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

BEFORE

C.L. SCOVEL **J.F. FELTHAM** **J.D. HARTY**

UNITED STATES

v.

Donald E. MEREDITH
Aviation Machinist's Mate First Class (E-6), U. S. Navy

NMCCA 200100985 Decided 30 May 2006

Sentence adjudged 6 October 2000. Military Judge: J. Styron. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

Maj C. ZELNIS, USMC, Appellate Defense Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel

SCOVEL, Senior Judge:

A general court martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of disobeying a lawful general regulation, rape, and adultery in violation of Articles 92, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 934. The appellant was sentenced to confinement for three years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's 10 assignments of error,[1] and the Government's answer. We conclude

[1] I. THE MILITARY JUDGE ERRED BY PERMITTING THE PROSECUTION TO PRESENT EVIDENCE REGARDING THE ALLEGED RAPE VICTIM'S SEXUAL PREDISPOSITION OVER DEFENSE OBJECTION AND IN VIOLATION OF MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ED.).

that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

On 2 March 2000, a group of aviation electronics students and their instructors, including the appellant, departed their base in Jacksonville, Florida, on an extended in-flight training mission to London, where they were granted liberty. Due to financial constraints, the appellant, another male, and two female students agreed to share a room together. After a night out, one of the women, Aviation Electronics Technician Third Class (AT3) "J," returned to the room and went to bed, fully clothed. She awoke the next morning, still fully clothed, and discovered the appellant in bed beside her, wearing only his boxer shorts, with his arm around her while both lay on their sides in the "spoon" position. At trial, she testified that his actions made her feel "uncomfortable." Record at 810.

II. THE MILITARY JUDGE ERRED BY PERMITTING A PROSECUTION WITNESS TO OFFER HIS OPINION REGARDING WHETHER AT3 "B" WAS RAPED BY THE APPELLANT.

III. THE MILITARY JUDGE ERRED BY PERMITTING THE PROSECUTION TO MAKE AN IMPROPER ARGUMENT LINKING THE CHARGED OFFENSES TOGETHER AS A COMMON SCHEME AND REFERRING TO UNCHARGED MISCONDUCT NOT IN EVIDENCE IN VIOLATION OF THE COURT'S RULINGS.

IV. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO CURE THE TRIAL COUNSEL'S IMPROPER COMMENTS ON THE LACK OF EVIDENCE PRESENTED BY THE DEFENSE IN CLOSING ARGUMENT.

V. THE CUMULATIVE EFFECT OF THE EVIDENTIARY ERRORS AND THE IMPROPER ARGUMENT BY THE GOVERNMENT COUNSEL CREATED PREJUDICE AND DEPRIVED THE APPELLANT OF A FAIR TRIAL.

VI. THE EVIDENCE AT TRIAL WAS FACTUALLY INSUFFICIENT TO FIND THE APPELLANT GUILTY OF THE RAPE OF AT3 B.

VII. THE EVIDENCE AT TRIAL WAS FACTUALLY INSUFFICIENT TO FIND THE APPELLANT GUILTY OF ENGAGING IN AN UNDULY FAMILIAR RELATIONSHIP WITH AT3 "J."

VIII. THE APPELLANT'S CONVICTION OF RAPE, ADULTERY, AND FRATERNIZATION ARISING OUT OF THE SAME SINGLE ACT OF SEXUAL INTERCOURSE IS AN UNREASONABLE MULTIPLICATION OF CHARGES.

IX. THE FINDINGS OF GUILTY OF RAPE, FRATERNIZATION, AND ADULTERY ARE LOGICALLY INCONSISTENT AND BASED ON MUTUALLY EXCLUSIVE FINDINGS.

X. THE APPELLANT HAS BEEN DENIED HIS RIGHT TO TIMELY POST-TRIAL REVIEW AND APPEAL OF HIS COURT-MARTIAL.

On 10 March 2000, the appellant and a group of students and instructors embarked on another training mission, this time to Hawaii, where they again received liberty. On the evening of 11 March 2000, the entire group went out to dinner and then to a bar. One female student, AT3 "B," drank a large quantity of alcohol, sang karaoke, and danced with the appellant. Others in the group noted the attention she paid him but did not conclude that it indicated a sexual attraction between them. By the end of the night, she was so intoxicated that she had difficulty standing upright and entered a male head by mistake. The appellant himself drank excessively and was told to quiet down by other patrons in the bar.

When the group left the bar, both AT3 B and the appellant needed assistance walking. By the time they reached their hotel, the appellant had regained a measure of stability on his feet, but AT3 B had passed out and could not tell the others the location of her room. Since the appellant was a senior enlisted person and was married, the group opted to leave AT3 B fully clothed on a bed in his room. The appellant assured them that he would take care of her.

AT3 B testified that her only memories after leaving the bar were falling backward onto a bed and then awaking in the middle of the night, naked and spread-eagled on the bed, with the appellant (also naked) on top of her, engaged in sexual intercourse. She could not move, and subsequently passed out again. She awoke the next morning, completely naked with the appellant lying naked beside her. When she left, the appellant asked her, "How about a good morning fuck?" *Id*. at 440.

Evidence of Victim's Sexual Predisposition

The appellant asserts that the military judge erred in admitting AT3 B's testimony, offered by the Government, relating to her sexual predisposition. Although we agree that the military judge erred, we find that error to be harmless.

Specifically, the Government elicited testimony from AT3 B that she would not have consented to sexual intercourse with the appellant because he was married and older than men with whom she usually went out; she was not sexually attracted to him; she did not have sex with men she did not know; and she would not have sex with a man in her chain of command, especially an instructor. She further testified that earlier in the evening of the alleged rape, she encountered several Marines in the bar and found them attractive, but refused their invitation to

return to their hotel room for what she assumed was a sexual encounter because she "was not looking for sex." *Id*. at 548-51. The military judge overruled a timely objection by the trial defense counsel to that part of AT3 B's testimony about the Marines' invitation, and denied a defense request that he instruct the members to disregard it. He reasoned that the evidence was relevant and its admissibility was necessary "in the interest of fairness to both sides" because he had determined that the defense would be permitted to test AT3 B's credibility and memory by cross-examining her about her alcohol consumption. *Id*. at 566-73.

MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), provides in pertinent part:

> (a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceeding involving alleged sexual misconduct . . .
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> . . . .
>
> (d) . . . The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

MIL. R. EVID. 412, sometimes known as a "rape shield law," was intended to "safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Analysis of the Military Rules of Evidence, at A22-36. It is a rule of exclusion, designed to protect alleged victims of sexual offenses from undue examination and cross-examination of their sexual history. *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). It is often invoked to prevent the accused from introducing evidence of the sexual history of the alleged victim, but its general rape-shield provisions are applicable to both parties. *Id*. at 223. Its proscription of evidence of the alleged victim's sexual predisposition also applies to an attempt by the Government to introduce evidence of what the

military judge in this case termed "chaste character." Record at 556.

MIL. R. EVID. 412 is not an absolute prohibition, however, because it provides for three exceptions. Evidence of specific instances of sexual behavior by the alleged victim is admissible to prove that a person other than the accused was the source of the semen, injury, or other physical evidence. MIL. R. EVID. 412(b)(1)(A). Evidence of specific instances of sexual behavior by the alleged victim with the accused may be offered by the accused to prove consent, or by the prosecution. MIL. R. EVID. 412(b)(1)(B). Finally, evidence the exclusion of which would violate the constitutional rights of the accused is also admissible. MIL R. EVID. 412(b)(1)(C). When a party offers evidence under one of these exceptions, the military judge must conduct a closed hearing, on the basis of which the military judge must apply a two-part process of review to determine its admissibility. First, the military judge determines whether the evidence is relevant under MIL. R. EVID. 401. If the military judge determines the evidence to be relevant, the judge conducts a balancing test to determine whether its probative value outweighs the danger of unfair prejudice. MIL. R. EVID. 412(c)(2) and (c)(3); *see Banker*, 60 M.J. at 222. In this context, "prejudice" refers, in part, to prejudice to the privacy interests of the alleged victim. *Banker,* 60 M.J. at 223.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). The test for nonconstitutional error is whether the error had a substantial influence on the findings. *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001). We determine prejudice from an erroneous evidentiary ruling using a four-part test: (1) the strength of the prosecution case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and, (4) the quality of the evidence at issue. *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985).

In this case, we hold that the military judge abused his discretion because he improperly applied the law. First, he admitted evidence of AT3 B's sexual predisposition in regard to the characteristics of men in general with whom she would or would not have sex, in the form of her explanation of why she would not have wanted to have sex with this appellant. Second,

he admitted evidence of AT3 B's sexual predisposition specifically in regard to several Marines whom she met in the bar on the night of the alleged rape. After first deciding to instruct the members to disregard this evidence, Record at 565, the military judge reconsidered and admitted it, seeking to balance "the interest of fairness to both sides" by permitting the defense to cross-examine AT3 B about her consumption of body shots,[2] *id*. at 573. The military judge's application of the law was erroneous because the Government's evidence of sexual predisposition did not fit within the terms of any exception in MIL. R. EVID. 412(b). This evidence should not have been admitted in the face of MIL. R. EVID. 412(a)'s general prohibition of such evidence, and the fact that the military judge engaged in *Banker's* two-part relevance-balance analysis could not render it admissible because no exception permitting consideration of its admissibility applied.

We find, however, that this error had no substantial influence on the findings. We apply the four-part *Weeks* test to determine prejudice. (1) The prosecution had a strong case in the link between AT3 Rhodes' testimony that he put the victim, fully clothed, on a bed in the appellant's hotel room and felt comfortable leaving her in the care of a more senior, married petty officer and AT3 B's testimony that she awoke in the night to find herself naked and the appellant engaged in sexual intercourse with her. (2) The defense case was comparatively weak, consisting of several witnesses who testified about the appellant's peaceful and nonaggressive character and the suggestion, through cross-examination of prosecution witnesses, that AT3 B's "slow dance" with the appellant indicated her sexual attraction to him. (3) The evidence of sexual predisposition was material to the issue of consent, but it was significantly overshadowed by the unrebutted evidence of AT3 B's intoxication, leaving her unable to express her consent after she was entrusted to the appellant's care or even to resist his forcible sexual intercourse with her when she awakened during the act. (4) The quality of the evidence, which seemed self-serving on the part of AT3 B, was not sufficient to blind the members on the issue of consent, in view of the other, more credible evidence adduced by the Government. We conclude that the appellant was not prejudiced by the improper admission of evidence of the victim's sexual predisposition. Although error was committed, no relief is warranted.

[2] A body shot is a method of consuming alcohol in which a person places salt on part of another person's body, such as the wrist or neck, and then licks off the salt immediately before drinking the shot of alcohol. Record at 328.

Witness' Testimony Regarding the Ultimate Issue

The appellant asserts that the military judge erred by permitting a prosecution witness to offer his opinion regarding whether the appellant raped AT3 B. We disagree.

When the members were afforded the opportunity to pose questions of Aviation Machinist's Mate Second Class (AD2) Doyle, one member asked, "Did you feel after [AT3 B's] conversation with you that morning that she had been raped?" The trial defense counsel objected on the basis that this question called for an opinion as to the ultimate issue, and the military judge declined to ask the question. Record at 639-41. Another member submitted this question: "Did [AT3 B] ever make reference to being taken advantage of or raped by [the appellant]?" The military judge *sua sponte* distinguished this question from the similar question to which he had sustained an objection, on the basis that it asked "what she had said[,] not his thought process, not his opinion," and permitted the question. When the military judge invited comments from the parties, the trial counsel replied in the negative while the trial defense counsel remained silent. *Id*. at 641-42. The witness then testified:

> Q. Now, did [AT3 B] ever make reference to being taken advantage of during your conversations with her?
> A. Speci—the next morning?
>
> MJ Yes.
> WIT Yes, sir.
>
> Q. Okay, did she ever make reference to being raped?
> A. No, sir, she—*I told her that I thought she was raped* and then she never said—well, every time she just starts crying.
>
> MJ Okay. Any additional questions, counsel?
> TC Nothing from the government, sir.
> DC Nothing from the defense, sir.

Id. at 643-44 (emphasis added).

We hold that the military judge erred in failing to instruct the members to disregard the response, which contained the witness's statement to the victim that he thought she had been raped. This response was inadmissible as opinion testimony

by a lay witness, which was not based on the witness's perception. MIL. R. EVID. 701. Moreover, since it was not otherwise admissible, it was objectionable as an opinion that embraced the ultimate issue to be decided by the members. MIL. R. EVID. 704. Since the appellant failed to make a timely objection, we will grant relief only if we find plain error. MIL. R. EVID. 103(a)(1); *see United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999). We will find plain error if: (1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000).

In this case, we find no plain error because while the military judge's error was obvious, we are convinced that there was no material prejudice to the appellant. First, placing in context the witness's statement that he believed the victim was raped, it is clear that he was testifying about what he told her shortly after she reported the event. He did not state that he held that opinion at the time of trial. Second, the conclusion expressed in his statement was clearly based only on what he had been told by the victim. We are confident that the members, who were provided all the admissible evidence surrounding this event, gave the totality of that evidence proper consideration. Finally, this witness was a layman, not a medical doctor, social worker, or behavioral science expert. Nothing about his experience or expertise would have reasonably led the members to give undue weight to his statement. Accordingly, no relief is warranted.

Trial Counsel's Argument

In his third and fourth assignments of error, the appellant contends that the trial counsel engaged in improper closing argument and rebuttal argument on findings. He also asserts that the military judge erred in failing *sua sponte* to give a curative instruction. We disagree.

1. Trial Counsel's Closing Argument on Findings

In an Article 39a, UCMJ, session, the military judge ruled that the Government had failed to show a connection between the alleged offenses that would support an argument under MIL. R. EVID. 404(b) that they comprised a common scheme or plan. The military judge cautioned the trial counsel against arguing that the two additional charges of attempted fraternization with "W" and fraternization with "J," both of whom were junior female

Sailors, were linked either to each other or to the original charges which identified AT3 B as the victim. Record at 77.

In his closing argument, the trial counsel used the term "wolf in sheep's clothing" to describe the appellant as he behaved toward W, J, and B. *Id.* at 921-22. The trial defense counsel did not object. The appellant now contends that this term was "improper spillover" because it linked all the charged offenses into a continuous course of conduct, which was forbidden by the military judge.

The appellant also asserts that the trial counsel included uncharged misconduct in his closing argument. During the testimony of AT3 J, the military judge forbade the trial counsel from eliciting information that the appellant had shared a room with her on any other night than that identified in the charge, when he slept in her bed while dressed only in his boxer shorts. In response to a member's question, AT3 J stated that she "put her foot down" and refused to agree to the same sleeping arrangements for the next night. *Id*. at 834-35. She did not state, however, that the appellant was involved in this conversation or behaved improperly after the first night. In closing argument, the trial counsel stated:

> While on this [training mission], the wolf under the guise of the senior flight engineer . . . decided to invite himself to stay in the room with two junior female students.
>
> In addition, he invited himself to sleep in the bed with one of them and ultimately wake up with her naked wearing nothing more than his underwear with his arm around her holding her in the spoon position. He was on the prowl. He was hungry to satisfy whatever sexual urge he had. *However, the very next day—the very next evening, he tried it again*. She put a stop to it . . . and that was the end of it. The wolf had been thwarted but he was still hungry.

Id. at 921-22 (emphasis added). The trial defense counsel did not object.

Failure to object to improper argument before the military judge begins to instruct the members on findings constitutes waiver[3] of the objection. RULE FOR COURTS-MARTIAL 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Notwithstanding the trial

[3] Properly forfeiture. *See United States v. Olano*, 507 U.S. 725, 733 (1993).

defense counsel's silence, however, we find that the issue of the trial counsel's supposed linkage of the offenses with the term "wolf in sheep's clothing" was preserved by the military judge's rulings in favor of the appellant at the Article 39(a), UCMJ, sessions. *United States v. Dollente*, 45 M.J. 234, 240 (C.A.A.F. 1996). If the trial counsel's argument was improper, then the military judge had a *sua sponte* duty to give the members a curative instruction. *See United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977).

With regard to the trial counsel's use of the term "wolf in sheep's clothing," we find no impropriety. We understand why the appellant now attacks this label, but we view it as a fair shorthand description of the appellant as he behaved toward each alleged victim, from the prosecution's point of view. As the trial counsel went on to state in his argument, the appellant was a "wolf in the guise of a good shipmate, a married man, a volunteer sheriff, a senior petty officer, a First Class Petty Officer, an instructor . . . [.]" This term described the two-sided relationship of the appellant to the alleged victims, and did not constitute improper spillover as it did not impermissibly link the offenses themselves together. We decline to disarm the trial counsel of this rhetorical weapon, and we conclude that the military judge had no duty to instruct the members to disregard this part of the trial counsel's argument.

With regard to that part of the trial counsel's argument in which he stated that on "the very next evening, [the appellant] tried it again[,]" we find this to be a reference to uncharged misconduct and not included in the military judge's prohibition against linking the charges. Because the trial defense counsel failed to object, the objection was forfeited. R.C.M. 919(c). In light of this failure to object, the appellant must show plain error. *United States v. Leco*, 59 M.J. 705 (N.M.Ct.Crim.App. 2003)(citing *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992)). To demonstrate plain error, the appellant must show that the alleged error was plain or obvious and that it materially prejudiced his substantial rights. *Kho*, 54 M.J. at 65.

The appellant asserts that the inclusion of uncharged misconduct in the trial counsel's argument denied him his right to confrontation, and the military judge erred in not giving a curative instruction to the members. Assuming *arguendo* that this part of the argument was improper, we find no material prejudice to the appellant's substantial rights. We note that the military judge both instructed the members that the

arguments of counsel were not evidence and issued a spillover instruction. Record at 905, 921. Both instructions were taken from the Military Judges Benchbook, and were given without objection or request for modification by the trial defense counsel. The trial counsel's reference to the appellant's attempted action on the next night was fleeting and must be weighed against the substantial weight of AT3 J's testimony in which she described in detail the circumstances giving rise to the appellant's charged misconduct. We are convinced beyond a reasonable doubt that any error was harmless and that the appellant suffered no material prejudice to his substantial rights.

2. Trial Counsel's Rebuttal Argument

The appellant contends that the trial counsel improperly commented in his rebuttal argument on the lack of evidence presented by the defense and that the military erred when he failed to issue a curative instruction to the members. The trial counsel stated:

> Now, we've gone on about credible, legal and competent evidence and do we really want to get into a match about what's credible evidence. Well, members, the [G]overnment has produced for you, in addition to [AT3 B], five witnesses—not just her, five witnesses to talk about her state of intoxication—five.
>
> Now, the defense does not have to put on a case whatsoever, but the only case they did put on was character of his peacefulness of people who had no idea of what kind of man he is outside of the workplace. That's it, and they want to talk to you about credible evidence.

Record at 952. The appellant asserts that by linking the issue of credibility to the number of witnesses presented by each side, the trial counsel implicitly stated that the defense case failed to match that of the prosecution because it lacked more witnesses--including the appellant, who did not testify.

Again we note that the trial defense counsel did not object to the trial counsel's argument. Failure to object to improper argument forfeits the objection, and, therefore, in seeking review of the issue before this court the appellant must show plain error. R.C.M. 919(c); *see Leco*, 59 M.J. 705. To demonstrate plain error, the appellant must show that the

alleged error was plain or obvious and that it materially prejudiced his substantial rights. *Kho*, 54 M.J. at 65.

A trial counsel may not comment directly, indirectly, or by innuendo on the fact that an accused did not testify in his or her case, nor may the Government comment on an accused's failure to produce witnesses in his behalf. *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990). Not every comment on a failure to produce witnesses, nor even of the accused to testify, triggers constitutional error, but rather such comments must be examined in the context of the facts of the case. *See United States v. Stadler*, 44 M.J. 566, 569 (A.F.Ct.Crim.App. 1996)(citing *United States v. Robinson*, 485 U.S. 25 (1988)), *aff'd*, 47 M.J. 206 (C.A.A.F. 1997).

In the context of these facts, we decline to find error. The appellant correctly notes that the Government's case rested on the testimony of AT3 B that she did not consent to sexual intercourse with him. The defense attacked her credibility, attempting to highlight her inability to recall some events of that night and asserting the defenses of consent and mistake of fact. The defense presented witnesses who testified that on the basis of their professional experience with the appellant, they found him to be peaceful and nonaggressive. Under these circumstances, we do not consider it unreasonable for the trial counsel to attempt to explain AT3 B's memory lapses by stating in his rebuttal argument that five witnesses had testified about her degree of intoxication. We also consider it fair comment for the trial counsel, who properly noted that the defense had no burden to present evidence, to assert that the members should not give great weight to the defense's argument that AT3 B should not be believed because the defense's own witnesses, who had admitted that they based their opinion of the appellant's peaceful nature on their professional acquaintance only, themselves lacked credibility. Even if the military judge had erred in not determining the trial counsel's argument to be improper and not instructing the members to disregard it, we are convinced beyond a reasonable doubt that the appellant was not prejudiced by the trial counsel's argument.

Cumulative Error

The appellant asserts that the accumulation of errors necessitates the disapproval of findings in this case. We have carefully considered the errors noted above and others that took place during the trial that were the subject of remedial efforts by the military judge. We have also considered the case as a

whole, especially the nature, number, interrelationship, and combined effect of the errors; how the military judge dealt with them; the strength of the Government's case; and the lengthy run of this trial. We decline to find that the errors in this case, in combination, denied the appellant a fair trial. *United States v. Yerger*, 3 C.M.R. 22 (C.M.A. 1952); *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992); *United States v. Dollente*, 45 M.J. 234 (C.A.A.F. 1996).

Post-Trial Delay

The appellant asserts that he has been denied his right to timely post-trial review and appeal of his court-martial, focusing on the period of time between when his case was docketed in this court and when his brief was filed. We disagree.

The following chronology applies to this issue:

Event	Date	Incremental Delay	Elapsed Time
Sentence adjudged	6 Oct 00	0	0
Record authenticated	3 Jan 01	89	89
SJAR completed	16 Mar 01	72	161
SJAR rec'd by TDC	26 Mar 01	10	171
CA's Action	25 Apr 01	30	201
Docketing at NMCCA	5 Jun 01	41	242
Appellant's first Brief	31 Jan 05	1332	1574

We analyze claims of post-trial delay using a two-step process. First, we consider the appellant's constitutional due process right to speedy review. Second, if no constitutional violation is established, we analyze the issue under our broad Article 66(c), UCMJ, power. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

In our constitutional analysis, we consider four factors in determining if post-trial processing delay has violated 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 v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, then we must balance the length of the delay against 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).

This case was docketed in this court 242 days after the completion of the trial, a delay that we do not consider unreasonable in view of the length of the record and the extensive clemency request submitted by the trial defense counsel. A delay of 1,332 days then ensued before the appellate defense counsel submitted a brief and assignment of errors. We note that during that period, four different counsel representing the appellant submitted 34 requests for enlargements of time.

We find this total delay to be facially unreasonable, triggering a due process review. Regarding the second factor, reasons for the delay, the enlargement requests filed by the various appellate defense counsel cite caseload commitments and the six-month deployment of one counsel to Afghanistan. We conclude that these reasons are tied to staffing levels. Our superior court, citing Article 70, UCMJ, recently stated that the Government has a duty to "provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *United States v. Moreno*, __ M.J. __, No. 200100715, slip op. at 18 (C.A.A.F. May 11, 2006). As for the third factor, we find no assertion of the right to a timely appeal before filing the appellant's brief in this court. Regarding the fourth factor, we find no claim or evidence of specific prejudice, beyond the fact that the appellant served his entire sentence to confinement without having had the opportunity to assert any basis for appeal. He suffered no "oppressive incarceration" because, in view of our resolution of his assignments of error, his substantive grounds for appeal were not meritorious and he was in no worse position due to the delay, even though it may have been excessive. *See Moreno*, slip op. at 22-23. Any anxiety and concern experienced by the appellant (no particularized anxiety or concern was communicated to us, other than that he "languished in confinement," Appellant's Brief of 31 Jan 2005 at 30) does not appear to us to be constitutionally cognizable. Finally, we find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice and no indication that the appellant's grounds for appeal, and his defenses in case of reversal and retrial, were impaired by the delay. *Id*. at 26-28. Thus, we conclude that there has been no due process violation resulting from the post-trial delay. *Jones*, 61 M.J. at 83.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

Conclusion

We have considered the remaining assignments of error and conclude that they are without merit. Accordingly, we affirm the findings of guilty and the sentence, as approved by the convening authority.

Judge FELTHAM and Judge HARTY concur.

For the Court

R.H. TROIDL
Clerk of Court