IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	19 October 2017 ANSWER TO APPELLANT'S ASSIGNMENT OF ERRORS ON BEHALF OF THE UNITED STATES Dkt. No. 1450 Case No. CGCMG 0353 Panel 8
v.	
Michael R. RODRIGUEZ, Boatswain's Mate Second Class (E-5), U.S. Coast Guard, Appellant	Tried at Beaumont, Texas by a general court-martial convened by Commander, Eighth Coast Guard District on 10 May, 26 July, and 19–21 September 2016.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 15 of this honorable Court's Rules of Practice and Procedure.

STATEMENT OF THE CASE

Before a military judge, Appellant, Boatswain's Mate Second Class Michael R. Rodriguez, was tried at a general court-martial on September 19, 2016. Contrary to his pleas, the military judge found Appellant guilty of one specification of the charge of sexual abuse of a child under Article 120b(c), UCMJ, 10 U.S.C. § 920b (2012) and the charge of adultery under Article 134, UCMJ, 10 U.S.C. § 934 (2012). R. at Vol. 5, pg. 1–2. Appellant was acquitted of one specification of sexual abuse of a child under Article 120b(c), UCMJ and the charges for obstructing justice and indecent langue under Article 134, UCMJ. *Id.* On September 21, 2016, the military judge sentenced Appellant to

confinement for 18 months, reduction to pay grade E-1, and a bad conduct discharge. R. at Vol. 5, pg. 41. On February 27, 2017, the convening authority approved the finding as well as the confinement and discharge portions of the sentence, but disapproved the adjudged reduction in rank due to the merits of Appellant's clemency request and the post-trial processing timeline. Convening Authority's Action of 27 Feb 17. The convening authority also waived all forfeitures arising under Article 58b, UCMJ for a period of six months and ordered the confinement portion of the sentence executed. *Id.*

STATEMENT OF FACTS

A. Facts related to charged offenses.

1. Appellant kissed, bit, and blew on his 8-year old stepdaughter's feet.

This case concerns Appellant's stepdaughter, VG, who was eight years old at the time of the offense. P.E. 4. Appellant married VG's mother, Mrs. [redacted] in June 2015. R. at Vol. 3, pg. 123. In December 2014, Appellant met Mrs. [redacted] a friend of Mrs. [redacted] who was then married to a fellow Coast Guardsman. R. at Vol. 4, pg. 3. Soon after, Appellant began a sexual relationship with Mrs. [redacted] *Id.* Mrs. [redacted] often went to Appellant's house to escape the marital issues she was having with her husband. R. at Vol. 4, pg. 27–28. While at Appellant's house, Mrs. [redacted] observed Appellant kissing and blowing on VG's feet on multiple occasions. Vol. 4, pg. 29. Mrs. [redacted] also observed Appellant put lotion on VG's feet, massage VG's feet, bite VG's feet, kiss VG's feet, blow on VG's feet, and paint VG's toe nails. R. at Vol. 3, pg. 117–18. VG also testified, confirming that Appellant painted her toenails and that he tickled, massaged, and kissed her feet. R. at Vol 3, pg. 82–83.

2. Appellant expressed specific sexual interest in VG's feet.

Appellant sent text messages to Mrs. [redacted] about VG's feet for the purpose of sexual foreplay. R. at Vol. 4, pg. 22. On April 16, 2015, Appellant and Mrs. [redacted] engaged in "sexting between two intimate people" where they discussed their sexual fantasies. R. at Vol. 4, pg. 39. Appellant sent a text message to Mrs. [redacted] stating "[p]erhaps have [your co-worker's] feet in ur face while u watch pornhub and masturbate." P.E. 6, pg. 61. Mrs. [redacted] responded stating "[a]nd hmm i would shes got oriental short little feet theyre adorable." *Id.* Appellant responded by stating "I know they do. Probably for the whole thing in my mouth like I do with [VG]." *Id.* Appellant then sent a picture message to Mrs. [redacted] of VG "laying across the couch with her feet up [and her having] on red-reddish pink nail polish." R. at Vol. 4, pg. 24. Appellant then sent Mrs. [redacted] text messages stating "I was showing u [VG's] feet" and "[p]osing them for you" and "I wanted to see u lick [VG's] feet" and "suck on mine." R. at Vol. 4, pg. 24–25; P.E. 6, pg. 63. Mrs. [redacted] did not initiate these discussions regarding VG's feet as she was not sexually attracted to young feet. R. at Vol. 4, pg. 24–26, 48. Mrs. [redacted] interpreted Appellant's messages regarding VG's feet to be sexual foreplay and as Appellant wanting Mrs. [redacted] to sexually suck on VG's feet while he watched. R. at Vol. 4, pg. 22, 25.

3. Appellant expressed general sexual interest in children's feet and adult's feet.

The government introduced evidence of Appellant's general sexual interest in feet through the testimony of Mrs. [redacted] Mrs. [redacted] Mrs. [redacted] his ex-wife, and through videos found on Appellant's electronic devices. Mrs. [redacted] testified that she and Appellant acknowledged to each other that they had a foot fetish and engaged in

sexual conduct focusing on their feet while they had sexual intercourse. R. at Vol. 4, pg. 18. Appellant and Mrs. [redacted] enjoyed "both touching, kissing, [and] sucking on [feet]" and "pretty much any sexual way you can use feet." R. at Vol. 4, pg. 19. However, Appellant's enjoyment of feet during sexual foreplay was not limited to adult feet and Appellant would only send pictures of children's feet to Mrs. [redacted] R. at Vol. 4, pg. 20; Vol. 4, pg. 43, 44. Appellant's ex-wife, Mrs. [redacted] testified that Appellant touched her feet in a sexual manner during their marriage. R. at Vol. 3, pg. 129. Although Ms. [redacted] testified that feet never came into foreplay or sex in her relationship with Appellant (R. at Vol. 5, pg. 88), the government introduced videos found on a computer Appellant shared with her that showed adults sucking on other adults' feet. R. at Vol. 3, pg 71, 126; P.E. 2.

The government also introduced expert testimony about paraphilias and foot fetishes.[1] Specifically, the government offered the testimony of Dr. [redacted] a psychologist, who offered some general information about paraphilias, including foot fetishes. R. at Vol. 4, pg. 50. Dr. [redacted] explained that some people are sexually aroused by interacting with feet. R. at Vol 4, pg. 59. However, the military judge did not allow Dr. [redacted] to state an opinion about whether Appellant had a diagnosable paraphilia. R. at Vol. 4, pg. 65.

B. Facts related to claim of error in the Staff Judge Advocate's Recommendation.

The text of Additional Charge I, Specification 2 charged Appellant with committing a lewd act upon VG, to wit: kissing VG's feet, on divers occasions, between April 2014 and September 2015. In making his finding as to Additional Charge I,

[1] Paraphilias are abnormal arousal patterns, behaviors, or impulses that drive intense recurrent sexual fantasies or urges. R. at Vol. 4, pg. 56.

Specification 2, the military judge excepted the date range of Appellant's conduct from April 2014-September 2015 to the narrower date range of December 2014-April 2015. R. at Vol 5, pg. 1–2. Thus, the military judge found Appellant guilty of committing a lewd act upon VG, to wit: kissing VG's feet, on divers occasions, between December 2014 and April 2015 and not guilty of any conduct occurring prior to December 2014 or after April 2015. *Id.* In making his Staff Judge Advocate Recommendation pursuant to R.C.M. 1106, the staff judge advocate informed the convening authority that Additional Charge, Specification 2 was a non-qualifying offense and that the convening authority was not permitted to change in whole or in part the portion of Appellant's sentence that included a bad conduct discharge and 18 months of confinement. SJAR of 25 Jan 17.

C. Facts related to claim of post-trial delay.

The sentence in this case was adjudged on September 21, 2016. R. Vol. 5, pg 41. The convening authority took action on February 27, 2017, 159 days later. Convening Authority's Action of 27 Feb 17. In the Staff Judge Advocate's Recommendation, the staff judge advocate attributed post-trial delay to a delay in the authentication of the record by the military judge, and to confusion about who represented Appellant on post-trial matters. SJAR of 25 Jan 17; Addendum to SJAR of 3 Feb 17. The convening authority waived automatic forfeitures for six months. Convening Authority's Action of 27 Feb 17. In a statement accompanying the Action, the convening authority disapproved the adjudged reduction in rank in order to provide relief for the post-trial processing delay. *Id.*

RESPONSE TO ERRORS ASSIGNED

I.

THE EVIDENCE WAS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD UNDER ARTICLE 120b(c), UCMJ.

A. Standard of Review

This Court has a statutory mandate to review *de novo* both the factual and legal sufficiency of the evidence. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

B. The evidence presented at trial was factually sufficient to support Appellant's conviction for sexual abuse of a child under Article 120b(c), UCMJ.

In order to convict Appellant under Article 120b(c), UCMJ, the Government was required to show that:

> (1) Between December 2014 and April 2015, on divers occasions, Appellant committed a lewd act upon VG, to wit: kissing her feet with his lips; and
> (2) That at the time, VG had not attained the age of 12 years.[2]

In reviewing the factual sufficiency of evidence, courts look to "whether, after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117. Courts conducting a review of the evidence for factual sufficiency are permitted to draw "reasonable inferences from the evidence presented." *United States v. Oliver*, 70 M.J. 64, 67 (C.A.A.F. 2011) (citing *United States v. McCray*, 1 C.M.R. 1, 3 (C.M.A. 1951)).

[2] Appellant has not raised any factual dispute that VG had not attained the age of 12 years at the time of the misconduct at issue. *See generally* App. Br.

1. **The United States proved beyond a reasonable doubt that Appellant engaged in a lewd act upon VG on divers occasions.**

An individual commits sexual abuse of a child in violation of Article 120b(c), UCMJ, when he or she commits a lewd act upon a child. A lewd act includes any sexual contact. Article 120b(h)(5)(A), UCMJ. Sexual contact includes any touching, causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Article 120(g)(2)(B), UCMJ.

a. Multiple witnesses testified that they saw Appellant kissing VG's feet on divers occasions.

Although Appellant asserts that Mrs. [redacted] testimony indicates that she observed Appellant kissing VG's feet on only one occasion, a plain reading of Mrs. [redacted] testimony indicates that Ms. [redacted] observed Appellant kiss VG's feet on multiple occasions. App. Br. at 11. Specifically, Mrs. [redacted] testified that she spent a lot of time at Appellant's house in order to escape the marital issues she was having with her husband. R. at Vol. 4, pg. 27–28. In discussing her personal observations regarding feet behavior while she was a guest at Appellant's house, Mrs. [redacted] responded to trial counsel's question of "[d]id you ever personally observe BM2 Rodriguez kiss [VG's] feet," by saying "[y]eah" and that Appellant would "play around and kiss [VG] on her feet or be like tossing her onto the couch and give her raspberry's towards her feet." R. at Vol. 4, pg. 28–29. Based on Mrs. [redacted] statement, and the greater context in which her statement was made—a discussion of her multiple visits to Appellant's house after she first met him in December 2014—it can reasonably be inferred that Mrs. [redacted] observed Appellant kiss VG's feet on multiple occasions. *See Oliver*, 70 M.J. at 67.

VG's testimony supports such an inference since VG stated "sometimes" in

response to trial counsel's question of "[d]oes [Appellant] kiss your feet" and that Appellant likes to play around with her and would tickle her feet and "kiss it, like a real quick kiss." R. at Vol. 3, pg. 83. Had Appellant only kissed VG's feet once, VG's response would not have been "sometimes." *Id.*

Mrs. [redacted] testified that she observed Appellant rub VG's feet with lotion, massage VG's feet, bite VG's feet, kiss VG's feet, and blow on VG's feet. R. at Vol. 3, pg. 117–118. Although Mrs. [redacted]s testimony does not indicate whether she observed Appellant kiss VG's feet on multiple occasions, the combination of the circumstantial evidence contained within the testimony of Mrs. [redacted] and VG, and the inferences that can be drawn there from, supports a finding beyond a reasonable doubt that Appellant kissed VG's feet.

b. Appellant had a sexual desire toward VG's feet which he intended to arouse or gratify when he kissed VG's feet.

The United States proved beyond a reasonable doubt that Appellant had a sexual desire toward VG's feet that he intended to arouse or gratify when he kissed VG's feet. EJ's testimony established that during the course of their sexual relationship, Appellant exhibited a strong sexual desire toward VG's feet. Specifically, Mrs. [redacted] testified that Appellant and Mrs. [redacted] acknowledged to one another that they had a "sexual fetish to feet." R. at Vol. 4, pg 18. In order to arouse or gratify their "sexual fetish to feet," Appellant and Mrs. [redacted] would not only engage in "touching, kissing, [and] sucking on [feet]" and "pretty much any sexual way you can use feet," but would also discuss sexual fantasies regarding feet as a form of sexual foreplay. R. at Vol. 4, pg. 19, 40. During the course of this sexual foreplay, Appellant would send pictures of VG's feet and discuss sexual fantasies regarding VG's feet. R. at Vol. 4, pg. 22. Mrs. [redacted] did

not have a sexual desire toward VG's feet as she did not like young feet and could not look at a child sexually because she was sexually assaulted when she was a kid. R. at Vol. 4, pg. 24–26, 38–40, 48. Thus, Appellant's inclusion of VG's feet as part of the sexual foreplay between himself and Mrs. [redacted] was based solely on his own sexual desire toward VG's feet.

Appellant's text message conversations with Mrs. [redacted] also exemplify how Appellant, but not Mrs. [redacted] maintained a sexual desire toward VG's feet. Additionally, Appellant's text messages to Mrs. [redacted] exemplify how Appellant aroused or gratified this sexual desire by placing his mouth or seeing another person's mouth on VG's feet. On April 16, 2015, Appellant and Mrs. [redacted] engaged in a text message conversation about their sexual fantasies. Mrs. [redacted] texted Appellant regarding a sexual fantasy involving her co-worker's "oriental" adult feet, stating "[a]nd hmm i would shes got oriental short little feet theyre adorable." P.E. 6, pg. 61. In response, Appellant described his own sexual fantasy regarding VG's feet, stating "I know they do. Probably for the whole thing in my mouth like I do with [VG]." *Id.* Appellant then sent a picture message to Mrs. [redacted] of VG "laying across the couch with her feet up [and her having] on red-reddish pink nail polish." R. at Vol. 4, pg. 24. Appellant sent text messages to Mrs. [redacted] stating "I was showing u [VG's] feet" and "[p]osing them for you" and "I wanted to see u lick [VG's] feet" and "suck on mine." R. at Vol. 4, pg. 24–25; P.E. 6, pg. 63. Based on the context of these text messages—i.e., sexual foreplay, as well as the inclusion of varying sexual acts involving VG's feet and a person's mouth, Appellant's sexual desire toward VG's feet was aroused or gratified by placing his mouth or watching another person place their mouth on VG's feet. R. at Vol.

4, pg. 25. Therefore, Appellant intended to arouse or gratify his sexual desire toward VG's feet when he kissed VG's feet.

c. Appellant did not have an innocent purpose when he kissed VG's feet.

Appellant argues that since Mrs [redacted]z, Mrs. [redacted] and VG did not observe any sexual behavior or evidence of sexual arousal or gratification on the part of Appellant when he kissed VG's feet, Appellant did so without an intent to arouse or gratify a sexual desire. App. Br. at 13–14. However, even though the testimony of Mrs. [redacted], Mrs. [redacted] and VG did not indicate that they witnessed overt sexual behavior on the part of Appellant while he kissed VG's feet, the government presented ample evidence that Appellant kissed VG's feet with an intent to arouse or gratify his sexual desire. First, the language of Article 120b(c), UCMJ does not require the government to show that an individual exhibited visible signs of sexual arousal or gratification while they engaged in a certain behavior in order for it to be found that they had an intent to arouse or gratify a sexual desire. Additionally, Article 120b(c), UCMJ does not require the government to show that an individual's behavior was visibly sexual to a witness in order for them to be found to have an intent to arouse or gratify a sexual desire. Instead, the language of Article 120b(c), UCMJ, requires that an individual commit a lewd act with an intent to arouse or gratify a sexual desire. Second, the Court of Appeals for the Armed Forces has held that intent, like any other mental state, can be shown through circumstantial evidence. *United States v. Vela*, 71 M.J. 283, 285 (C.A.A.F. 2012).

In light of this, the testimony of Mrs. [redacted] as well as Appellant's text messages to Mrs. [redacted] clearly establish that Appellant had a sexual desire toward VG's feet and that this sexual desire was aroused or gratified by Appellant placing his

mouth on VG's feet.[3] Thus, through the testimony of Mrs. [redacted] and Appellant's text messages to Mrs. [redacted] the United States proved beyond a reasonable doubt that Appellant kissed VG's feet with an intent to arouse or gratify his sexual desire.

C. The evidence presented at trial was legally sufficient to support Appellant's conviction for sexual abuse of a child under Article 120b(c), UCMJ.

The test for reviewing the legal sufficiency of evidence is lower than that used for factual sufficiency. Specifically, courts look to "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014). Further, this Court is required to "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Blocker*, 32 M.J. 281, 284 (C.A.A.F. 1991). As the evidence presented at trial is factually sufficient to support Appellant's conviction for sexual abuse of a child under Article 120b(c), UCMJ, the evidence is equally sufficient to support a finding of legal sufficiency.[4]

II.

THE STAFF JUDGE ADVOCATE DID NOT ERR IN MAKING HIS R.C.M. 1106 RECOMMENDATION TO THE CONVENING AUTHORITY.

A. Standard of Review.

As Appellant failed to previously complain of the alleged errors in the Staff Judge Advocate's Recommendation, this court reviews his claim on appeal for plain error. *United States v. Wilson*, 54 M.J. 57, 59 (C.A.A.F. 2000). An appellant meets their burden

[3] *See supra*, at Section I.B.1.b.
[4] *See supra*, Section I.B.

of establishing plain error by showing: (1) there was an error; (2) that was plain or obvious; and (3) that the error materially prejudiced a substantial right. *Id.* (citing *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999)). Failure to establish any one of these prongs is fatal to the claim of plain error. *United States v. McClour*, 76 M.J. 23, 25 (C.A.A.F. 2017) (citation omitted).

B. The Staff Judge Advocate correctly advised the convening authority of his limited options under Article 60, UCMJ.

1. Appellant was found guilty of an offense that occurred entirely after 24 June 2014.

Appellant asserts that the SJA erred when he deemed Additional Charge I, Specification 2 to be an offense occurring after 24 June 2014 and therefore failed to properly advise the convening authority of his options under R.C.M. 1107. App. Br. at 17. Although Appellant's assertion is correct when considering the original text of Additional Charge I, Specification 2, the military judge made exceptions to Additional Charge I, Specification 2 that resulted in Appellant being found guilty of an offense that occurred entirely after 24 June 2014. Specifically, Additional Charge I, Specification 2 originally charged Appellant with committing a lewd act upon VG, to wit: kissing VG's feet, between April 2014 and September 2015. However, the timeframe in which this offense was alleged to have occurred was changed to after 24 June 2014 when the military judge, in making his findings, excepted the date range of April 2014-September 2015 and substituted the narrower date range of December 2014-September 2015. R. at Vol. 5, pg. 1–2. In doing so, the military judge found Appellant guilty under Additional Charge I, Specification 2 of committing a lewd act upon VG between December 2014 and April 2015 and not guilty of the excepted words—i.e., any offense prior to December 2014 or after April 2015. *Id.* Thus, the offense to which Appellant was found guilty

occurred after 24 June 2014.

2. The Staff Judge Advocate correctly applied R.C.M. 1107.

In making his recommendation ("SJAR") to the convening authority in accordance with R.C.M. 1106, the staff judge advocate ("SJA") accurately stated the convening authority's options under R.C.M. 1107. The note to R.C.M. 1107 states:

> [Note: Subsections [Note: Subsections (b)-(f) of R.C.M. 1107 apply to offenses committed on or after 24 June 2014; however, if at least one offense resulting in a finding of guilty in a case occurred prior to 24 June 2014, or includes a date range where the earliest date in the range for that offense is before 24 June 2014, then the prior version of R.C.M. 1107 applies to all offenses in the case, except that mandatory minimum sentences under Article 56(b) and applicable rules under R.C.M. 1107(d)(1)(D)-(E) still apply.]

Thus, R.C.M. 1107(c) and R.C.M. 1107(d) were applicable to Additional Charge I, Specification 2. Under R.C.M. 1107(c)(1)(B), the convening authority was prohibited from dismissing, changing, or setting aside the guilty finding for Additional Charge I, Specification 2 as it was a non-qualifying offense under R.C.M. 1107(c)(1)(A). Additionally, under R.C.M. 1107(d)(1)(B), the convening authority was prohibited from disapproving, commuting, or suspending, in whole or in part, the portion of Appellant's sentence that included 18 months of confinement and a bad conduct discharge. As such, the SJA's recommendation to the convening authority regarding his options as to the findings and sentence was correct. SJAR of 25 Jan 17.

3. R.C.M. 1107 prohibited the convening authority from considering conduct outside of the timeframe within Additional Charge I, Specification 2.

As Appellant was found not guilty of the excepted words and thereby any offense prior to December 2014, the convening authority was not permitted to consider any conduct occurring prior to 24 June 2014. Under R.C.M. 1107(a), a convening authority is permitted to take action on the sentence and at their discretion, the findings. However,

under R.C.M. 1107(b)(4), a convening authority is not permitted to take action on any finding of not guilty or ruling amounting to a finding of not guilty. Since the military judge found Appellant not guilty of the excepted words to Additional Charge I, Specification 2, Appellant was found not guilty of any offenses originally alleged to have occurred prior to 24 June 2014 and the convening authority was prohibited from considering such conduct in accordance with R.C.M. 1107(b).

C. Plain and Obvious error did not arise from the SJA's recommendation.

Even if the SJA erred in his SJAR to the convening authority, this error was not plain or obvious as the SJAR was based on a reasonable interpretation of the language of the military judge's findings and R.C.M. 1107. First, the SJA was reasonable in interpreting the military judge's finding regarding Additional Charge I, Specification 2 as finding Appellant not guilty of any alleged offense prior to December 2014 or after April 2015. R. at Vol. 5, pg 1–2. Second, based on this finding, the SJA was reasonable in interpreting R.C.M. 1107(b)(4) as prohibiting the convening authority from considering Appellant's conduct prior to December 2014 as it constituted a not guilty finding. Thus, the SJA's interpretation that no offense in the case occurred prior to 24 June 2014 was reasonable and his failure to properly inform the convening authority of his options under R.C.M. 1107 did not constitute plain and obvious error.

D. A substantial right was not materially prejudiced.

Even if there was plain error in the SJAR, Appellant is not entitled to relief because he has failed to make a colorable showing of possible prejudice. Because of the highly discretionary nature of the convening authority's clemency power, military courts will grant relief based on an unobjected to matter in the post trial recommendation only

when the accused presents some colorable showing of possible prejudice *Wilson*, 54 M.J. at 59. Appellant has failed to make such a colorable showing of possible prejudice and instead, has speculated that but for the alleged error within the SJAR, the convening authority would have acted differently as to the findings and sentence. Specifically, Appellant has asserted that he would have requested that the convening authority set aside the guilty finding as to Additional Charge I, Specification 2 on the premise that the evidence presented at trial was factually and legally insufficient to support such a finding. App. Br. at 19. However, the government presented sufficient evidence to prove beyond a reasonable doubt, that Appellant committed a lewd act, to wit: kissing VG's feet, a child having not obtained the age of 12 years old.[5]

Appellant also asserts that he would have requested a sentence reduction and requested to set aside the bad conduct discharge he received based on his "extensive military career . . . and the lone specification of sexual abuse of a child." App. Br. at 20. However, in addition to waiving all forfeitures arising from the adjudged sentence for a period of six months, the convening authority granted Appellant substantial clemency by disapproving the adjudged reduction in rank to E-1. Convening Authority's Action of 27 Feb. Thus, it is highly speculative for Appellant to argue that the convening authority would have granted the additional clemency he now claims he would have requested absent the SJAR. Further, the convening authority, upon reviewing the record of trial in this case, would have seen that Appellant's "extensive military career" included not only the sexual abuse of a child and adultery, but that Appellant had fourteen negative CG-3307 administrative remarks forms. P.E. 6 at 134, 136–145, 150, 152–153. As such, Appellant's assertion that the convening authority would have granted him a sentence

[5] *See* supra, Section I.B.

reduction or set aside his bad conduct discharge is unsubstantiated and speculative. Therefore, Appellant has failed to meet his burden and make a colorable showing of possible prejudice as a result of the alleged error within the SJAR.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ALLOWING ALL EVIDENCE THAT APPELLANT HAD A FOOT FETISH INTO THE TRIAL UNDER M.R.E. 404(b).

A. Standard of Review.

A military judge's decision to admit evidence is reviewed for abuse of discretion. *United States v. Goodin*, 67 M.J. 158, 160 (C.A.A.F. 2009).

B. Evidence in Question.

On July 11, 2016, defense filed a motion to suppress certain evidence of Appellant's "foot fetish," which the government opposed. A.E. II; A.E. V. The military judge permitted testimony about Appellant's foot fetish in various forms, and on January 16, 2017, issued a written ruling explaining the reasons why evidence of Appellant's foot fetish was admitted under Mil. R. Evid. 404(b). A.E. XXVII, Ruling. The military judge's ruling specifies:

> In the present case, the Government should be permitted to introduce evidence that the accused sucked and kissed the feet of his former spouse, current spouse, and girlfriend as a means to gratify his sexual desire in order to prove both motive and intent with respect to the alleged lewd acts committed against VG. The fact that the accused has committed these noncriminal acts with adult women in a manner to gratify his sexual desire is admissible for the Government to attempt to circumstantially prove his motive and intent of committing the lewd acts with VG.

A.E. XXVII, Ruling, pg. 4. This is consistent with the military judge's on-the-record discussions of why this evidence was admissible. R. at Vol 3, pg. 6. The evidence

ultimately presented as to Appellant's sexual interest in feet consisted of the testimony of Mrs. [redacted] and Mrs. [redacted] and videos found on the computer shared by Mrs. [redacted] and Appellant. *See supra*, Statement of Facts at A.3. While an expert witness, Dr. [redacted] provided some general information about paraphilias, including foot fetishes, he did not offer any specific opinions or diagnoses about Appellant or the evidence of his conduct. R. Vol. 4, pg. 50–65. The military judge stated on the record that he would "not consider a diagnosis on the stand" by Dr. [redacted] R. at Vol. 4, pg. 66.

C. The military judge properly admitted evidence of Appellant's sexual interest in feet to demonstrate Appellant's motive and intent under M.R.E. 404(b).

Mil. R. Evid. 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Mil. R. Evid. 404(b).

The test for admissibility of uncharged misconduct is: (1) whether the evidence reasonably supports a finding by the court members that the Appellant committed prior crimes, wrongs, or acts; (2) what fact of consequence is made more or less probable by the existence of the evidence, and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). In *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005), the court set out an eight-part test for conducting the balancing test for admission of evidence, which stems from Mil. R. Evid. 403: (1) the strength of proof of the act; (2) the probative weight of the evidence; (3) the potential to present less prejudicial evidence; (4) the possible distraction of the fact-finder; (5) the time needed to prove the conduct; (6)

the temporal proximity of the prior event; (7) the frequency of the act; (8) the presence of any intervening circumstances; and (9) the relationship between the parties. Finally, it is relevant to this Court's review of this issue that the case was heard by a military judge sitting alone. The military judge is presumed to have considered the admitted evidence only for the limited purpose for which it was offered. *United States v. Hill*, 62 M.J. 271, 276 (C.A.A.F. 2006).

Here, the military judge acknowledged the *Reynolds* factors and applied them in making his written ruling on evidence of Appellant's general interest in feet. A.E. XXVII, Ruling, pg. 3–4. Under the first prong of the *Reynolds* test, the evidence presented clearly supported a finding that Appellant had a sexual interest in feet; two witnesses, Mrs. [redacted] and Mrs. [redacted] explained that Appellant had an ongoing sexual interest in feet, supported by additional evidence of Appellant's statements demonstrating that interest.

Under the second prong, the evidence is also relevant. This case is akin to military cases where courts have found the possession of pornographic books, magazines or videos concerning a particular sex act or partner around the time of the alleged offense to be relevant to motive or intent. *United States v. Whitner*, 51 M.J. 457, 460 (C.A.A.F. 1999); *see also United States v. Mann*, 26 M.J. 1 (C.M.A. 1988) (heterosexual pornography depicting children and adults was admissible under Mil. R. Evid. 404(b) to provide specific intent required for charge of indecent acts with a minor). In *Whitner*, CAAF explained that "motive evidence shows the doing of an act by a particular person by evidencing an emotional need in that person which could have incited that person to do that act in satisfaction of that emotion." In that case, homosexual videotapes and

similar materials were relevant to show both motive and intent to engage in homosexual sex with junior enlisted members. *Id.* Here, rather than pornographic materials, the military judge considered witness testimony and statements from Appellant about his sexual fantasies and preferences, for the same reasons and purposes that pornographic materials were considered in *Whitner* and *Mann*. Because the evidence in question reasonably demonstrated Appellant's emotional need to gratify himself sexually by interacting with feet, it was relevant to both his motive and intent to do the same.

The third prong of the *Reynolds* test concerns balancing probative value against danger of unfair prejudice. The military judge applied some analysis, finding that because having a foot fetish is noncriminal, "[t]here is a low risk that the accused would be unfairly convicted based upon those acts and because he has a 'foot fetish.'" A.E. XXVII, Ruling, pg. 5. An application of the *Berry* factors supports these conclusions. The evidence in question supported a conclusion that Appellant had a foot fetish, and was probative of Appellant's motive and intent. The evidence demonstrated an ongoing sexual interest in feet at the time of the alleged offenses. Although two additional witnesses, Dr. [redacted] and Mrs. [redacted] testified almost exclusively about foot fetishes or Appellant's specific sexual interest in feet, the majority of the testimony came from Mrs. [redacted] who was an eyewitness to Appellant kissing VG's feet and also testified to specific statements Appellant made about being sexually aroused by VG's feet. Given that this was a military judge alone trial, the potential for confusion or wasted time was low compared to the probative value of Appellant's sexual interest in feet.

D. Even if the military judge had erred in admitting evidence of Appellant's sexual interest in feet, Appellant is entitled to no relief because the military judge discounted or ignored that evidence in reaching his findings.

"A finding or sentence of a court-marital may not be held incorrect on the ground

of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. When evidence is erroneously admitted, military courts evaluate claims of prejudice by weighing four factors "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). This is a test designed for cases with members. While, under the *Kerr* test, it is clear that the evidence in question did not prejudice Appellant, the military judge's findings of fact are even more persuasive, because in them, the judge explains how he gave little to no weight to that evidence. A.E. XXVII, Special Findings, pg. 4–5.

Overall, the government's case was strong. Appellant did not deny kissing VG's feet, but argued that the context was not sexual. He argued, for example, that no one had observed Appellant doing anything overtly sexual while interacting with VG's feet. R. Vol. 4, pg 84. Defense argued it was Mrs. [redacted] not Appellant, who had an interest in VG's feet. *Id.* However, the government demonstrated through VG, Mrs. [redacted], Mrs. [redacted] and Appellant's own statements that Appellant had a sexual interest in VG's feet specifically.

As to the third factor, the evidence was material, because it provided part of the foundation for the Government's theory that Appellant would have a specific intent to gratify his sexual desire when he kissed his stepdaughter's feet. However, general information about Appellant's interest in feet was not the only evidence presented of that specific intent. Appellant also made statements about his sexual interest in VG's feet specifically: he would discuss VG's feet and send photos of her feet to Mrs. [redacted] as a

form of foreplay. R. Vol. 4, pg 22, P.E. 6, pg 63.

Also, ample, credible evidence was presented that Appellant had a strong sexual interest in kissing, touching, licking, and sucking on feet. Both Mrs. [redacted] and Mrs. [redacted] testified as to this interest. R. at Vol 3, pg. 129; R. at Vol. 4, pg. 19. Mrs. [redacted] testimony was supported by admitted text messages from Appellant where he made statements of his sexual interest in feet. P.E. 6, pg 61, 63. Mrs. [redacted] also spoke to Appellant's interest in children's feet. Vol. 4, pg. 43, 44. Finally, a video found on a computer Appellant shared with his current wife showed his interest in sucking on feet. P.E. 2. There is no question that Appellant had a very strong motivation to pursue sexual experiences having to do with feet, as evidenced by his long-term and frequent efforts to pursue that topic.

Most significantly, the military judge's special findings explain exactly how this evidence played into the finding of guilty of sexual abuse of a child. The military judge explained that as evidence of sexual intent, he relied largely on the text messages between Appellant and Mrs. [redacted] specifically discussing VG's feet in a sexual context. A.E. XXVII, Special Findings, pg. 4. The military judge wrote,

> Although the court did consider the testimony of Dr. [redacted] the Court is satisfied, beyond a reasonable doubt, of the accused's guilt as to sexual abuse of a child without such evidence, and without other evidence that the accused has a "foot fetish". The Court gave no weight to Prosecution Exhibit 2, the videos of feet recovered from a computer within the accused's home"

Id. at 5. Where the fact finder—the military judge—all but discounted the "foot fetish" evidence and completely ignored the videos of feet in Prosecution Exhibit 2, this Court should be absolutely satisfied that Appellant was not prejudiced by admission of this evidence.

IV.

APPELLANT IS NOT ENTITLED TO RELIEF FOR POST-TRIAL DELAY PURSUANT TO THE *BARKER V. WINGO* FACTORS.

A. Standard of Review

Whether an appellant has been deprived of his due process rights due to post-trial delay is a question of law that is reviewed *de novo*. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

B. Although the first three *Barker* factors weigh against the government, Appellant has failed to demonstrate the most important factor of prejudice.

An appellant's due process rights are infringed where an unreasonable post-trial delay occurs. A post-trial delay is presumed to be unreasonable where the convening authority's action does not take place within 120 days of the completion of trial. *Moreno*, 63 M.J. at 142. In determining whether a delay is unreasonable, and thus whether a due process violation exists, courts balance the four factors found in *Barker* and look to: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Of these four factors, courts place the greatest emphasis on whether the appellant was prejudiced by the post-trial delay. *United States v. Dearing*, 63 M.J. 478, 487 (C.A.A.F. 2006) (holding that "we are most sensitive to the final factor that relates to any prejudice either personally to Appellant or the presentation of his case that arises from the excessive post-trial delay").

Appellant's due process rights were not infringed because the four *Barker* factors, when balanced together, do not rise to the level of an unreasonable delay. Here the first three *Barker* factors weigh against the government. Action was taken 159 days

after the sentence was adjudged, 39 days beyond the 120 days prescribed in *Moreno;* the delay is not excusable, and Appellant has asserted his right to timely review by asserting this error. However, Appellant has not shown how the 39-day delay prejudiced him. In looking to whether a post-trial delay has resulted in prejudice to an appellant, courts consider three interests: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal might be impaired. *Moreno*, 63 M.J. 138–39. Here, the risk of oppressive incarceration was minimal; Appellant will be released from confinement well before completion of review. Nothing about the 39-day delay will impair his grounds for appellate relief or cause him anxiety. Rather than being harmed by the delay, he received a benefit; a longer period of time in which the waived automatic forfeitures would be provided to his dependents. *See* SJAR of 25 Jan 2017. Most significantly, to the extent that Appellant suffered any prejudice, the convening authority already provided him complete relief by disapproving his reduction in pay grade.

C. Since Appellant already received complete relief, no further relief under *Tardif* is warranted.

The government cannot excuse the delay in this case. However, before granting relief in this case under Article 66, UCMJ, this Court should consider what findings and sentence should be approved based on all the facts and circumstances in the record, not just the post-trial delay. *See Tardif*, 57 M.J. at 224.

In determining whether *Tardif* relief is appropriate, this Court should adopt the factors set out by the Air Force Court of Criminal Appeals in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). These