IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Albert G. CAREY
Commander (O-5), U. S. Navy

NMCCA 200201238 Decided 15 November 2006

Sentence adjudged 3 March 2001. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Warfare Center Aircraft Division, Patuxent River, MD.

LT BRIAN L. MIZER, JAGC, USN. Appellate Defense Counsel
Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel
CHARLES W. GITTINS, Civilian Appellate Defense Counsel
Capt BRIAN K. KELLER, USMC, Appellate Government Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

CARVER, Senior Judge:

The appellant was convicted, contrary to his pleas, at a general court-martial composed of officer members, of sodomy on divers occasions with his natural daughter who was then between 12 and 16 years of age; one specification of indecent acts with his natural daughter who was then between 12 and 16 years of age; and two specifications of indecent acts by having sexual intercourse with his natural daughter who was at the time at least 16 years of age, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The appellant was sentenced to confinement for 8 years and a fine of $75,000.00 with provision to serve an additional 2 years of confinement if the fine was not paid. The convening authority approved the sentence as adjudged.

The appellant has submitted 10 assignments of error: (1) the Government failed to prove the appellant guilty of any of the offenses beyond a reasonable doubt, (2) the Government failed to

present credible evidence of the acts alleged in Specification 1 of Charge III (indecent acts), (3) adult incest is not an offense (two of the specifications of indecent acts), (4) conviction of adult incest violates the constitutional right to privacy, (5) the military judge abused his discretion in admitting evidence that the appellant spanked his children, (6) the military judge erred in permitting a Government witness to testify as an expert on child abuse issues, (7) the military judge erred in admitting the prior testimony of the appellant's wife when she refused to testify, (8) the sentence is inappropriately severe, (9) the military judge committed plain error by not objecting to a portion of the trial counsel's closing argument, and (10) the military erred by failing to grant a mistrial when inadmissible evidence was inadvertently published to the court members. Finally, on 29 August 2006, the appellant filed a "Petition for an Extraordinary Writ in the Nature of Habeas Corpus."

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, the reply brief, and the outstanding oral argument by both parties, we conclude that the finding of guilty to one specification of indecent acts must be set aside and dismissed. We further conclude that the remaining findings of guilty are correct in law and fact. However, we provide sentence relief in our decretal paragraph. We conclude that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant was convicted of sexually abusing his daughter MC by orally sodomizing and fondling her on divers occasions when MC was between 12 and 16 years of age, and having sexual intercourse with her on divers occasions after she turned 16 years of age. The appellant's offenses came to light when MC, then 20, confided to a friend at a religious conference that she had been sexually abused by her father, the appellant. MC reported the appellant's conduct to local authorities after her friend threatened to report the appellant if she did not. After reporting the appellant's conduct, MC cooperated with Naval Criminal Investigative Service (NCIS) in an extensive investigation of the alleged offenses that included secretly audio taping her conversations with family members.

Before she reported the abuse to NCIS, MC had also disclosed the sexual abuse to two other individuals. The first was her then-boyfriend and later fiancé, after he sharply questioned her about whether she was a virgin. Although MC revealed the sexual abuse to RF at that time to explain why she was not a virgin, she did not reveal that she had engaged in consensual sexual intercourse with a previous boyfriend. The second person to whom MC disclosed the sexual abuse was a fellow college student, after he confided in her that he had been sexually abused as a child.

At trial, MC testified that the appellant began sexually abusing her when she was 5 years old. She testified to a pattern of sexual abuse that evolved from genital fondling to oral sodomy and finally sexual intercourse as she became older. She testified that she had performed oral sex on the appellant "every week" that he was home and had engaged in sexual intercourse with the appellant "hundreds of times" since she was 12 years old. Record at 328, 331. MC also testified that the appellant had sexually abused DC, her younger sister, on numerous occasions and described one such occasion during which the appellant had directed them both to perform oral sex on him. MC stated that most of the sexual abuse had happened in the family home while Mrs. Carey and DC were away, or during summer trips with the appellant.

Through her testimony, MC described two summer trips during which the appellant had sexually abused her. One was a trip to visit colleges in the southeastern United States during June 1998, and the other was a vacation to the northeastern United States in July and August 1999. MC testified that she and the appellant were alone on both trips and that they had sexual intercourse on several occasions during each trip. She also testified that there was usually only one bed in the hotel rooms where they stayed during these trips. The Government presented business records and testimony from hotel employees confirming that many of the hotel rooms in which MC and the appellant had stayed contained only one bed.

MC testified that the appellant was a strict disciplinarian who showered the family with gifts when they complied with his wishes, but gave them the "cold shoulder" and "guilt trips" when they did not. *Id.* at 338-39. She also testified that Mrs. Carey was Korean and very submissive. MC testified that the appellant spanked her when she disobeyed him and struck her in the face on one occasion around Christmas 1998 when she resisted his sexual advances. The Government corroborated this testimony by introducing a photograph showing MC with a black eye during that timeframe. The Government also introduced two notes written by the appellant, one to MC containing a poem detailing how alone she had made him feel, and another to the family in general that appeared to be a suicide note drafted after MC had reported the appellant's offenses. The Government later presented expert testimony that many child sexual abusers control their victims and other family members by "grooming" them through emotional manipulation, isolation, and physical intimidation.

At trial, Mrs. Carey was called as a witness for the Government but ultimately refused to testify. After evading service of process and attempts by federal officers to secure her attendance at trial, DC eventually appeared as a witness for the Government pursuant to a warrant of attachment. DC initially refused to testify, but later relented when the military judge ruled that he would admit her audiotaped conversations with MC if she did not testify. Although DC testified emphatically that the

appellant had never sexually abused her or MC, she was impeached with her audiotape statements to MC that strongly suggested otherwise. DC's efforts to explain away these statements were less than convincing, leading the military judge to comment at one point that she had been a particularly evasive witness. So resistant was DC to answering even the most basic questions that the military judge allowed the trial counsel to conduct much of the direct using leading questions and even then was repeatedly forced to order DC to answer questions.

At the time of his conviction and sentencing in March 2001, the appellant was a 54-year-old Navy Commander with 30 years of otherwise honorable and distinguished service.

Factual Sufficiency and Credibility

The appellant contends that all 4 findings of guilty must be set aside due to factual insufficiency because the victim MC was not credible. We disagree.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. We must review the entire record, giving no deference to the verdict:

> The Court of Criminal Appeals is required to conduct a *de novo* review of the entire record of a trial, which includes the evidence presented by the parties and the findings of guilt. Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses.
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> In the performance of its Article 66(c), UCMJ, functions, the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt. The court must assess the evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. In contrast to the lay members who serve on courts-martial, the mature and experienced judges who serve on the Courts of Criminal Appeals are presumed to know and apply the law correctly without the necessity of a rhetorical reminder of the "presumption of innocence."

United States v. Washington, 57 M.J. 394, 399-400 (C.A.A.F. 2002). Reasonable doubt does not require that the evidence presented be free from conflict. *United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris,* 8 M.J. 52, 59 (C.M.A. 1979).

The appellant asserts that the Government's primary witness, MC, was not credible because she had a motive to lie to cover up her consensual sexual activities by blaming her father for nonconsensual sex in order to keep her boyfriend, who wanted to marry a virgin; her testimony was directly contradicted by that of her younger sister, DC; and her testimony was improbable since neither she nor DC contracted herpes even though the appellant had the disease.

We find however that several matters in evidence convince us that MC was credible. She told several people that her father sexually abused her before she made her statement to NCIS. Her testimony was corroborated in part because she knew that the appellant was circumcised. She also explained that she did not contract herpes from the appellant because he intentionally did not have sex with her when he had an outbreak of herpes. No expert testimony was presented at trial pertaining to the likelihood of herpes contraction as a result of sexual intercourse. Her testimony was far more credible than that of DC, who was hostile and evasive on the stand. Further, MC was willing to wear an NCIS wire in conversations with DC and Mrs. Carey. We find it highly unlikely that if she were lying about the allegations she would take the risk of having these conversations taped and reviewed by a third party. In short, we find that the testimony of MC was compelling and credible. After reviewing the evidence, we are convinced beyond a reasonable doubt of the appellant's guilt of sodomy and two of the three specifications of indecent acts (see next section).

Failure to Present Sufficient Evidence As to Specification 1 of Charge III

The appellant contends that the Government failed to present credible evidence that the appellant committed indecent acts upon MC by rubbing her genitalia and buttocks, as alleged in Specification 1 of Charge III. After reviewing the record, we agree with the appellant. Upon reassessment in light of our dismissal of this specification, we find that the sentence received by the appellant would not have been any lighter even if he had not been charged with, and found guilty of, that offense. We further find that the sentence is appropriate for this offender and the remaining offenses. *See United States v. Moffeit,* 63 M.J. 40, 41-42 (C.A.A.F. 2006); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Incest Charged as Indecent Act

The appellant contends that Specifications 3 and 5 of Charge III must be set aside because charging incest as an indecent act under Article 134, UMCJ, "violates the appellant's constitutional right to privacy because the military has no 'compelling interest' in prohibiting such conduct." Appellant's Brief and Assignment of Errors of 28 May 2004 at 13 (quoting *Lawrence v. Texas,* 539 U.S. 558 (2003)). The appellant contends that "in the absence of a 'legitimate government interest,' [all] private, consensual activity is constitutionally protected," [under *Lawrence*]. *Id.* We disagree.

Under Specification 3 of Charge III, the appellant was convicted of indecent acts on divers occasions by having sexual intercourse with his daughter when she was 16 to 19 years of age. In Specification 5 of Charge III, the appellant was convicted of one act of sexual intercourse with his daughter when she was 19 years of age.

The Supreme Court ruled that, with a few exceptions, criminalizing private consensual sodomy between adults [and by analogy other sexual acts], whether homosexual or heterosexual, violated the right to liberty under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. *Lawrence*, 539 U.S. at 578. The majority opinion listed several exceptions:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Lawrence, 539 U.S. at 578. Our superior court held that we must apply the *Lawrence* holding on a case-by-case basis using a three-part test:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence? 539 U.S. at 578. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?

United States v. Stirewalt, 60 M.J. 297, 304 (C.A.A.F. 2004)(citing *United States v. Marcum*, 60 M.J. 198, 206-07 (C.A.A.F. 2004)). The first question in the test requires us to determine if the offense involved sodomy in private between consenting adults. Clearly, the sexual activity in this case was not sodomy, but *Lawrence* has been extended by analogy to other forms of sexual activity. The conduct was in private.

However, we are not convinced that the conduct involved consenting adults. As for consent, the victim, MC, never testified that the sexual intercourse with her father was consensual. On the contrary, she said that he began sexually touching her when she was very young. This conduct eventually escalated to sexual intercourse. She testified that the appellant was the disciplinarian of the house, that she was afraid of him, that he spanked her, and that on the one occasion she stood up to him, he hit her with a switch although he later apologized about it. She testified that she loved her father, that she allowed him to sexually abuse her because she did not want to disappoint him. The appellant used "guilt trips" to get her to comply. Record at 340.

The appellant contends that when MC became 16 years of age, she was no longer a minor since she had reached the age of consent, without citing any authority. The appellant is correct that 16 years of age is the age of consent in the military for indecent acts with a child and for carnal knowledge, two related offenses. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 87b; Art. 120(b)(2), UCMJ. We also note that the appellant was not convicted of indecent acts with a child, but with the lesser offense of indecent acts with another, where age is not an element. But the definition of minor is elusive. "Adult" is defined as someone who has attained the legal age of majority, usually 18. Black's Law Dictionary 52 (7th ed. 1999). A "juvenile" is defined as one who has not reached the age (usually 18) at which one should be treated as an adult by the criminal justice system. *Id.* at 871. A "minor" is defined as one who has not reached the full legal age. *Id.* at 1011. A "minor" is defined under Chapter 110 (Sexual Exploitation and Other Abuse of Children), Title 18, U.S. Code, as "any person under the age of eighteen years." We note that a person in the U.S. must be 21 years of age to drink alcohol. At the time of the charged sexual intercourse, the victim was 16 to 19 years of age. Thus, we are not convinced that the conduct was sexual activity between consenting adults.

Further, even if we found that the conduct was between consenting adults, we hold that adult incest is not protected conduct under the liberty clause. The 7th Circuit recently upheld, as constitutional, the conviction of an adult male for incest when he married his sister and had several children by her. The Court concluded that *Lawrence* applied retroactively to the conviction, but that "*Lawrence* did not announce a fundamental right of adults to engage in all forms of private consensual

sexual conduct." *Muth v. Frank,* 412 F.3d 808, 818 (7th Cir. 2005), *cert. denied,* __ U.S. ___, 126 S.Ct. 575 (2005). Prior to *Lawrence,* military appellate courts have upheld convictions for adult incest. *See United States v. Wheeler,* 40 M.J. 242, 247 (C.M.A. 1994); *United States v. Toy,* 60 M.J. 598, 607 (N.M.Ct.Crim.App. 2004)(citing *Wheeler,* 40 M.J. at 247.); *United States v. Aaron,* 54 M.J. 538, 548 (A.F.Ct.Crim.App. 2000)(citing *Wheeler*, 40 M.J. at 247).

Assuming, *arguendo,* that adult incest meets the first test in *Marcum*, we nonetheless agree with the Government that both the second and third parts of the test exclude this conviction from the protections of the Constitution. As to the second part of the test, we find that the teenage daughter of the appellant is a victim who might easily be coerced and is situated in a relationship where consent might not easily be refused because of the familial relationship. At the time of the offenses, the victim was young and immature, lived in the same home with the appellant, and relied upon him for financial and other support. We can hardly imagine a stronger case in support of this second part of the test.

As to the third part of the test, we find additional factors in the military environment that support the conviction. The appellant was convicted of indecent acts under Article 134, UCMJ. The third element of those two offenses required the court members to find beyond a reasonable doubt that his conduct was either of a nature to bring discredit upon the armed forces or was prejudicial to good order and discipline. MCM, Part IV, ¶ 87b(1)(e). There is little doubt in our mind that these offenses of sexual misconduct by a commander in the U.S. Navy with his teenage daughter brought discredit upon the armed forces. The offenses are also prejudicial to good order and discipline as they directly and adversely affect the family unit in a military setting. We have found that adultery between consenting adults is not constitutionally protected conduct under *Lawrence* where the offense is service discrediting or prejudicial to good order and discipline. *See United States v. Orellana,* 62 M.J. 595, 601 (N.M.Ct.Crim.App. 2005); *United States v. Bart,* 61 M.J. 578, 582 (N.M.Ct.Crim.App. 2005).

Admission of Mrs. Carey's Prior Testimony
Consciousness of Guilt Instruction

The appellant claims that the military judge erred by admitting and publishing audiotapes of Mrs. Carey's prior testimony at an Article 39a, UCMJ, session and by instructing the members that her failure to testify could be considered as consciousness of the appellant's guilt. We find error, but conclude that the error was harmless.

Refusal to Testify and Military Judge’s Ruling

A. Background

Shortly before Mrs. Carey was scheduled to testify as a witness for the Government, the appellant's civilian defense counsel notified the military judge that Mrs. Carey had informed him that she would refuse to testify and would defy a court order to that effect. The parties agreed to call Mrs. Carey in an Article 39(a), UCMJ, session to determine her intentions. After initially refusing to take the oath, Mrs. Carey took the stand and was questioned briefly by the trial counsel. Mrs. Carey stated that she would not testify because she loved both MC and the appellant and did not want to hurt either one of them. The trial counsel responded that the Government was only asking her to answer questions truthfully and not to testify "for or against any individual." Record at 583. When Mrs. Carey appeared to acknowledge that she understood this, the trial counsel asked her whether she was "willing to come in here and answer our questions truthfully and provide testimony?" *Id.* Mrs. Carey answered "yes" to this question. *Id.* The military judge apparently interpreted this as meaning that Mrs. Carey had changed her mind and agreed to testify. Without further elaboration, she was excused from the courtroom.

When the Government counsel attempted to call Mrs. Carey as a witness the following day, the appellant's civilian defense counsel informed the military judge that immediately after Mrs. Carey had appeared in court the day before, she had informed him "that she was mixed up, that she didn't understand the question she was asked about whether she would testify." *Id.* at 744. The civilian defense counsel further represented that Mrs. Carey had an obvious "language difficulty,” meaning that she spoke poor English, and "got into a series of 'yes' questions and answered yes to a question that she did not intend to answer yes to." *Id.* The military judge allowed the Government to recall Mrs. Carey in an Article 39(a), UCMJ, session for further questioning. During this session, Mrs. Carey refused to sit in the witness chair and repeatedly asserted that she had been confused the day before and did not intend to testify. After Mrs. Carey refused an order to testify, the military judge directed the bailiff to escort her from the courtroom.

The trial counsel never provided a synopsis of expected testimony for Mrs. Carey. Instead, the trial counsel presented to the military judge a results of interview and two transcripts of conversations with MC in which MC was surreptitiously wired by NCIS. On 20 April 2000, Mrs. Carey was interviewed by an agent working for NCIS. Afterward, Mrs. Carey refused to sign a written statement, but the agent typed up her notes as a Results of Interview. The Results of Interview document reflects that Mrs. Carey essentially stated that MC's allegation must be a lie because her husband was such a wonderful man. Mrs. Carey stated that her husband could not have been alone in their house with

either of their daughters since Mrs. Carey was a housewife and was always home. She said that her husband and her daughters never took a vacation without her. She concluded that the sexual allegations could not be true since her husband was a good man and a good provider. Appellate Exhibit LXXI. The transcripts were of limited value. In the transcripts, Mrs. Carey never admitted that her husband had committed any of the allegations or that she had witnessed any of them. At one point, Mrs. Carey said that she was told by a Navy lawyer that if her husband was convicted the family would lose the Navy retirement benefits. Mrs. Carey told MC that she could just say that she made up her statement to NCIS and that it wasn't true. MC insisted that her statement to NCIS was in fact true.

After another overnight recess, the military judge told both counsel that he believed there might be sufficient evidence to raise the inference that the appellant had improperly influenced Mrs. Carey to refuse to testify. The military judge stated that he was considering allowing the Government to introduce the audiotape of her refusals to testify as evidence of the appellant's consciousness of guilt. The appellant's civilian defense counsel immediately objected on the grounds that there was insufficient evidence to raise such an inference and that playing the audiotape to the members would violate the appellant's Sixth Amendment right to confrontation because he would be unable to cross-examine the witness. The military judge responded in part by suggesting that if the appellant or his counsel could persuade Mrs. Carey to testify it would not be necessary to play the audiotape to the members. The appellant’s civilian defense counsel responded "[w]hy would I want to do that, sir, when you violated my client's constitutional rights?" *Id.* at 768.

The military judge then ruled that he would permit the Government to introduce the audiotape of Mrs. Carey refusing to testify, as well as "any other evidence tending to show that the [appellant] has improperly influenced [Mrs. Carey] to refuse to testify." *Id.* at 770. Although the military judge listed several facts that he had considered in making his ruling, he seemed most persuaded by the fact that Mrs. Carey was still residing with the appellant. The appellant's civilian defense counsel objected to the military judge's ruling, noting at length that many of the facts he had considered were not in evidence before the court. The military judge responded that he considered the evidence only for the purpose of the balancing test under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). *Id.* at 781.

The military judge also noted that the proper standard was not whether he was convinced beyond a reasonable doubt that the appellant had in fact improperly influenced Mrs. Carey not to testify, but whether the Government could produce some evidence sufficient to permit the members to infer that the appellant had improperly influenced her not to testify. The appellant’s

civilian defense counsel later asked the military judge whether the Government would be required to produce this other evidence and "lay a foundation" before the audiotape was played, to which the military judge responded that the audiotape and "the evidence that has been presented" were sufficient to permit the Government to introduce the audiotape and the Government would not be required to introduce other evidence. *Id.* at 783. The appellant's civilian defense counsel objected to this, and the military judge did not respond to the objection.

The appellant's civilian defense counsel repeated his concern that playing the audiotape to the members would violate the appellant's Sixth Amendment right to confrontation because he had not been permitted to cross-examine Mrs. Carey when she appeared in court. He specifically noted that the military judge had not asked him whether he wished to comment while Mrs. Carey was present in the courtroom. The military judge responded by asking the appellant's civilian defense counsel whether he wanted to attempt to bring Mrs. Carey back into court to testify, stating that he was "more than willing to try to get her back in." *Id.* at 773. The appellant's civilian defense counsel rejected this course of action, arguing that the military judge had already ruled. The military judge then overruled the defense objection, finding that the audiotaped statements were not hearsay because they were not being introduced for the truth of the matters asserted therein but rather for the fact of what Mrs. Carey had said. The military judge played the audiotape of both her testimonies to the members and read a limiting instruction to them immediately thereafter.

B. Discussion

A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000). The test to overturn the ruling is whether the military judge's evidentiary decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(citations omitted). A military "judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995); *see United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004).

The appellant first argues that the military judge erred in playing the transcripts of her Article 39a, UCMJ, testimony because the trial defense counsel was denied the right to cross-examine Mrs. Carey. We disagree. The civilian trial defense counsel was offered the opportunity to cross-examine Mrs. Carey but refused to do so for tactical reasons. One consequence of that decision was to forfeit the right to cross-examine the witness. The Sixth Amendment is satisfied if the appellant has the opportunity to cross-examine. There is no right to effective

cross examination. *See United States v. Rhodes,* 61 M.J. 445, 449-50 (C.A.A.F. 2005).

The appellant next contends that the military judge erred because there was no evidence presented that the appellant influenced his wife to refuse to testify. Here, we must agree with the appellant. The only evidence on this point was that Mrs. Carey resided with her husband, the appellant. No evidence was presented that the appellant actually influenced Mrs. Carey. Rather, we are to infer that since Mrs. Carey's testimony would have been adverse to the appellant and because they were living together, he must have convinced her not to testify.

There is no evidence in the record to conclude that Mrs. Carey's testimony would have been adverse to the appellant. Mrs. Carey did not observe any misconduct by her husband. She did not dispute or corroborate the testimony of either daughter. She did request that her daughter MC go back to NCIS to retract her allegations. But, it is not clear from the transcript of the secret wire if Mrs. Carey wanted MC to lie to NCIS or if she wanted MC to admit that her allegations were untruthful. In short, we find that if Mrs. Carey had testified, her testimony would not have benefited either side. The court members did not even have the "benefit" of reviewing Mrs. Carey's results of interview or the transcripts of the two secret recordings. They had no evidence at all upon which to conclude that Mrs. Carey's testimony would have been adverse to the appellant. Nor, was there any evidence presented to the court members that the appellant made any attempt to influence his wife in that regard. We are therefore compelled to find that the military judge's findings of fact were clearly erroneous and that he abused his discretion in admitting the two audio tapes of her Article 39a, UCMJ, testimony.

However, we also find that the admission of Mrs. Carey's Article 39a, UCMJ, testimony and the "consciousness of guilt" instruction were harmless error by the military judge. The military judge gave the following instruction:

> Members, you have heard that Mrs. Carey has refused to testify in this case. If you find that there is some evidence that Commander Carey solicited or procured her refusal to testify, that may be considered by you for the limited purpose of its tendency, if any, to show the accused's awareness of his guilt of the offenses charged. You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that he, therefore, committed the offense charged.

Record at 794-95. Contrast the permissive nature of the instruction given by the military judge with the impermissible instruction given in *Rhodes*:

> Before counsel made their closing arguments, the military judge in *Rhodes* instructed the members concerning the "evidence that the accused may have contributed to Senior Airman Daugherty's lack of present memory." He told the members that this evidence "may be considered by you for the limited purpose of its tendency, if any, to show the accused's awareness of his guilt of the psilocyn allegations." *Rhodes*, 61 M.J. at 448-49. The military judge then cautioned the members that:
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> > An accused has a right to assist in his own defense. This right includes the ability to assist his counsel in securing evidence and witnesses for use in the defense of the case. An accused may also interview witnesses and request that witnesses meet with the defense counsel. In sum, there is nothing improper per se in an accused meeting with potential witnesses and arranging meetings for them with his lawyer.
> >
> > If you find that the accused did indeed influence Senior Airman Daugherty, you may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that he, therefore, committed the offenses charged.

Id. Further, the trial counsel elaborated on this instruction in his closing argument. *Id.* On the other hand, the permissive inference of "consciousness of guilt" instruction given by the military judge in the case *sub judice* was of little harm to the appellant since it left it up to the court members to determine if Mrs. Carey had been influenced by the appellant not to testify. There was of course no evidence presented upon which to arrive at that conclusion since the court members did not even know if her testimony would have been unfavorable to the appellant. If we assume, as we must, that the court members followed the court's instruction, we must also assume that the court members did not find consciousness of guilt from Mrs. Carey's refusal to testify.

Further, the trial counsel hardly referred to Mrs. Carey's Article 39a, UCMJ, testimony or to the consciousness of guilty instruction. Only in one sentence in his opening statement and in one sentence in his closing argument, did the trial counsel make a reference to Mrs. Carey's failure to testify. Both of those comments were relatively insignificant in light of the trial counsel's lengthy argument on other matters. Also, we are assured that the Article 39a, UCMJ, testimony and the inference of guilt instruction had little influence on the court members as they found the appellant not guilty of 8 of the 12 specifications

that went to the members, all involving sexual abuse of MC, including two specifications of rape.

Denial of Motion for Mistrial

The appellant contends that the military judge erred by failing to grant a motion for mistrial. We hold that the military judge did not err and deny relief.

During deliberations on findings, the members asked the military judge to clarify his instructions concerning their use of a prosecution exhibit. The members also requested access to a photocopier so that they could each have copies of the exhibit. Realizing that the members had mistakenly been given a prosecution exhibit not admitted into evidence, the military judge ordered the president to return the document. The president stated that only one member had reviewed the document and had not yet discussed it with any other member. The appellant's civilian defense counsel immediately moved for a mistrial, noting that the document had been used to impeach DC's testimony and that those passages adverse to the appellant had been highlighted in pink. Before ruling on the appellant's motion, the military judge went through all of the published exhibits with counsel to determine whether any other document had been sent to the members in error. The appellant's civilian defense counsel discovered that a defense exhibit used in part to impeach MC had also been published in error. The military judge recalled the members and determined that a second member had reviewed the erroneously published defense exhibit.

The military judge denied the appellant's motion for a mistrial, finding that a proper limiting instruction would be sufficient to cure any prejudice to appellant. The military judge then asked whether either side wished to challenge any member for cause in light of his ruling. The appellant's civilian defense counsel initially challenged three members, including the two members who had admitted to reading the improperly published exhibits and, inexplicably, one member who did not appear to have read either document. When the military judge denied the appellant's challenge to the member who had not read either document, the appellant's civilian defense counsel withdrew the other two challenges. The military judge recalled the members and provided limiting instructions regarding the two improperly published exhibits. Interestingly, the military judge used wording that had been drafted by the appellant's civilian defense counsel and to which the trial counsel strenuously objected. All members indicated that they understood and could follow the limiting instructions given by the military judge. The military judge excused the members and then individually recalled the two members who had admitted to reading the improperly published exhibits. Both agreed that they would disregard what they had read and would not discuss it with any other member. Following this individual voir dire, the appellant's civilian defense counsel repeated that he had no

challenge to these two members. Under these facts and circumstances, we hold that the military judge did not err in denying the motion for mistrial.

Speedy Review

Although not raised as an assignment of error, there has been considerable post-trial delay in this case. Upon review, we will grant sentence relief.

An appellant's right to a timely review extends to the post-trial and appellate process. *See Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003). This right is embodied in Article 67, UCMJ, as well as the Due Process Clause of the Fifth Amendment. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *Diaz*, 59 M.J. at 37-38.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey,* 60 M.J. at 102). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may" 'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey,* 60 M.J. at 102).

Here, there has been a total delay of over 2000 days (about 69 months) since the date of sentence until the date of our opinion. The record of trial was docketed with our court about 500 days after the date the sentence was announced. In November of 2003, the military appellate defense counsel stated that the appellant objected to any further delay. A month later, the military appellate defense counsel stated that the appellant consented to further delays in filing the brief and assignments of error. No mention was made that a civilian appellate defense counsel had been retained. On 24 May 2004, the civilian defense counsel filed the appellate brief and assignments of error. The Government filed its answer brief on 21 October 2004. In November of 2004, the appellant requested oral argument. The Government opposed the request. The appellant filed a reply brief on 3 February 2005. We then ordered the Government to produce a copy of the appellant's request for clemency which had been submitted prior to the convening authority's action, but was missing from the record of trial. The Government provided the missing document on 12 August 2005. We granted oral argument on three of the assignments of error on 4 January 2006 and heard oral argument on 16 February 2006.

It should also be noted that the record of trial is quite lengthy, encompassing 1129 pages of text and numerous prosecution, defense, and appellate exhibits. Obviously, a record of that length and complexity would require more time at every stage of the post-trial process. Nonetheless, we find that the unexplained delay alone is facially unreasonable, triggering a due process review. *See Moreno,* 63 M.J. at 129; *United States v. Brown,* 62 M.J. 602, (N.M.Ct.Crim.App. 2005)(*en banc*).

We next look to the third and fourth factors. Through his military appellate counsel, the appellant did assert his right to timely appellate review on 25 November 2003. But, as noted above, in December of 2003, the appellant consented to further appellate defense counsel delays. As to the fourth factor, we do not find any evidence of prejudice to the appellant. In balancing all four factors, we must give more weight to the lengthy delay. We conclude that there was a due process violation in this case. We will provide relief in our decretal paragraph.

We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice. *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Jones,* 61 M.J. at 83; *Toohey*, 60 M.J. at 100; *Diaz*, 59 M.J. at 37; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). In particular, we have considered the factors set forth in *Brown*. If we had not found a due process violation, we would have granted the same sentence relief under Article 66.

Extraordinary Writ of Habeas Corpus

The appellant filed an extraordinary writ as follows:

> CAN RESPONDENT [Commandant U.S. Disciplinary Barracks] CONTINUE TO HOLD PETITIONER IN CONFINEMENT, PAST HIS SCHEDULED MINIMUM RELEASE DATE, ON THE GROUNDS THAT PETITIONER HAS NOT PAID THE ADJUDGED FINE OF $75,000, WHEN PETITIONER HAS BEEN ALLOWED TO RETIRE FROM THE NAVY AS A LIEUTENANT, AND THE CHIEF OF NAVAL PERSONNEL HAS STATED THAT PETITIONER IS NO LONGER INDEBTED TO THE U.S. NAVY?

The convening authority affirmed the adjudged sentence which included a fine of $75,000.00 with a provision for additional confinement of 2 years if the fine is not paid. At some point, the fine was processed as a debt and deducted from his pay on a monthly basis. Two years after trial, a Board of Inquiry recommended that the appellant be retired in the grade of O3E (Lieutenant with enlisted service). The Chief of Naval Personnel (CNP) concurred with the recommendation. In making that recommendation, the CNP stated that the appellant was no longer indebted to the Navy. The Secretary of the Navy (SecNav) acted on the request and retired the appellant on 16 May 2003. The appellant admits that he still owed $ 21,385.19 at the time of his retirement. Petition for an Extraordinary Writ in the Nature

of a Writ of Habeas Corpus of 29 Aug 2006 at 4. However, the Defense Finance and Accounting Service (DFAS) sent the appellant a letter in August of 2006 which stated that his entitlement to pay expired 14 February 2003, that he erroneously received pay after that date, and that he owed the Government a total of $ 143,901.03 for the overpayment. The total owed included the amount the Government provided in the allotment to pay off his fine.

In response to the Writ, we granted the request of the Government to attach to the record an affidavit of 15 September 2006, from Ms. Sandra Mousa, a Fiscal Quality Supervisor in the Directorate of Debt and Claims Management of DFAS. She explained that the appellant's automatic forfeitures were deferred until the convening authority's action on 14 February 2002 at which time the appellant should have been subject to total automatic forfeitures, but he continued to receive pay erroneously until September 2002 when his pay was placed in a hold pay status. However, the pay system continued to reflect inaccurately that he was entitled to pay. Ms. Mousa wrote that when the appellant was notified of the overpayment, his civilian attorney wrote her a letter (attached to her affidavit) in which he wrote,

> As the results of trial clearly indicate, my client's sentence is contingent -- he can choose to pay the fine or serve an additional two years in the brig. My client has chosen to remain in the brig and does not intend to pay the fine.
>
> . . . .
>
> My client has made a choice -- that his family is better off not paying the $75,000 fine because the marginal additional confinement time he would serve as a result of not paying the fine [sic].

Mr. C. W. Gittins ltr of 5 Feb 2003. The CNP's letter to SecNav recommending retirement was signed 13 days later. We also granted the Government's request to attach to the record an affidavit of 14 September 2006, from Mr. William Tyminski, Acting Director for Retired and Annuitant Pay in the Directorate for Military and Civilian Pay, DFAS. He wrote that the appellant has received retired military pay for the period since 1 July 2003, but no allotments or debts have been deducted from his retired pay. The Government contends that the CNP's statement that the appellant was not indebted to the Government was boilerplate language that should not be held against the Government. The Government further states that if the appellant now desires to contest the recoupment of the overpayment, he must appeal to DFAS, but that we have no authority to grant the Writ. In his reply brief, the appellant admits that the appellant did at one point choose additional confinement over payment of the fine, but that

the Government should be bound by CNP's later statement that the appellant was not indebted to the Government.

We find and hold that we do have the authority to grant or deny the Writ of Habeas Corpus. *See Aviz v. Carver,* 36 M.J. 1026 (N.M.C.M.R. 1993). From the evidence properly attached to the record and agreed to by the appellant, we find that the Government erroneously paid the appellant when he was not entitled to pay and that the CNP erroneously stated that the appellant was not indebted to the Government. We find that prior to the CNP's erroneous statement, the appellant was properly placed on notice that he owed the fine (as well as back pay) and that he made an informed decision with his attorney to serve the additional two years confinement instead of paying the fine. Under the circumstances of this case, the Writ is denied.

Conclusion

We have considered the remaining assignments of error and find them to be without merit. Accordingly, the finding of guilty to Specification 1 of Charge III is set aside and dismissed. The remaining findings of guilty are affirmed. We approve only so much of the sentence as provides for confinement for 90 months (7 years and 6 months) and a fine of $75,000.00. We have disapproved 6 months of confinement. If the appellant has already served his original sentence to confinement, this credit shall be applied to the additional confinement imposed as a result of his failure to pay the fine.

Senior Judge VOLLENWEIDER and Senior Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court