IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	)	19 September 2017
	)	ASSIGNMENTS OF ERROR AND BRIEF ON BEHALF OF THE APPELLANT
v.	)	Dkt. 1450 Case No. G 0353 Panel 8
Michael R. Rodriguez Boatswain's Mate Second Class (E-5) U. S. Coast Guard, Appellant	)	Tried at New Orleans, LA 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

Statement of the Case[1]

On 10 May, 26 July, and 19-21 September 2016, a military judge sitting as a general court-martial tried Boatswain's Mate Second Class Michael R. Rodriguez (Appellant). Contrary to his pleas, the military judge convicted Appellant of sexual abuse of a child (one specification) and adultery (one specification), in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934 (2012). The military judge acquitted Appellant sexual abuse of a child (one specification), obstruction of justice(one specification), indecent language (one specification), in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 120 and 134 (2012 ed and 2007 ed.)

The military judge sentenced Appellant to reduction to E-1, 18 months confinement, and a

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant asserts those matters set forth in the Appendix.

bad-conduct dishonorable discharge. (R. at Vol V, page 41, 4-6)[2] The convening authority approved the adjudged sentence on 27 February 2017. (Action and Prom. Order).

Statement of Facts

All facts necessary to determine the disposition of the issues are found below with their respective assignments of error.

Assignments of Error

I.

THIS COURT CANNOT BE CONVINCED BEYOND A REASONABLE DOUBT THAT APPELLANT ENGAGED IN SEXUAL ABUSE OF A CHILD BECAUSE THE GOVERNMENT FAILED TO PRESENT ANY EVIDENCE OF WHEN A LEWD ACT OCCURRED AND THE ONLY EVIDENCE OF APPELLANT KISSING HIS DAUGHTER'S FEET DURING THE CHARGED TIME FRAME OCCURRED IN A LOVING FAMILY ENVIRONMENT AND FAMILY MEMBERS DESCRIBE THE INCIDENT AS PLAYFUL AND IN NO WAY INAPPROPRIATE.

Standard of Review

This Court reviews legal and factual sufficiency of the evidence *de novo*. Article 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Facts

A. Evidence presented by the government to prove Sexual Abuse of a Child.

1. V.G. and [redacted]

Mrs. [redacted] is married to Appellant and has three biological children, one of whom is V.G. (R. at Vol. 3, pg. 114, line 14). V.G. is not Appellant's biological daughter. (R. at Vol. 3, 114, line 7-8). Mrs. [redacted] has known Appellant since 2012 and has been living with

[2] Because line numbering starts over at line 1 at every page of the transcript and each volume starts over with page 1, the reference is to Volume, page number, and line number.

him, along with her three children including V.G. since 2013. (R. at Vol. 3, pg. 115, line 17-23). Mrs. [redacted] married Appellant in June 2015. (R. at Vol. 3, pg. 123, line 9). Mrs. [redacted] is protective of her children and will not let a man around them until she knew he was going to be a part of her life. (R. at Vol. 3, 121, line 1-3). Mrs. [redacted] is not concerned about Appellant being around her daughter. (R. at Vol. 3, pg. 115, line 1-5).

V.G is the Appellant's stepdaughter and was a month shy of 10 years old when she testified at the court-martial. (R. at Vol. 3, pg. 78, line 10-15). V.G. swore to tell the truth and understood the oath. (R. at Vol. 3, pg. 78, line 10-15). V.G. aptly demonstrated she understood this oath and that she knew the difference between the truth and a lie. Upon examination by the military judge V.G. articulated with great detail how she understood the difference between the truth and a lie and that her testimony was the truth. (R. at Vol. 3, pg. 85-86, line 21-23, 1-7). She also informed the military judge that her testimony had not been influenced by outside individuals as her mother had instructed her to tell the truth. (R. at Vol. 3, pg. 88, line 2-3). The military judge summed up his impressions of V.G. by stating

> "I understand testimony is difficult for anyone, but the court's observation is, one that she understood the oath from the onset … three, she seemed very friendly and forthright and friendly posture within the court. So I understand it's a difficult situation, but to the extent that traumatic, I know the whole event probably is, but as to her testimony she seemed very forthright and candid in her responses including salutations that I don't get from most adult witnesses with respect to counsel."

(R. at Vol. 3, pg. 88, line 9-16).

The military judge also found that V.G. did not have a problem recalling the events in question and that her memory was no different than an adult. (R. at Vol 4 pg 71, line 21).

Appellant and Mrs. [redacted] sometimes kiss V.G. on her forehead and check. (R. at Vol. 3, pg. 82, line 15-22). V.G. and her mother describe Appellant's interactions with V.G. as those of a playful father. Appellant engaged in numerous playful activities to razzle or

"aggravate" V.G. (R. at Vol. 3, pg. 117, line 19). For instance, while engaged in playful activity, Appellant would sometimes tickle V.G.'s feet, give her "raspberries" on her feet, and sometimes would kiss her feet real quick in a playful manner. (R. at Vol. 3, pg. 83, line 7-8; Vol. 3, pg. 117, line 19). Mrs. [redacted] described Appellant "as a typical father figure" when he would in these playful activities. (R. at Vol. 3, pg. 121, line 22-23). In fact, Appellant engaged in these playful activities and "aggravated" all three of her children, not just V.G. (R. at Vol. 3, pg. 121, line 22-23). Mrs. [redacted] and V.G. never provided a reference to the time period when this playful conduct occurred.

V.G. testified that Appellant never did anything to make her feel like he was being sexual towards her. (R. at Vol. 3, pg. 83, lines 11-14). Appellant never sucked on V.G.s feet or never did anything inappropriate with feet in front of V.G. such as sucking on her mother's feet. (R. at Vol. 3, pg. 84, line 20-23). The Appellant never took pictures of V.G.'s feet. (R. at Vol. 3, pg. 84, line 20-23). V.G. has never complained to her mother about Appellant. V.G. loves the Appellant and loves being around him. (R. at Vol. 3, pg. 122, line 12-13).

2. [redacted]

[redacted] worked for the State of Texas, child protective services division. (R. at Vol. 3, pg. 90, line 22-23). Although the government wanted to use Mrs. [redacted] to lay the foundation for an interview she took with V.G., the military judge denied the government's request to accept the interview as evidence under a hearsay exception. Thus, Mrs. [redacted]'s testimony provides no evidence to support the sexual abuse conviction.

3. [redacted]

Mrs. [redacted] is Appellant's ex-wife, and she was married to him almost 10 years. (R. at Vol. 3, pg. 128, line 16). Their marriage ended in April 2014. (R. at Vol. 3, pg. 128, line 23). Together they have two children, a boy and a girl. (R. at Vol. 3, pg. 128, line 16). Although Appellant had

not seen his daughter since she was five years old, over two years before the court-martial, their father/daughter relationship had been normal. (R. at Vol. 3, pg. 129, line 18-20; R. at Vol. 3, pg. 131, line 11-14). During their marriage Appellant occasionally touched and kissed his wife's feet in a sexual manner. (R. at Vol. 3, pg. 129, line 8-13).

4. [redacted]

In December 2014, Mrs. [redacted] met Appellant through her ex-husband and became friends with Appellant. (R. at Vol. 4, pg. 3, line 1-15). Although Mrs. [redacted] and Appellant began their relationship as friends, they developed a sexual relationship in 2015. (R. at Vol. 4, pg.4, line 11). Mrs. [redacted] testified that her sexual relationship with Appellant began approximately 4 May 2015. (R. at Vol. 4, pg.16, line 11-15). Mrs. [redacted] also claimed she was sexually and physically assaulted by her husband around this time. (R. at Vol.4, pg.4 line 14-17). A law enforcement investigation into her husband's abuse began sometime around April 2015. (R. at Vol. 4, pg 31, line 5-8). Mrs. [redacted] moved in with Appellant and his wife at this time. R. at Vol. 4, pg 31, line 19-24). During the investigation, her phone was confiscated, and text messages between her and Appellant were discovered. (R. at Vol. 4, pg. 5, line 8-14). Many of these text messages involved sexual discussions between Appellant and Mrs. [redacted]. (Pros. Ex. 6). Mrs. [redacted] testified that she and Appellant "both enjoyed feet, both touching, kissing, sucking on them. We would use feet orally, we would use feet with penetration and pretty much any sexual way you can use feet we did other than anal, sorry." (R. at Vol. 4, pg. 19 line 8-10).

Mrs. [redacted] has a self-described foot fetish. (R. at Vol. 4, pg 41, line 1; Pros. Ex. 6). Many of the texts between Appellant and Mrs. [redacted] were sexual in nature involving feet. (Pros. Ex. 6). Some of these texts messages involved sexual fantasies involving V.G.'s feet. (Pros. Ex. 6). Mrs. [redacted] and Appellant texted about V.G.'s feet. (Pros. Ex. 6; R. at Vol. 4, pg 22, line 12-14). Mrs. [redacted] claimed that Appellant texted her pictures of just V.G.'s feet but that she

erased them. (R. at Vol. 4, pg 24, line 5-10). She thought Appellant's text about putting V.G.'s feet in his mouth was funny and responded "haha." (R. at Vol. 4, pg 37, line 11-15; Pros. Ex. 6). Mrs. [redacted] did not take his claims seriously and never informed Appellant that his text messages were inappropriate. (R. at Vol. 4, pg 37, line 11-15; Pros. Ex. 6).

Throughout the 89 pages of texts in Pros Ex. 6, Appellant never sent a picture of him kissing or otherwise using his mouth on V.G.'s feet. While this court may find many of the text messages inappropriate, they amount to nothing more than fantasy discussion between two adults.

Mrs. [redacted] testified that she knew V.G. and that Appellant played with her between 2014 and 2015. (R. at Vol. 4, pg 22, line 1). However, Mrs. [redacted] testified that only on one occasion did she witness Appellant kissing V.G.'s feet. On this occasion, she was at Appellant's house and he and Mrs. [redacted] were playing with V.G. (R. at Vol. 4, pg 29, line 2-5. She testified that "he would play around and kiss [V.G.] on her feet or be like tossing her onto the couch and give her raspberries towards her feet." (R. at Vol. 4, pg 29, line 3-5). Mrs. [redacted] never testified that this playful time was inappropriate or provided any other circumstantial evidence that Appellant was somehow sexually gratifying himself during this family playtime.

5. Doctor [redacted]

Doctor [redacted] is a forensic psychologist who the government offered to explain paraphilia. (R. at Vol. 4, pg 50, line 21; pg 54, line 14-20). Paraphilia involves abnormal arousal patterns with things that are usually not considered sexually arousing to others. (R. at Vol. 4, pg 56, line 4-9). Fetishism is a type of paraphilia that involves arousal to objects or body parts other than the genitals. (R. at Vol. 4, pg 56, line 21-22). Podophilla is a fetish with feet. (R. at Vol. 4, pg 59, line 19-20). From reading the text messages Dr. [redacted] believed that Appellant's statements are "directly associated to watching others, in this case…Ms. [redacted] lick [V.G.]'s feet, suck his own feet, or rub his feet." (R. at Vol. 4, pg 63, line 6-8). Dr. [redacted] never

diagnosed Appellant and specifically stated that he had "no opinion about him specifically in terms of the diagnosis." (R. at Vol. 4, pg 56, line 8-10).

6. Text Messages

The government submitted 89 pages of text messages from Mrs. [redacted]'s phone, hundreds of which were between her and Appellant. (Pros. Ex. 6). Many of these text messages describe explicit sexual discussions and fantasies between Appellant and Mrs. [redacted]. (Pros. Ex. 6). Many of the messages discuss fantasies involving feet. (Pros. Ex. 6). One such discussion that took place on 16 April 2015 involved a fantasy where Appellant and Mrs. [redacted] made the following comments

> Appellant: I thought so. Perhaps have Jennas feet in your face while you watch pornhub and masturbate.
> . . . .
> Mrs. [redacted]: Lol. Aww
> Mrs. [redacted]: And hmmm I would she's got oriental short little feet they are adorable.
> Appellant: I know they do. Probably for the whole thing in my mouth like I do with [V.G.].
> Mrs. [redacted]: Haha

(Pros. Ex. 6, pg. 61).

B. Rule for Court-Martial 917 Motion and Government Argument

1. Rule for Court-Martial 917 Motion

At the close of the government's evidence, the defense made a motion to dismiss both Specifications of Additional Charge I. (R. at Vol. 4, pg 73, line 1-2). Regarding Specification 2 of Additional Charge I, the defense stated

> So here again we're talking about whether there has actually been evidence of arousal at the time the alleged conduct occurred. And that's simply lacking. There has been no evidence. You in fact had evidence of the opposite. That in any of these situations that were cited to you have no evidence from V.G. that she was ever uncomfortable or she viewed this as anything inappropriate. And you also on top of that have the testimony of her mother who says that she as observed, you know any tickling of feet or anything like that and that was an entirely a non-

> sexual environment. So absent some showing by the Government, there's a lot of assumptions and there's a lot of insinuations, but there's no actual evidence in front of this court at the time these actions occurred there was any arousal or gratification of sexual desire.

(R. at Vol. 4, pg 77, line 9-19).

The government responded that it does not matter what anyone else thought, it is what Appellant thought and referenced the text message where Appellant claims to have put V.G.'s foot in his mouth. (R. at Vol. 4, pg 77, line 11-12). After the military judge denied the defense motion to dismiss, he discussed his rationale for each charge and specification. However, he neglected to discuss Specification 2, of Additional Charge I.

2. Government Argument

During closing argument, the trial counsel made it clear that the text message where Appellant claimed to have put V.G.'s foot in his mouth was the misconduct that Specification 1 of Additional Charge I sought to address. The trial counsel stated,"BM2 Rodriguez did suck on the feet of V.G. That is evident in the text message, text message 1047." (R. at Vol. 4, pg 96, line 4-6). The trial counsel was also unequivocally clear that the misconduct underlying Specification 2 of Additional Charge 1 was limited to the kissing of feet described by V.G., Mrs. [redacted], and Mrs. [redacted]. The trial counsel stated, "[W]e know he kissed V.G.'s feet. We've had three witnesses to testify to that including V.G. herself." (R. at Vol. 4, pg 96, line 6-8).

Because of the confusion from the lack of evidence the government presented regarding when the acts of sexual abuse in Specifications 1 and 2 of Additional Charge I occurred, the military judge requested that the government focus its rebuttal on the acts that occurred during the charged periods of between April 2014 and September 2015. (R. at Vol. 4, pg 108, line 17-19). In its rebuttal the government responded that Mrs. [redacted] testified to the time periods that she knew the Appellant and that the text messages were sent in April 2015. (R. at Vol. 4, pg 109, line 6-8).

Because the trial counsel failed to adequately state what specific acts of sexual abuse they were aiming to cover in the charged offenses, the military judge allowed the trial counsel to rebut the defense claim that the trial counsel failed to present evidence of when the acts of sexual abuse occurred. (R. at Vol. 4, pg 110, line 13-17). The trial counsel responded, "Your Honor, we would ask you to go back and examine what [redacted] said when she testified that she went over to the house and saw BM2 Rodriguez kiss V.G.'s feet. I believe she stated the specific dates or states the months and years. I think that would be direct evidence to the actual date and articulated and outlined in the specification." (R. at Vol. 4, pg 110, line 18-22).

The military judge found Appellant not guilty of Specification 1 of Additional Charge I, sexual abuse by sucking on V.G.'s feet, but found Appellant guilty of Specification 2 of Additional Charge I, sexual abuse by kissing V.G.'s feet, and made by exceptions and substitutions that this abuse occurred on divers occasions between December 2014 and April 2015. (R. at Vol. 5, pg 2, line 1-4).

In his special findings for the conviction of Specification 2 of Additional Charge I, the military judge found,

> Although the timeframe of the kissing as testified to by V.G. and V.G.'s mother was somewhat vague, the findings as excepted and substituted are corroborated by the timeframe [redacted] knew the accused and V.G. and would be a guest in their home, wherein she observed the accused's kissing of V.G.'s feet.

. . . .

> The evidence of intent to arouse and gratify the sexual desire of the accused is demonstrated most significantly through the accused's text messages to [redacted]. Both preceding and following other sexually explicit text conversations, the accused's expressing an ability to put another woman's small foot into his mouth like he does with V.G.'s was compelling evidence of sexual intent when kissing V.G.'s feet. The evidence was further strengthened by additional admissions by the accused that he would pose V.G.'s feet

> for [redacted] for purposes of foreplay and stating that he would like to see [redacted] lick V.G.'s feet and suck on his.
>
> The Court is satisfied, beyond a reasonable doubt, that the kissing of V.G.'s feet was done with the intent of to arouse and gratify the sexual desire of the accused based on the text messages alone when placed in context of the sexual text conversations. However, such evidence was further strengthened by [redacted]'s testimony that the accused would send pictures of V.G.'s feet when engaging in sexual conversation with her.
>
> Although the Court did consider the testimony of [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 four videos of feet recovered from a computer within the accused's home.

(App. Ex. XXVII).

Law

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may substitute its own judgment for that of the trial court. Art. 66, UCMJ; *Turner*, 25 M.J. at 324. This court reviews factual insufficiency with a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff'd,* 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean "an honest, conscientious doubt, suggested by the material evidence, or lack of it," and that the government must prove guilt "to an evidentiary certainty" and must exclude "every fair and reasonable hypothesis of the evidence except that of guilt." *United States v. Harville*, 14 M.J. 270, 271 (C.M.A. 1982)). In exercising this duty, the Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the factfinder. Art.

66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). A court of criminal appeals must set aside a conviction when the court is not personally convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324. (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Argument

This court cannot be convinced beyond a reasonable doubt that the Appellant engaged in sexual abuse of his daughter by kissing her feet on divers occasions between December 2014 and April 2015 because 1) the only evidence the government presented regarding Appellant kissing V.G.'s feet within the charged time frame is limited to one instance, as conceded by the government in their rebuttal and the military judge's Special Findings, described by Mrs. Jackson at the Rodriguez house; and 2) Mrs. [redacted] described this one instance of kissing and giving "raspberries" on V.G.'s feet occurring in a family environment with Appellant, Mrs. Rodriguez, and V.G all wresting and playing around. Without some type of evidence demonstrating Appellant intended to gratify his sexual desires during this one instance, this court cannot be convinced beyond a reasonable doubt that kissing and giving raspberries to his V.G's feet in a playful family environment was a lewd act.

1) It cannot be disputed that the evidence demonstrates only one instance where Appellant's lips touched actually touched V.G's feet during the time frame charged by the government.

The government charged Appellant with Specification 2 of Additional Charge I, sexual abuse of a child:

> In that BM2 Michael R. Rodriguez, U.S. Coast Guard, on active duty, did, at or near Nederland, Texas, on divers occasions, between April 2014 and

> September 2015, commit a lewd act upon V.G., a child who had not attained the age of 12 years, to wit: kissing V.G.'s feet with his lips, with an intent to arouse and gratify his own sexual desire.

(Charge Sheet).

The military judge found him guilty of this specification, but he excepted the word "April" and substituted "December" and excepted the word "September" and substituted the word "April." (Vol. V, page 2, line 1-4).

Appellant met Mrs. [redacted] and her family in 2012 and moved in with them in 2013. Although V.G. and Mrs. [redacted] testified that Appellant would give "raspberries" and kiss her feet in order to aggravate V.G., their testimony did not state when these events occurred. Putting aside that both V.G. and Mrs. [redacted] testified that nothing was weird about these events and that they were just playing around, the government failed to elicit testimony – any testimony – from them that these events occurred on or about the alleged charged time frame. On their testimony alone, it is just as likely that these events occurred in 2012 and 2013, well outside the charged timeframe.

Because the military judge recognized that there was a problem with the government's evidence supporting the charged offense, the military judge requested the government to state what specific evidence supported the offense occurring within the charged timeframe. The government conceded that the only evidence that was produced that supported the act of Appellant kissing V.G.'s feet during the charged time frame was Mrs. [redacted]'s testimony where she stated that one time she went over Appellant's house and saw him, Mrs. [redacted], and V.G. playing around, and he was giving V.G. "raspberries" on her feet. Because Mrs. [redacted] only knew and spent time with Appellant and his family from December 2014 to approximately May 2015, this is the only instance in the charged time frame that this court can review for sexual abuse of a child.

Indeed, the military judged recognized this one instance as the sole event for finding Appellant guilty of sexual abuse for kissing V.G.'s feet. In his special findings, the military judge found that the evidence was vague and that Mrs. [redacted]'s testimony describing this one event was enough for him to find beyond a reasonable doubt that Appellant sexually abused V.G.

2) **This court cannot be convinced beyond a reasonable doubt that Appellant engaged in a lewd act during this one instance because all direct evidence provided by the three witnesses to the event describe a playful family environment**.

Under Article 120b(c), UCMJ, Sexual Abuse of a Child.—Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct. The term lewd act includes any "any sexual contact with a child." *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 45b.h(5)(B). The term sexual contact includes "any touching, or 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. *MCM*, pt. IV, ¶ 45(g)(2)(A). Thus, this court must be convinced beyond a reasonable doubt that the one instance of Appellant blowing "raspberries" on V.G.'s feet during a loving family environment was done with intent to arouse or gratify his sexual desire. The three witnesses to this event provide zero evidence of such intent, and to the contrary, describe nothing more than a playful family environment.

Because the government failed to elicit time frames of Appellant's conduct during V.G. and Mrs. [redacted]'s testimony, it is not possible determine if those witnesses were referring to this one event testified to by Mrs. [redacted]. Assuming *arguendo* that their description of Appellant's behavior does fall within this time frame, they described Appellant's behavior as a loving father. V.G. and her mother describe Appellant's interactions with V.G. as those of a playful father. Appellant engaged in numerous playful activities to razzle or "aggravate" V.G. (R. at Vol. 3, pg. 117, line 19). As relayed, above, while engaged in playful activity, Appellant

would sometimes tickle V.G.'s feet, give her "raspberries" on her feet, and sometimes would kiss her feet real quick in a playful manner. (R. at Vol. 3, pg. 83, line 7-8; Vol. 3, pg. 117, line 19). Mrs. [redacted] described Appellant "as a typical father figure" engaging in these playful activities in order to "aggravate" V.G. (R. at Vol. 3, pg. 121, line 22-23). In fact, Appellant engaged in these playful activities and "aggravated" all three of her children, not just V.G. (R. at Vol. 3, pg. 121, line 22-23). V.G. clearly testified that Appellant never said anything weird or asked her to do anything weird while engaged in this conduct. (R. at Vol 3, pg. 83, line 11-14). Appellant never sucked on V.G.s feet or never did anything inappropriate with feet in front of V.G. such as sucking on her mother's feet. (R. at Vol. 3, pg. 84, line 20-23). V.G. has never complained to her mother about Appellant. V.G. loves the Appellant and loves being around him. (R. at Vol. 3, pg. 122, line 12-13).

The only other witness to this event was Mrs. [redacted]. On this one occasion, she was at Appellant's house, and he and Mrs. [redacted] were playing with V.G. (R. at Vol. 4, pg 29, line 2-5. She testified that "he would play around and kiss [V.G.] on her feet or be like tossing her onto the couch and give her raspberries towards her feet." (R. at Vol. 4, pg 29, line 3-5). Mrs. [redacted] never testified that this playful time was inappropriate. Mrs. [redacted] did not provide any other context where this one event was inappropriate. She did not provide any testimony or any other circumstantial evidence that Appellant was somehow sexually gratifying himself during this one event during family playtime.

Thus, this court must be convinced beyond a reasonable doubt that the text messages Appellant sent Mrs. [redacted] supplied the court-martial with enough evidence to find beyond a reasonable doubt that Appellant's blowing "raspberries" on V.G.'s feet during this one instance was with the intent to arouse or satisfy his sexual desire. Indeed, the military judge found "the text messages alone when placed in context" were compelling evidence of sexual intent when

kissing V.G.'s feet. (App. Ex. XXVII.)

Although this court might find the text messages inappropriate, they are not enough for this court to be convinced beyond a reasonable doubt that Appellant was intending to satisfy his sexual desires during this one event. The inappropriate text messages describe nothing more than foot fantasies between Mrs. [redacted] and V.G. Further, when evaluating the text messages in context of the sexual text conversation between Appellant and Mrs. [redacted], any sexual gratification they received came from placing feet in their mouths rather than blowing "raspberries" on feet. The distinction matters, as apparently Appellant's fantasy of placing V.G.'s foot in his mouth was not sufficient for the military judge to convict Appellant of sucking V.G.'s foot.

Importantly, Appellant did not communicate any evidence of being sexually gratified from blowing "raspberries" on V.G.'s feet. Even if intent may be demonstrated by the his fantasy of putting V.G.'s foot in his mouth, that Appellant may achieve sexual gratification from one type of behavior does not mean he has the same intent at each and every turn to achieve that gratification through a different type of behavior. To argue otherwise is akin to believing that a man who kisses his wife and mother does so with the same intent each time.

Given the facts and circumstances of this one incident demonstrating no sexual intent, this court cannot confirm the conviction solely on the basis of another charge which he was found not guilty. "Where a CCA's Article 66(c), UCMJ, factual and legal sufficiency review appears to affirm the findings of guilty based solely upon uncharged misconduct, it is legally deficient, and a proper Article 66(c), UCMJ, review must be conducted upon remand from [CAAF]. United States v. McAllister, 55 M.J. 270, 277 (C.A.A.F. 2001)."

II

BECAUSE SPECIFICATION 2 OF ADDITIONAL CHARGE I, SEXUAL ABUSE OF A CHILD, WAS CHARGED AND PROSECUTED DURING THE COURT-MARTIAL AS OCCURING BETWEEN APRIL 2014 AND SEPTEMBER 2015, THE STAFF JUDGE ADVOCATE RECOMMENDATION INCORRECTLY INFORMED THE CONVENING AUTHORITY THAT HE COULD NOT DISMISS SPECIFICATION I OF ADDITIONAL CHARGE I AND THAT HE COULD NOT PROVIDE SENTENCE RELIEF.

Facts

Appellant was charged and prosecuted throughout his court-martial under Specification 2 of Additional Charge I, for engaging in sexual abuse of a child, on divers occasion between April 2014 and September 2015. (Charge Sheet). Although the military judge found him guilty of this specification, he excepted the word "April" and substituted "December" and excepted the word "September" and substituted the word "April." (Vol. V, page 2, line 1-4).

In the Staff Judge Advocate Recommendation, the Staff Judge Advocate informed the convening authority:

> Limitations on Action on Findings.
>
> . . . .
>
> Non-qualifying offense. The accused was found guilty of a non-qualifying offense: Additional Charge I, Specification 2 (sexual abuse of a child). Accordingly, the offense will be approved by operation of law upon your action on the sentence.
>
> Limitations on Action on Sentence. Because the adjudged sentence includes confinement for more than six months and a bad conduct discharge, you may not disapprove, commute, or suspend the sentence of confinement and bad-conduct discharge. However, you may act to defer those punishments and may modify any other part of the adjudged sentence. If, in accordance with your authority, you act to disapprove, commute, or suspend, in whole or in part, any portion of the sentence, you must provide a written explanation

of the reasons for doing so.

(Staff Judge Advocate Recommendation).

Law and Argument

The staff judge advocate applied an erroneous application of the law and incorrectly informed the convening authority that he could not dismiss or alter Specification 2 of Additional Charge I and that he could not alter or dismiss the sentence. The beginning of R.C.M. 1107 states,

> [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 in a case occurred prior to 24 June 2014, then the prior version of RCM 1107 applies to all offenses in the case, except that mandatory minimum sentences under Article 56(b) and applicable rules under RCM 1107(d)(1)(D)–(E) still apply.]

Thus, for offenses that occurred before 24 June 2014, the convening authority maintains full discretion in disposing of the charges and sentences. R.C.M. 1107. After 24 June 2014, offenses charged under subsection (a) or (b) of Article 120, offenses charged under Article 120b, and offenses charged under Article 125: (A) The convening authority is prohibited from: (i) Setting aside any finding of guilt or dismissing a specification; or (ii) Changing a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification. R.C.M. 1107(c). In addition, for offenses occurring after June 2014, the "the convening authority may not disapprove, commute, or suspend that portion of an ad- judged sentence that includes a dismissal, dishonorable discharge, or bad-conduct discharge." R.C.M. 1107(d).

Because Specification 2 of Additional Charge I was charged and prosecuted that included a timeframe before the change in the law, the staff judge advocate incorrectly advised the convening authority that his options were limited. Applying the new R.C.M. 1107 limitations to

Appellant's case would result in an improper application of the law as it changes a substantial right to the Appellant at the end of his court-martial. Because clemency is a highly discretionary executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *United States v. Rosenthal*, 62 M.J. 261, 263 (C.A.A.F. Dec. 20, 2005).

There was prejudice in this case because the convening authority was prohibited from considering his full range of options in deciding to exercise his clemency power.

As the Court of Appeals for the Armed Forces (CAAF) stated in *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998), "it has long been asserted that an accused's best chance for post-trial clemency is the convening authority." As such:

> A convening authority is vested with substantial discretion when he or she takes action on the sentence of a court-martial. As a matter of "command prerogative" a convening authority "in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part."

United States v. Davis, 58 M.J. 101, 102 (C.A.A.F. 2003)(citations omitted). A convening authority, therefore, must be provided all the relevant and necessary information pertinent to decisions regarding clemency. Such information, required by Rule for Courts-Martial (RCM) 1106, UCMJ, is normally presented in the SJAR. Because a convening authority is not required to read the record of trial to arrive at decisions regarding initial action on the findings and sentence, he or she relies almost exclusively on the SJAR for decisions regarding the grant or denial of clemency. The SJAR is the primary resource for making this extremely important decision. The SJAR's inaccurate statement adversely impacted the convening authority's decision because he limited the convening authority's power.

In *United States v. Wilson*, 54 M.J. 57 (C.A.A.F. 2000), CAAF established the analysis for examination of SJAR errors. If the trial defense counsel does not comment on the SJAR error in a

timely fashion, the error is waived unless determined to be "plain error." *Id*. Although defense counsel requested that the convening authority take action outside the SJAR's prohibition, he failed to specifically object to the SJAR. Thus, Appellant has the burden of persuading this Court that plain error existed. *Id.* at 59. Appellant must show that (1) there was an error; (2) that it was plain and obvious; and (3) that the error materially prejudiced a substantial right. *Id*. (citing *United States v. Finster*, 51 M.J. 185, 187 (1999); *United States v. Powell*, 49 M.J. 460, 463, 465 (1998)). To determine SJAR-based prejudicial error, CAAF established a lower trigger for relief: appellant must present "some colorable showing of possible prejudice." *Wheelus*, 49 M.J. at 289. This standard for relief is a deliberately low threshold. *Finster*, 51 M.J. at 188.

With regard to post-trial errors, "because of the highly discretionary nature of the convening authority's clemency power, the threshold for showing the resulting prejudice is low." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Where such errors occur, "'there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Id*. (citations omitted). As the Court of Appeals for the Armed Forces stated in *United States v. Johnston*:

> [whether] appellant is unlikely to get any relief from a new convening authority is an issue upon which reasonable people might disagree. Our opinion is not about whether this appellant gets relief -- that is the question the convening authority must answer. Our concern is ensuring that the law is adhered to, [and] established procedures are followed….

51 M.J. 227, 229 (C.A.A.F. 1999).

This case is a text book demonstration of CAAF's concern in *Johnston.* Because the SJAR applied an erroneous view of the law, the proper law and procedures were not adhered to. Appellant, asserts that he would have requested relief in the form of setting aside the abusive sexual contact of a child based on the same argument in Assignment of Error I. In additional he

would have requested a sentence reduction and a request to set aside the discharge if he had not been limited by the SJAR and his defense attorney's reliance on the SJAR. Given the extensive military career of Appellant and the lone specification of sexual abuse of a child, the convening authority might well have provided sentencing relief. This issue might be one "upon which reasonable people might disagree. [CAAF's] opinion is not about whether this appellant gets relief -- that is the question the convening authority must answer." *Id*.

Conclusion

WHEREFORE, appellant respectfully requests that this Court return the record to the convening authority for a new post-trial recommendation, opportunity for the defense to submit matters, and action.

Conclusion

Based upon the foregoing, Appellant requests that this honorable court set aside and dismiss the findings and sentence in this case.

WHEREFORE, Appellant so prays.

DATE: 19 September 2017

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Boatswain's Mate Second Class Michael R. Rodriguez, through communications with counsel, requests this Court consider the following matter:

I.

THE MILITARY JUDGE ABUSED HIS DISCRESTION BY ALLOWING ALL EVIDENCE IN UNDER 40B THAT APPELLANT HAD A FOOT FETISH.

Facts

The government sought to introduce evidence of the Appellant's foot fetish under Mil. R. Evid. 404(b) through numerous means. (App. Ex. II). The government only offered a general statement that it sought to provide evidence of Appellant's foot fetish to prove intent to gratify sexual desire or in the alternative, motive. (App. Ex. III). The record is not clear on what evidence the government sought to use to introduce under MRE 404(b) as its notice was for evidence to prove foot fetish. (App. Ex. III). However, it appears from the record that all witnesses and evidence presented during the government's case in chief was used for this purpose.

The military judge stated,

> We discussed the motion of the 404(b) motion that was previously raised. The court informed the parties that I find within the 404(b) motion that the evidence of, and I'm just going to generically summarize it right now, foot fetish to be admissible as to intent, but perhaps not the foot fetish in and of itself was a diagnosis, but any factual testimony with respect to forming any intent based on those types of activities I do find to be admissible.

(R. at Vol. 3, pg. 6, lines 4-9).

The military judge followed up this finding with a written ruling. In this ruling he stated

> The Government should be permitted to introduce evidence that the accused sucked on and kissed 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 V.G. 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 V.G. Direct evidence of intent is often difficult to prove and the government must prove beyond a reasonable doubt that the acts of sucking and kissing V.G.s feet were done with the intent to arouse or gratify a person's sexual desire.

(App. Ex. XVII).

The military judge also found,

> The fact that the accused has "foot fetish" is circumstantial evidence of motive and intent, and intent is an element of two of the specifications of the charged offenses, which is a fact of consequence that is made more probable by the evidence.
>
> The acts themselves and having a "foot fetish" are not illegal or criminal. There is low risk that the accused would be unfairly convicted based upon those acts and because he has a "foot fetish." Therefore, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

(App. Ex. XVII).

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006).

Law

Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. Mil. R. Evid. 404(a). "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). Mil. R. Evid. 404(b) allows this

evidence to beconsidered for *non-character* purposes, and only if the government can demonstrate its admissibility under *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989), and its

progeny.

In *Reynolds* the Court of Military Appeals adopted the following test for determining whether prior uncharged misconduct of an accused is admissible under Mil. R. Evid. 404(b):

> (1) Whether the evidence reasonably supports a finding by the court members that appellant committed the prior crimes, wrongs, or acts;
>
> (2) Whether the evidence makes a "fact of consequence" more or less probable; and
>
> (3) Whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403.

United States v. Morrison, 52 M.J. 117, 121-22 (C.A.A.F. 1999) (citing *Reynolds*, 29 M.J. at 109).

The Court of Appeals for the Armed Forces has explained that that "[p]roof of the first prong is satisfied if the conduct is proven by a preponderance of the evidence." *Id.* at 122. In analyzing the second prong, a "fact of consequence" that is made more or less probable must be one or more of the non-propensity bases provided for in Mil. R. Evid. 404(b). *Id*. The third prong involves a conventional balancing test under Mil. R. Evid. 403. *Id.* at 123. "The evidence at issue must fulfill all three prongs to be admissible." *Barnett*, 63 M.J. at 394.

In the present case government submitted evidence to show that BM2 Rodriguez had a foot fetish. The prior act is only relevant if the members can reasonably conclude that the act occurred, and that the accused was the actor. U.S. v. Huddleston, 485 U.S. 681,685 (1988). The

court must examine the factual similarities and dissimilarities between the offenses charged at trial and the prior acts. See Barnett, 63 M.J. at 395.

The third prong examines whether the evidence is both logically and legally relevant by ensuring that the probative value of logically relevant evidence is not outweighed by its unfairly prejudicial effect. See Barnett,63 M.J. at 394-95. Even if uncharged misconduct is determined to be logically relevant, it must still pass the test of legal relevance under the third prong of Reynolds. Reynolds at 396. This is a balancing test pursuant to M.R.E. 403 and should include the following factors: the strength of proof of the prior act(s); the probative weight; the potential for using less prejudicial evidence; the distracting effect of the prior evidence; the time required to prove the act(s); temporal proximity of the charged offense to the prior act(s); the frequency of the prior act(s); intervening circumstances between the prior act(s) and the charged offenses; and the relationship between the parties. Barnett, 63 M.J. at 396 (citing *United States v. Beny*, 61 M.J. 91, 95-96 (C.A.A.F. 2005); *United States v. Wright*, 53 M.J. 476,482 (C.A.A.F. 2000)).

First, the "acts" that the government introduced in this case are not even generally criminal. Any activity that BM2 Rodriguez participated in with consenting adult partners in a sexual situation is perfectly legal and thus the Appellant argues does not even fall properly within the gaze of MRE 404(b). Rather, it is purely broad character evidence which is inadmissible. The government did not submit evidence that dealt with prior crimes, wrongs or acts that involve children in general, and certainly no prior acts involving his stepdaughter, V.G.

However, even if these acts committed with other consenting adults are deemed to fit within the parameters of MRE 404(b), evidence of the acts is still inadmissible as it does not have any relevance to "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident", as required by the rule. There is no evidence that his

prior acts motivated him to commit the charged ones. There is no way the prior acts are relevant to motive or intent. Any contrary argument is merely dressing up propensity as intent. The only logical purpose of introducing evidence of the prior acts is to misconstrue the nature of the events in this case and potentially enflame the members.

The proffered evidence ultimately fails all three prongs of the Reynolds test. The evidence cannot reasonably show that an ··act" was committed in this context because there is no such individual act that is relevant or logical in this case. There is nothing illegal about having a foot fetish.

The evidence offered by the government will also fail to make any fact of consequence more or less probable and any *de minimis* probative value that might be taken from the evidence will be significantly outweighed by the serious prejudice suffered by the accused. The government to introduced this evidence of a foot fetish to enflame the passions of the members by painting BM2 Rodriguez as a sexual deviant of some kind before making the argument that his physical contact with his stepdaughter's feet constituted sexual abuse.

II.

APPELLANT IS DUE RELIEF BECAUSE OF THE UNREASONABLE POST-TRIAL DELAY.

The unreasonable post-trial processing delay prejudiced Appellant. A government-attributable delay of 160 days occurred from trial until the convening authority's action on 27 February 2017. A 160 day delay is presumptively unreasonable and should be evaluated under the *Barker v. Wingo* factors. *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). Those factors are: (1) length of delay; (2) reasons for delay; (3) an assertion of the right to timely review and appeal; and (4) prejudice flowing from the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Here, the first factor is in Appellant's favor because the delay exceeded 120 days. Although the court-martial was completed on 21 September 2016, the government did not even send the ROT for to the Appellant until 24 January 2017, after the 120 day expiration. The second factor also is in Appellant's favor because the reasons for the delay either do not excuse the delay or are unexplained in the record of trial. An inability of military justice officials to timely discharge their duties must be charged against the government because the government is responsible for properly resourcing the military justice system. *Moreno,* 63 M.J. at 137. Finally, the delay here prejudiced Appellant because of his unique factual insufficiency argument where the government failed to prove beyond a reasonable doubt Specification 2 of the Additional Charge.

In the alternative, even if the court finds no prejudice, it should still re-assess Appellant's sentence. "A timely, complete, and accurate record of trial is a critical part of the court-martial process." *United States v. Collazo,* 53 M.J. 721, 725 (Army Ct. Crim. App. 2000). "Every soldier deserves a fair, impartial, and timely trial, to include the post-trial processing of his case." *Id*. In *Collazo*, this Court held that ten months to prepare and authenticate a 519-page record of trial "is too long" and reduced the sentence. *Id.* at 725, 727. Service courts have granted relief in cases involving post-trial processing in excess of 120 days even without a showing of prejudice. *E.g., United States v. Rubino,* ARMY 20100675, 2012 WL 2403450, at *1 (Army Ct. Crim. App. 22 June 2012)(granting relief of two months confinement for an unexplained 289 day post-trial delay for an eighty-six page guilty plea despite no showing of prejudice); *United States v. Weaver*, ARMY 20090397, 2012 WL 1075713, at *9 (Army Ct. Crim. App. 28 March 2012)(mem. op.)(granting a two-month reduction in sentence, even without prejudice, for the unexplained post-trial delay of 294 days for the 543 page record of trial); *United States v. Scott*,

ARMY 20091087, 2011 WL 6778538, at *1 (Army Ct. Crim. App. 23 Dec. 2011)(summ. disp.)(granting relief for post-trial delay, even without prejudice, when the government did not provide reasons for the delay); *United States v. Benson*, ARMY 20071217, 2010 WL 3613895, at *1 (Army Ct. Crim. App. 29 Jan. 2010)(summ. disp.)(granting relief when the post-trial process took an unexplained 156 days, even without a showing of actual prejudice). This court should follow these holdings and re-assess Appellant's sentence in light of the unreasonable, delay present in this case. *United States v. Mack* 2006 CCA LEXIS 223, *15-16 (N.M. Ct. Crim. App. 28 Aug. 2016)(unrep.).

Very Respectfully,

Boatswain's Mate Second Class
Michael R. Rodriguez

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via email on 19 September 2017.

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