in the plain error analysis.

Unlawful Command Influence

Appellant also argues that we should dismiss, with prejudice, his convictions because there was an appearance of UCI. Lieutenant General Craig A. Franklin was the convening authority who referred charges in this case.[4] Appellant contends that the military judge improperly applied the legal standard for actual UCI, rather than applying the correct legal standard for apparent UCI, and by failing to consider how the facts and circumstances behind the convening authority's decision to resign would impact the public's perception of his actions. We disagree.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states in relevant part: "No person subject to this chapter may attempt to coerce or . . . influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . or the action of any convening . . . authority with respect to his judicial acts." Our review of this matter is "not limited to actual unlawful influence and its effect on this trial." *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). We must also ensure there

[4] There were multiple convening authorities in this case. Lieutenant General Craig A. Franklin referred the charges, but he was later replaced.

is no appearance of UCI. The mere appearance of UCI may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94–95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)) (internal quotation marks omitted).

Where, as here, the issue is litigated at trial, the military judge's findings of fact are reviewed under a clearly erroneous standard, but the question of command influence flowing from those facts is a question of law that this court reviews de novo. *See United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999).

Before wading deeper into the facts of this case, it is necessary to provide some detail about the convening authority's actions in two prior cases involving allegations of sexual assault—*United States v. Wilkerson* and *United States v. Wright*. The convening authority's decision to set aside the findings and sentence in the *Wilkerson* case resulted in negative attention from, among others, Congress and the media. He then became involved in another controversy when, consistent with the recommendation of an Article 32, UCMJ, 10 U.S.C. § 832, preliminary hearing officer and his staff judge advocate, he chose not to refer sexual assault charges against an Airman. *See United States v. Wright*, 75 M.J. 501, 502–03 (A.F. Ct. Crim. App. 2015).

After making his decision not to refer charges in the *Wright* case, on 27 December 2013, the convening authority was informed by the Chief of Staff of the Air Force that the Secretary of the Air Force had lost confidence in him and that he had two options: retire at the lower grade of Major General or wait for the Secretary of the Air Force to remove him. That same day, the convening authority received Appellant's referral package. On 6 January 2014, the convening authority referred charges against Appellant; two days later he announced his retirement.

At trial, the Government provided an affidavit from the convening authority in which he acknowledged the controversy created by his decisions in both the *Wilkerson* and *Wright* cases. Nevertheless, he maintained that his decision to refer charges in this case was not impacted by his experiences with any other court-martial case, and he asserted that he "did not and would not allow improper outside influences to impact [his] independent and impartial decisions as a [general court-martial convening authority]."

The military judge made an initial oral ruling on the UCI issue but did not issue written ruling until after the trial adjourned. The military judge bifurcated his ruling, making separate decisions on UCI for the accusatorial and adjudicative stages of the proceedings.

> With regards [sic] to the accusatorial phase, while I do believe that a burden shift was required and that the defense did meet its very low burden with regards [sic] to the accusatory phase,

> I do believe the [G]overnment has proven beyond reasonable doubt that, in fact, if UCI did exist or apparent UCI existed, that it had absolutely no impact on this particular case.

To be clear, while the existence of actual UCI might affect the fairness of court-martial proceedings in a given case, apparent UCI calls into question the public's perception of the fairness of the proceedings. The proceedings might be untainted by actual UCI even when there is apparent UCI. The concern with apparent UCI is that the public may lose confidence in the fairness of the court-martial process as a whole, not necessarily a specific case, and that is why a military judge must guard against it. *See Ayers*, 54 M.J. at 94–95.

While the military judge found no evidence of actual UCI, he did find that the Defense had met its burden of showing that there was apparent UCI. He based this finding on evidence that the convening authority's career was seemingly curtailed as a result of his decisions in the *Wilkerson* and *Wright* cases. Specifically, he noted that there was "some evidence" that "a member of the general public would be concerned about the fairness of the proceedings when lawful decisions by a [c]onvening [a]uthority adverse to an alleged victim's desires bring such great negative scrutiny and the termination of a lengthy military career." Ultimately, the military judge was convinced beyond a reasonable doubt that there was no actual or apparent UCI at either the accusatorial or adjudicative stages and that Appellant had received a fair trial.

We find that the military judge applied the correct analysis for actual and apparent UCI. We agree with his ruling that the convening authority was not affected by actual UCI when he made his decision to refer charges in this case. As the military judge noted, this convening authority may have been "the most bombproof of any convening authority" at the time. He had certainly demonstrated his independence with respect to his decision-making in sexual assault cases. He was aware of the high degree of scrutiny sexual assault cases were receiving from both military and civilian leaders and lawmakers. He was aware that his decisions in the *Wilkerson* and *Wright* cases had received criticism from many prominent figures. Furthermore, he provided an affidavit that unequivocally attested to his not being influenced in any way by outside pressure.

Our superior court has declared, "[T]he appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Lewis*, 63 M.J. at 415. Once the defense successfully raises the issue of apparent UCI, the burden shifts to the government to prove that it has been "ameliorated and made harmless beyond a reasonable doubt." *Id*. In the case at bar, the Government does this by convincing us that a disinterested member of the public would believe that the convening authority was unaffected by UCI when he made his decision to refer charges against Appellant.

In this case, the UCI issue manifested in a way that inextricably intertwined the questions of whether there was actual or apparent UCI. While we agree that there was some evidence of apparent UCI at the referral stage of Appellant's case, based on the facts described above and our examination of the entire record of trial, we are convinced that an objective, disinterested, reasonable person, fully informed of all the facts and circumstances, would not believe that the convening authority was affected by UCI and would not "harbor a significant doubt about the fairness" of Appellant's court-martial proceeding. *Id.*

Pierce Credit.

Citing *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), *United States v. Gammons*, 51 M.J. 169 (C.A.A.F. 1999), and *United States v. Webb*, ACM 34598 (A.F. Ct. Crim. App. 8 October 2002) (unpub. op.), Appellant argues that the military judge erred when he did not credit Appellant for the reprimand that he received as nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for a crime that he was later convicted of committing at his court-martial. We agree.

Before he was court-martialed, Appellant received nonjudicial punishment for assaulting SrA DR on or about 21 September 2011, at or near Aviano, Italy. This was the same misconduct alleged in Specification 2 of Additional Charge III, of which Appellant was convicted.[5] His nonjudicial punishment included a reduction in rank of one grade, which was suspended, and a reprimand. Later, the suspended reduction in rank was vacated after Appellant allegedly failed to obey an order not to contact SrA DR on or about 24 October 2011. This "failure to obey" was the same misconduct that was alleged in the specification of Additional Charge I, of which Appellant was acquitted. The vacation action was not admitted into evidence.

During an Article 39a, UCMJ, 10 U.S.C. § 839a, session, Appellant initially requested that the members be informed only that he received nonjudicial punishment, but not informed of the specific nature of the punishment. Trial counsel argued that this was not an available option, and the military judge agreed. Shortly thereafter, when trial counsel offered the nonjudicial punishment into evidence, Appellant did not object.

After the nonjudicial punishment was introduced into evidence, the military judge addressed the issue of *Pierce* credit. With the agreement of the trial defense counsel, the military judge decided to instruct the members that they had to consider the nonjudicial punishment as a matter in mitigation.[6] The military judge also informed the parties that,

[5] The military judge incorrectly found that this was the same misconduct alleged in Specifications 1 and 2 of Additional Charge III. In fact, Specification 1 of Additional Charge III alleges a different assault. However, this error did not materially prejudice Appellant.

[6] The military judge instructed the panel as follows:

after the announcement of the sentence, he would determine the credit to be awarded by the convening authority.

The military judge concluded that if the members adjudged a reprimand, the convening authority should be prohibited from approving it. At this stage, the military judge believed that Appellant should receive credit for a reduction in rank, only if he was convicted of the specification of Additional Charge I. In fact, he referred to this specification as the "tripwire." Because Appellant was acquitted of this charge and specification, the military judge and the parties agreed that the only punishment Appellant could receive credit for would be a reprimand. In the end, all agreed that the convening authority was unconstrained in his authority to approve the sentence because no reprimand was adjudged.

However, upon reconsideration after the court-martial adjourned, the military judge reasoned that the vacation action was an extension of Appellant's nonjudicial punishment. He concluded that it was illogical to not provide *Pierce* credit for the reduction in rank simply because Appellant was acquitted of the specification of Additional Charge I, and he ordered the convening authority not to approve any reduction in rank.[7]

At trial, Appellant did not object to the military judge's conclusion that he was not entitled to credit for the reprimand he received as a result of his nonjudicial punishment. Therefore, we review the military judge's decision for plain error. *Gladue*, 67 M.J. at 313. "Under plain error review, we will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused." *Sweeney*, 70 M.J. at 304.

"The accused, as gatekeeper, may choose whether to introduce the record of a prior [nonjudicial punishment] for the same act or omission covered by a court-martial finding and may also choose the forum for making such a presentation." *Gammons*, 51 M.J. at 183. Appellant, as the gatekeeper, determines whether he wants any credit calculated and applied by the panel, the military judge, or the convening authority. *United States v. Mead*, 72 M.J. 515, 518 (Army Ct. Crim. App. 2013) *aff'd* 72 M. J. 479 (C.A.A.F. 2013). "In a judge-alone trial, if the accused offers the record of a prior [nonjudicial punishment] for the purposes of evidence in mitigation during sentencing, the military judge will state on

> When you decide upon a sentence in this case, you must consider that punishment has already been imposed upon the accused under Article 15, UCMJ, for the offense of assault consummated by a battery against [SrA DR] on or about 21 September 2011 of which he has also been convicted at this court-martial. This prior punishment is a matter in mitigation which you must consider.

[7] We do not address whether an appellant is entitled to *Pierce* credit when a suspended punishment is later vacated. *See United States v. McCrary*, NMCCA 201300135, unpub. op. at 6 n.7 (N.M. Ct. Crim App. 2013) (calculating confinement credit without including a suspended reduction that was later vacated).

the record the specific credit awarded for the prior punishment." *Gammons*, 51 M.J. at 184.

The case law is clear. Allowing a servicemember to be punished twice for the same misconduct "would violate the most obvious, fundamental notions of due process of law." *Pierce*, 27 M.J. at 369. Moreover, "an accused must be given *complete* credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Id*. However, the military judge has some discretion in fashioning an appropriate credit based on the facts of each case. *See Mead*, 72 M.J. at 481–82; Article 15(f), UCMJ. "Because the types of punishment administered nonjudicially and those adjudged by courts-martial are not always identical, there may be some difficulties in reconciliation." *Pierce*, 27 M.J. at 369.

> While certain matters under [nonjudicial punishment], such as admonitions and reprimands, may require a degree of flexibility in providing an appropriate credit, matters involving pay, extra duties, and restrictions on liberty should be susceptible to standard credits. In the absence of such credits, however, it is the responsibility of the military judge, the convening authority, or the Court of Criminal Appeals, as appropriate, to make such assessment.

Gammons, 51 M.J. at 184.

In *Webb*, the appellant had been reprimanded as part of the nonjudicial punishment he received for misconduct that he was later sentenced for at a court-martial. *Webb*, unpub. op. at 6. He did not, however, receive a reprimand as part of his sentence. *Id*. at 1. Nevertheless, we held that he was entitled to one day of confinement credit for the reprimand he received as part of his nonjudicial punishment. *Id*. at 8.

Our superior court has not extended the requirement that *Pierce* credit be specified, on the record, to cases that are tried before a panel of members. Arguably, if an accused chooses to have the military judge generally inform the panel about a nonjudicial punishment he or she previously received, there would be a double credit if, after the sentence is announced, the military judge also specified *Pierce* credit on the record. This is because the accused was presumably given credit by the panel when it considered the nonjudicial punishment as mitigating evidence in accordance with the military judge's instructions.[8] If a military judge decides to specify the *Pierce* credit after giving a general instruction concerning prior nonjudicial punishment, particularly when an accused agrees

[8] Despite this double benefit, this practice is consistent with procedures outlined in the Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 2-7-21 (1 January 2010). We question whether this procedure is consistent with our superior court's case law; however, it was the process explained to and relied on by Appellant.

with and relies on that approach as Appellant did in this case, it is incumbent on the military judge to correctly apply this credit.[9]

Once the military judge, in the case at bar, committed to providing this double credit it was error for him not to grant Appellant any credit for the reprimand, and this error was plain and obvious. Moreover, because Appellant relied on receiving this credit, the military judge's error materially prejudiced a substantial right of Appellant. Therefore, applying the *Webb* rationale for determining credit to this case, we award Appellant one day of confinement credit.

Delay in Post-Trial Processing

In *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), our superior court established guidelines that trigger a presumption of unreasonable delay in post-trial processing and appellate review. A presumption of unreasonable delay exists "when action of the convening authority is not taken on the case within 120 days of the completion of trial." *Id*.

Appellant's court-martial took place at Aviano Air Base, Italy. He was sentenced on 15 March 2014. It took 33 days for the court reporter to transcribe the record of trial and another 32 days for the parties to proofread the 1473-page transcript. On 9 June 2014, the military judge reconsidered his earlier ruling on *Pierce* credit. On 12 June 2014, the military judge issued his ruling on the defense motion to dismiss for unlawful command influence. On this same date, 89 days after Appellant's court-martial adjourned, the military judge authenticated the record. On 24 June 2014, the staff judge advocate's recommendation (SJAR) was completed (101 days after the adjournment of Appellant's trial). The SJAR was served on Appellant on 16 July 2014 and on his counsel on 21 July 2014 (22 and 27 days, respectively, after the SJAR was completed). The record of trial was served on Appellant on 6 August 2014. However, the military judge's ruling on the defense motion to compel discovery had been erroneously omitted. Appellant did not possess the complete record of trial until 27 August 2014. Appellant submitted clemency on 26 August 2014, and the convening authority took action on 4 September 2014, 173 days after Appellant's court-martial adjourned and exceeding the *Moreno* standard by 53 days.[10] Appellant's case was docketed with this court on 29 September 2014, 25 days after action.

[9] We leave as unanswered the question of whether an appellant who is properly advised of the options provided in *Gammons* and elects to have the members informed of the nonjudicial punishment should be entitled to additional credit. *See Mead*, 72 M.J. at 482 ("The military judge considered the NJP [nonjudicial punishment] and specifically awarded *Pierce* credit for it. Neither Article 15(f) nor this Court's case law grants him more.").

[10] The Government argues that Appellant's trial defense counsel was responsible for over a month of post-trial delay because she did not submit clemency until 41 days after she received her copy of the staff judge advocate's recommendation (SJAR). However, an accused has 10 days from whichever is *later*: the receipt of the authenticated record of trial; the SJAR; or the addendum to the SJAR, in cases where there is new matter in the addendum. *See*

Appellant does not allege that the delay caused him any prejudice. Nevertheless, he asks this court for five days of credit against his sentence to confinement.

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135. We review de novo whether an appellant has been denied the due process right to speedy post-trial review and whether any constitutional error is harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). A facially unreasonable delay will trigger an analysis that requires us to balance the four factors elucidated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), and adopted in *Moreno*, 63 M.J. at 135. Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005) (citing *Barker*, 407 U.S. at 530).

When there is no showing of prejudice under the fourth *Barker* factor, "we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). Appellant has identified no specific prejudice resulting from the 53-day delay, and we find none. Having considered the totality of the circumstances and the entire record, when we balance the other three factors, we find the post-trial delay in this case not so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system. We are convinced the error is harmless beyond a reasonable doubt.

Tardif Relief

Even though we have concluded that the error was harmless beyond a reasonable doubt, Article 66(c), UCMJ, empowers the appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *see also United States v. Harvey*, 64 M.J. 13, 24–25 (C.A.A.F. 2006).

This court set out a non-exhaustive list of factors we consider when evaluating the appropriateness of *Tardif* relief in *United States v. Bischoff*, 74 M.J. 664, 672 (A.F. Ct. Crim. App. 2015). *See also United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015) (articulating factors specifically tailored to answer the question of whether *Tardif* relief is appropriate). The factors include the length and reasons for the delay, the length and complexity of the record, the offenses involved, and evidence of bad faith or gross negligence in the post-trial process.

R.C.M. 1105(c)(1). In this case, Appellant did not receive the complete record of trial until 27 August 2014, one day *after* trial defense counsel submitted clemency matters. Thus, Appellant actually submitted clemency early.

The record of trial in this case is relatively lengthy. Nevertheless, the preparation of the record of trial was fairly efficient, especially considering the fact that the military judge issued two rulings after the trial adjourned. However, it took 22 days to simply deliver the SJAR to Appellant (27 days to deliver it to his counsel) and 55 days to deliver the record of trial, an incomplete one at that. While there may be reasonable explanations for these delays, the record is barren as to why these tasks took so long to complete.

In *United States v. Sutton*, we exercised our broad authority under Article 66(c), UCMJ, 10 U.S.C. § 966(c), to grant the appellant *Tardif* relief when the government failed to meet the 30-day standard for forwarding the record of trial for appellate review. We noted that this 30-day standard was not "particularly onerous." *Sutton*, ACM S32143, unpub. op. at 9 (A.F. Ct. Crim. App. 21 August 2014). The delay in this case is no more excusable than the delay in *Sutton.* The forwarding of an SJAR or a record of trial to an appellant likewise "'involves no discretion or judgment; and . . . involves no complex legal or factual issues or weighing of policy considerations.'" *Id.* (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)).

We have considered the facts and circumstances of Appellant's offenses and the entire record of trial. We conclude that sentence relief under Article 66(c), UCMJ, is warranted; we grant Appellant five days of credit against his sentence to confinement.

Conclusion

We affirm the approved findings. We approve of a sentence to 47 months, 3 weeks, and 1 day of confinement and forfeiture of all pay and allowances. The approved findings and sentence, as modified, are correct in law and fact. Articles 59(a) and 66(c), UCMJ. Accordingly, the approved findings and the sentence, as modified, are **AFFIRMED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist