

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

**BEFORE**

**D.O. VOLLENWEIDER**

**J.E. STOLASZ**

**V.S. COUCH**

**UNITED STATES**

**v.**

**Carlos J. RODRIGUEZ  
Gunnery Sergeant (E-7), U.S. Marine Corps**

NMCCA 9900997

Decided 17 July 2007

Sentence adjudged 1 July 2003. Military Judge: R.S. Chester.  
Staff Judge Advocate's Recommendation: Col W.D. Durrett, Jr.,  
USMC. Review pursuant to Article 66(c), UCMJ, of General Court-  
Martial convened by Commanding General, Marine Corps Installation  
West, Camp Pendleton, CA.

Maj GREGORY CHANEY, USMC, Appellate Defense Counsel  
Capt BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Couch, J., delivered the opinion of the Court. Vollenweider,  
S.J., wrote a separate concurring opinion, with Stolasz, J.,  
joining.

COUCH, Judge:

In 1998, a general court-martial composed of officer members convicted the appellant, contrary to his pleas, of two specifications of forcible sodomy (one with a child under the age of 12, one with a child under the age of 16), and two specifications of indecent acts (one with a child under the age of 12, one with a child under the age of 16), each on divers occasions, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The appellant was sentenced to confinement for 25 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The findings and the sentence, as adjudged, were approved by the convening authority. On appeal, this court set aside the findings of guilty to one specification of forcible sodomy, and one specification of indecent acts, and the sentence; the remaining findings were affirmed. A rehearing was authorized

on the findings that were set aside and the sentence. *United States v. Rodriguez*, No. 9900997, 2002 CCA LEXIS 259, unpublished op. (N.M.Ct.Crim.App. 25 Oct 2002).

On remand, a general court-martial composed of officer members again convicted the appellant, contrary to his pleas, of the two specifications before that court. The appellant was sentenced for all of the offenses of which he was convicted to confinement for 50 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the findings and only so much of the sentence as provided for a dishonorable discharge, total forfeitures, reduction to pay grade E-1, and 20 years confinement, after considering the appellant's clemency request and the advice of the staff judge advocate.

After considering the record of trial, the appellant's seven assignments of error (AOE's),<sup>1</sup> and the Government's response, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed.<sup>2</sup> Arts. 59(a) and 66(c), UCMJ.

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<sup>1</sup> I. THE EVIDENCE [sic] FACTUALLY AND LEGALLY INSUFFICIENT TO UPHOLD A CONVICTION FOR THE PORTION OF CHARGE II, SPECIFICATION 2, INDECENT ACTS UPON A MINOR, BECAUSE IN THE SUBSTANTIVE EVIDENCE (TRANSCRIPT OF M'S TESTIMONY IN CIVILIAN COURT HEARING) M SAID APPELLANT [sic] DID NOT PENETRATE [sic] HER DIGITALLY.

II. THE MILITARY JUDGE ERRED BY ALLOWING THE ADMISSION OF IRRELEVANT EVIDENCE (PROSECUTION EXHIBITS 3 AND 6) WHOSE SOLE PURPOSE WAS TO INFLAME THE PASSION OF [sic] MEMBERS.

III. THE RECORD OF TRIAL IS NOT READY FOR APPELLATE REVIEW AS PAGES 1-22 HAVE NOT BEEN AUTHENTICATED AS REQUIRED BY ART. 54, UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 854. (summary assignment of error).

IV. THE RECORD OF TRIAL IS NOT READY FOR APPELLATE REVIEW BECAUSE IT DOES NOT CONTAIN A COPY OF THE CONVENING ORDER FOR APPELLANT'S REHEARING THAT IS REQUIRED BY R.C.M. 504, ART. 22 AND ART. 54 OF THE UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. [sic]. (summary assignment of error).

V. THE GOVERNMENT VIOLATED APPELLANT'S STATUTORY AND DUE PROCESS RIGHT TO A TIMELY REVIEW BY STRUCTURING THE APPELLATE REVIEW ACTIVITY IN SUCH A WAY THAT APPELLANT'S INITIAL APPEAL WAS 1436 [sic] (3 YEARS, 11 MONTHS AND 6 DAYS) AFTER HIS INITIAL COURT-MARTIAL.

VI. APPELLANT HAS BEEN DENIED SPEEDY POST-TRIAL REVIEW OF HIS COURT-MARTIAL IN THAT THE GOVERNMENT ALLOWED 1052 [sic] (2 YEARS, 10 MONTHS AND 17 DAYS) TO PASS BETWEEN THE CONCLUSION OF TRIAL AND THE TIME THE RECORD OF TRIAL WAS DOCKETED WITH THE NAVY/MARINE CORPS COURT OF CRIMINAL APPEALS FOR APPELLATE REVIEW.

VII. THE MILITARY JUDGE ERRED WHEN HE RULED THAT THE MEMBERS COULD BE INFORMED THAT APPELLANT HAD BEEN "CONVICTED" DURING THE REHABILITATION OF J IF THE DEFENSE IMPEACHED J OR CALLED INTO QUESTION THE FINDINGS OF APPELLANT'S PREVIOUS [sic] COURT-MARTIAL REGARDING THE OFFENSE CONCERNING J.

<sup>2</sup> We have given thorough and careful consideration to AOE's I, II, III, and IV, and have determined each to be without merit. They will not be discussed

## Background

The appellant was convicted of molesting two of his daughters, MR and JR. At the time of the appellant's offenses, MR was under the age of 16 years and JR was under the age of 12 years. The appellant's offenses were charged as one specification each of forcible sodomy and indecent acts, committed against each of the victims on divers occasions. The appellant's activities came to light after MR and JR confided the circumstances of their father's abuse to each other and a friend. The girls were subsequently interviewed by agents of the Naval Criminal Investigative Service (NCIS). They related similar descriptions of how the appellant removed their clothes, and would touch their buttocks and vaginas with his hands and penis. They also described how the appellant had them take his penis in their hands and forced them to perform fellatio. Both girls revealed that on occasion their father would tie them to the bed or bind them using "skinny green rope" that he kept near his bed. *Rodriguez*, 2002 CCA LEXIS 259, at 3-4, 18-20. During a search of the appellant's quarters, a length of green parachute cord, was found in a nightstand drawer next to his bed. Record at 391.<sup>3</sup>

At the appellant's first trial, JR testified as to his molestation of her, but MR refused to testify. The military judge allowed the Government to admit, pursuant to MILITARY RULE OF EVIDENCE 804(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), MR's former testimony from a California state child custody hearing wherein she described the appellant's sexual abuse in graphic detail. On appeal, this court found insufficient facts to support the military judge's ruling that MR was an unavailable declarant under MIL. R. EVID. 804(a)(2), and concluded that her former testimony was not properly admitted under MIL. R. EVID. 804(b)(1). *Rodriguez*, 2002 CCA LEXIS 259, at 10. Accordingly, we affirmed the findings related to JR, but set aside the findings related to MR (Charge I, Specification 2, and Charge II, Specification 2) and the sentence, and authorized a rehearing on the charges related to MR and the sentence. *Id.*

At the appellant's rehearing, MR testified and recanted her former testimony to the California state court.<sup>4</sup> Under MIL. R. EVID. 801(d)(1)(A), the military judge allowed the Government to introduce MR's former state court testimony as substantive

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further in this opinion. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

<sup>3</sup> All citations to the record relate to the rehearing.

<sup>4</sup> The Government introduced as impeachment evidence that MR was now living with her mother, while JR remained a ward of the state and living in a foster home. The record reflects that MR's recantation was clearly at the behest of her mother, the appellant's wife, and motivated by MR's desire to be reunited with the rest of her family. Victim recantation is not uncommon in child sex abuse cases. See *United States v. Cuento*, 60 M.J. 106 (C.A.A.F. 2004); *United States v. Rios*, 48 M.J. 261 (C.A.A.F. 1998); *United States v. Giambra*, 33 M.J. 331 (C.M.A. 1991).

evidence of her molestation by the appellant. JR again testified to the appellant's molestation of her, offered as evidence of a similar crime in a child molestation case under MIL. R. EVID. 414.

### **Prior Conviction Evidence**

The appellant's seventh AOE alleges the military judge erred when he ruled the members could be informed of the appellant's conviction of his offenses against JR, if the defense impeached JR or called into question the findings of the prior court-martial for those offenses. We disagree.

### Facts

Before trial on the rehearing, the Government moved *in limine* to admit evidence of the appellant's conviction for the molestation of JR, in the event the defense opened the door to its admissibility by impeaching the testimony of JR or attempting to discredit her testimony in any manner. Appellate Exhibit LVIII. The Government contended the appellant should not be allowed the unfettered ability to challenge the credibility of JR, without the members learning that at a prior trial he had been found guilty of molesting her. *Id.* (citing *United States v. Ruppel*, 45 M.J. 578 (A.F.Ct.Crim.App. 1997), *aff'd*, 49 M.J. 247 (C.A.A.F. 1998)). In response, the appellant claimed R.C.M. 810(a)(3) requires exclusion of any "reference to the offenses being reheard on sentence only," in this case the appellant's molestation of JR. AE LXVIII at 2.

During an Article 39(a), UCMJ, hearing on the Government's motion, the trial counsel acknowledged the appellant's record of conviction would not be admissible until JR was impeached by the defense, as a means to rehabilitate her credibility as a witness. Record at 232. After argument by counsel, the military judge expressly reserved ruling on the motion *in limine*, stating:

Well, at this point, I will withhold ruling on [the motion]. I think it would be premature. However, under ... M.R.E. 414 ... and 404(b), the government ... is entitled to prove up the other molestation. And how they choose to do so is and to what extent they choose to do so is, to some degree, in their corner up until the point where it becomes otherwise cumulative or overkill. And so ... the defense is on notice that the possibility is there that they will open that door, and it will come in.

*Id.* The trial defense counsel acknowledged that a ruling on the issue would have to await trial. *Id.* at 233. During further discussion, the military judge suggested that if the defense sought to impeach JR and attacked the prior finding that the appellant molested JR, the Government could try to rehabilitate her. *Id.* The military judge ended this discussion by saying:

[T]he record of a prior conviction, assuming there's an otherwise proper purpose for admitting it, is admissible in this court....

I think the defense is on fair notice that that's out there, that if they open the door and the government decides to drive the truck through, that they may very well be entitled to. And it would certainly be something that the defense counsel should take into consideration as you're litigating this case. It does seem to me that it's very powerful evidence. Simply because it's powerful and prejudicial does not make it inadmissible. It has to do with unfair prejudice. And all evidence offered against the accused is prejudicial. Otherwise, it wouldn't be offered.

*Again, I will withhold my ruling on that until such time as the government decides to offer it, if they do, and make that ruling.*

*Id.* at 235 (emphasis added). The military judge instructed the parties to consider what form the evidence of the prior conviction should take, and indicated that the parties would have another opportunity to present argument before he ruled on its admissibility. *Id.* at 236-37.

At a later pretrial Article 39(a), UCMJ, session, the military judge discussed further the appellant's prior conviction for JR's molestation:

As to the conviction, I went back and I read *Ruppel* again this morning, and I'm satisfied that *Ruppel* stands for the proposition that [R.C.M.] 810 does not overrule or control MRE 414. It is a procedural rule, not an evidentiary rule, and if the evidence is otherwise relevant and admissible, 810 does not preclude the admission of it.

However, what I am concerned with is if the government does decide to offer evidence of the conviction of the offenses pertaining to [JR] that it be done in such a way, if that's possible, that it doesn't make it apparent that the charges were tried at the same trial.

....

What I'm concerned about is inference by the members that would cause them to conclude that the accused was convicted of all those offenses at the same trial and for some reason only this, the charges pertaining to [MR], were returned for retrial or hearing.

So if you [trial counsel] decide to offer that [conviction], then we'll need to take that up in a [Article]39(a) [UCMJ, session] to evaluate how that's going to come in and what type of limiting instruction. Obviously there has to be a limiting instruction, as well as a[n] spillover instruction. I think both are required and I intend to give both should the government offer that evidence - - that the evidence of [JR]'s molestation as well if the government were to offer the record of conviction or evidence on the conviction.

*Id.* at 256-57.

Despite the concerns articulated by the military judge above, and despite the fact the military judge expressly withheld ruling on the Government's motion *in limine*, the trial defense counsel presented the prior conviction issue to the members for the first time during his opening statement, discussing the appellant's prior conviction at length:

The abuse never happened. Nothing happened....  
....

Now, members, I want you to understand exactly where we stand procedurally so that you are on the same page as all the lawyers that are involved in litigating this case. The military judge has instructed you that this is a retrial. And as such, Gunnery Sergeant Rodriguez has already stood trial for charges of molestation, and that was back in 1998.

Well, members what the judge didn't tell you and what I'm going to tell you now is that at that hearing, at that proceeding, Gunnery Sergeant Rodriguez was found guilty. He was found guilty of committing molestation *against [MR] and [JR]*. Now, you're also going to find out that [MR] did not testify at that original trial, and that because of that the Court of Appeals returned this case back here and that's why there's this new panel of members to determine, now that [MR] will come in and testify, to determine if Gunnery Sergeant Rodriguez committed these acts that he's accused of.

... It is important for you to know that he has always, always maintained his innocence since these allegations surfaced back in April of 1998. He pled not guilty at the original trial, continued to maintain his innocence throughout the last five years, and has obviously pled not guilty here today at this retrial. As a result of that appellate decision, Gunnery Sergeant Rodriguez has the opportunity for a new panel of members to determine whether these acts occurred.

Now as the military judge has already instructed, Gunnery Sergeant Rodriguez is presumed innocent and it is only if the government convinces you beyond a reasonable doubt that this presumption can be overcome. Members, you must not be swayed by the decision back in 1998 of that original court-martial. It was a panel of members such as yourselves. They were presented with different evidence and you will be presented with new evidence that has occurred over the last five years. So you must judge this case and judge Gunnery Sergeant Rodriguez based on the information that is presented at this trial.

*Id.* at 373-74 (emphasis added). In contrast, the trial counsel did not mention the prior conviction during opening statement.

At an Article 39(a), UCMJ, session held immediately after opening statements, the military judge questioned the trial defense counsel about his comments:

MJ: Okay, Captain [D], in your opening statement you made reference to the prior conviction of the accused for this offense as well as those with [JR]. I'm assuming, and please tell me if I'm assuming correctly, that this is a tactical decision on the defense's part as how to take on the issues in this case.

DC: Yes, sir, that's correct, based on prior rulings of this court.

MJ: You mean my intent to give the members an additional cautionary instruction, what would have been referenced to that prior conviction that that prior conviction cannot be used in any way by the members in assessing the guilt or innocence of this accused. That decision must be made based on the evidence as introduced in this court. I will instruct them to disregard that as it may pertain to whether this accused has committed the offense as charged.

Any problem with that from either side?

I'm not telling them to disregard your ... opening statement, Captain [D], only to disregard it as - - that fact as it may pertain to the guilt or innocence of this accused.

DC: I don't have any objection to that, sir. Thank you.

....

TC: ...[D]uring the opening statement of defense counsel there was significant reference to the

conviction the accused received for [JR], and it's the government's belief that that, pursuant to the motion we filed with this court, opened the door to us offering on the merits now the conviction of (sic) [JR].

MJ: Well, I think I've made it clear that that information concerning the abuse of [JR] by the accused is admissible in this court and I've not drawn any lines limiting the type or the nature of that evidence other than to say that it has to be admissible under the Rules. A record of a final conviction of an offense is admissible under - - as an exception to the hearsay rule, and I don't know - - I know of no other reason that would exclude it.

....

I would invite comment from [defense counsel].

DC: Sir, I'm going to stand on the motions that have been filed with this court. I still do not believe that they are admissible given RCM 810(a)(3), but *I have essentially adapted based on the judge's ruling.*

*Id.* at 376-78 (emphasis added).

During her testimony on direct, JR recounted the appellant's sexual molestation of her. *Id.* at 410-32. The trial defense counsel cross-examined JR generally about her lack of memory, and specifically about two letters she wrote to her mother and the appellant after the first trial. *Id.* at 448. In the letters, JR said she lied under oath at the first trial regarding the appellant's molestation of her. *Id.* The trial defense counsel also brought out on cross-examination that JR had told three of her counselors in the state home where she lived that she "lied about the whole thing." *Id.* at 451. In response to questions from the military judge, JR stated that the letters were not true, and that she wrote them at the behest of her mother:

She [JR's mother] said that if my dad could come back home that he wouldn't try to contact me or my sister and that if we took back what we said in the court that everything would be back to normal and she'd pretty much forgive us for testifying and telling what happened.

*Id.* at 460. During his second re-direct examination, the Government trial counsel asked her whether her father had been convicted of the offenses that she testified about, and she replied "yes." *Id.* at 461-62. The trial defense counsel did not object to this question. *Id.*

After JR's testimony, the military judge again considered the appropriate form of evidence for the appellant's prior molestation of JR. *Id.* at 473. The Government asked the court

to take judicial notice and advise the members of the prior conviction. The appellant objected, citing R.C.M. 810(a)(3) and claiming that in conjunction with JR's testimony, an instruction of judicial notice would be prejudicial under MIL. R. EVID. 403. *Id.* at 474. The military judge responded:

Well, let's set aside the issue of whether or not the members can be informed.... [W]e're a long ways downstream from that, not based on the evidence but based on counsel's opening statement. So let's set that part of it aside and let's just consider the issue of whether or not that's an adjudicated fact that can be judicially noticed.

*Id.* The military judge ruled that he would give an instruction on judicial notice, but not allow introduction of the results of trial documentation of the appellant's conviction in the prior case. The military judge was concerned that the results of trial could be misleading or confusing to the members. *Id.* at 475-78.

At the beginning of the next session, the military judge gave a limiting instruction related to the appellant's prior molestation of JR:<sup>5</sup>

Members, I want to give you an instruction concerning some of the evidence that you heard yesterday. I'll [r]ead this to you now and you will here (sic) it again before you close to deliberation (sic) when I instruct you on the law.

But you're advised that you have heard evidence that the accused may have previously committed other offenses of child molestation, specifically you have heard the testimony of [JR]. You may consider the evidence of such other acts of child molestation for their tendency, if any, to show the accused's propensity to engage in child molestation, as well as their tendency, if any, to prove a plan or design of the accused to molest [MR] or to determine whether the accused had the intent to satisfy his lust and sexual desires.

You may not, however, convict the accused merely because you believe he committed these other offenses against [JR] or merely because you believe he has a propensity to engage in child molestation. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each every element of each offense charged.

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<sup>5</sup> The instruction was consistent with those for MIL. R. EVID. 404(b) found in the Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 830 (30 Sep 1996).

*Id.* at 479.

At a later session, the members received the following instruction:

I've taken judicial notice that on 19 November 1998 the accused was convicted by a general court-martial of forcibly sodomizing [JR], a child under the age of 12 years of age, without the consent of [JR], and committing an indecent act upon the body of [JR] ... by removing her clothing, tying her hands behind her back and fondling her breast, buttocks, and vagina, such acts occurring on divers occasions between about August 1997 and April 1998.

This ... means you are now permitted to recognize and consider this information as fact without further proof. It should be considered by you as evidence with all of the other evidence in this case. You may accept as conclusive any matter that I've judicially noticed, but you are not required to do so.

With that in mind, let me again remind the members that as with the testimony of [JR] concerning the prior molestation, you may consider this evidence of such acts of child molestation for its tendency, if any, to show the accused's propensity to engage in child molestation, as well as any other tendency it may have to prove a plan or design of the accused to molest [MR] or to determine whether the accused had the intent to satisfy his lust and sexual desires with respect to [MR].

You may not, however, convict the accused merely because you believe he committed these other offenses against [JR] or merely because you believe that he has the propensity to engage in child molestation. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt is and remains with the prosecution to establish that on each and every element of the offenses to which the accuses [sic] is charged.

Do all the members understand both of those instructions?

Affirmative response from all members.

*Id.* at 529-30.

The Government called as a witness Mr. Brian Bouffard, the Government trial counsel in the first court-martial, to testify regarding a prior inconsistent statement by MR, and admissions by the appellant during his testimony in the first trial. During Mr.

Bouffard's cross-examination, the trial defense counsel mentioned the appellant's prior conviction to attack his credibility:

- Q. And you secured a conviction; correct?  
A. The members convicted the accused.

....

- Q. You don't want to see that conviction in any way jeopardized, correct, yes or no?

*Id.* at 811-12.

During the appellant's sworn testimony, the trial defense counsel asked the following during his direct examination:

- Q. ... [Y]ou've been convicted on these charges; isn't that correct?  
A. Yes, sir, I have.  
Q. Then how do you explain that?  
A. Sir, because I've been convicted doesn't mean I did it.

*Id.* at 997. The appellant was impeached with his prior conviction during cross-examination by the Government trial counsel:

- Q. Now you told everyone in this courtroom that you didn't do anything to [MR]; right?  
A. That's correct, sir.  
Q. And you didn't do anything to [JR]?  
A. That's correct, sir.  
Q. Even though you've been convicted of sexually molesting your eleven-year-old daughter?  
A. Even though I've been convicted of it, yes, sir.

*Id.* at 1009.<sup>6</sup>

Prior to the members' deliberation on findings, the military judge gave a spillover instruction *Id.* at 1082-83. Prior to authentication of the record, the military judge appended his essential findings in support of his rulings, which contain his balancing analysis under MIL. R. EVID. 403. Record at 1203; AE C.

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<sup>6</sup> The reference to the appellant's eleven-year-old daughter meant JR; the Government trial counsel did not ask questions relating the appellant's prior conviction for molesting MR.

## Judicial Notice

The appellant contends that the military judge erred in taking judicial notice of, and instructing the members about, the appellant's prior conviction. The standard of review for questions concerning admissibility of prior convictions of the accused is abuse of discretion. *United States v. Cobia*, 53 M.J. 305, 309 (C.A.A.F. 2000)(prior state court conviction of accused admissible after he testifies about it on direct as proper MIL. R. EVID. 609 impeachment evidence).

The military judge may take judicial notice of adjudicative facts so long as they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MIL. R. EVID. 201(b). The taking of judicial notice by the military judge is mandatory if requested by a party and supplied with the necessary information. MIL. R. EVID. 201(d).

MIL. R. EVID. 414 establishes a presumption in favor of admissibility of evidence of prior similar crimes in child molestation cases, in order to show an appellant's predisposition to commit the designated crimes under the rule. *United States v. Tanner*, 63 M.J. 445, 448 (C.A.A.F. 2006)(citing *United States v. Wright*, 53 M.J. 476, 482-83 (C.A.A.F. 2000)). This similar crimes evidence also includes prior convictions of the accused for offenses of child sexual abuse, especially when the accused, as here, testifies that the alleged offenses never occurred. See *Cobia*, 53 M.J. at 310-11. Further, our superior court has recognized that an appellant's prior conviction can be introduced as substantive evidence and not limited solely to the issue of credibility. *Id.* at 310 (citing *United States v. Gray*, 51 M.J. 1, 25 (C.A.A.F. 1999)). In the case of a combined rehearing, R.C.M. 810(a)(3) normally prohibits "reference to the offenses being reheard on sentence only" absent an independent theory of admissibility such as MIL. R. EVID. 404(b) or 414. See *Ruppel*, 49 M.J. at 250; see also *Tanner*, 63 M.J. at 448.

In *Ruppel*, our superior court ruled that evidence underlying the appellant's conviction of a sex offense involving his natural daughter was not rendered inadmissible at a rehearing on the merits regarding offenses involving his stepdaughter. The court specifically held that R.C.M. 810(a)(3), as a rule of procedure, should not be elevated into an evidentiary rule with the potential to exclude other evidence, such as "other crimes, wrongs, or acts" under MIL. R. EVID. 404(b). *Ruppel*, 49 M.J. at 250.<sup>7</sup>

In this case, the appellant elected to waive the protection of R.C.M. 810(a)(3) and the rules of evidence by introducing the results of his original trial during opening statement, and by

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<sup>7</sup> We note that the trial in *Ruppel* occurred before the enactment of MIL. R. EVID. 414.

presenting a defense theory that claimed he never molested either of his daughters. Record at 374. It follows that the appellant may not on appeal claim that the introduction of this fact before the members was error. *Cobia*, 53 M.J. at 310 (citing *Ohler v. United States*, 529 U.S. 753, 755 (2000)). The Government and the defense must each "make choices as the trial progresses," but they do so knowing those choices may open the door to evidence they otherwise wish to keep out. *Id.* (quoting *Ohler*, 529 U.S. at 757).

The trial defense counsel's tactical decision to advise the members of the circumstances related to the appellant's first trial, coupled with the defense theory of complete denial, clearly opened the door for the admissibility of the appellant's prior conviction. Further, the appellant testified in his own behalf on the merits and denied that the molestation of JR occurred. Record at 997. Even if the trial defense counsel had not divulged the prior conviction, the appellant's complete denial on the stand also opened the door for contradictory evidence, and made his prior conviction clearly admissible under MIL. R. EVID. 609(a). See *Cobia*, 53 M.J. at 310. We find that the appellant waived this issue by his tactical decisions at trial.

The appellant argues that the military judge ruled on the Government's motion *in limine* "despite the fact that the military judge mouthed the words 'withholding' in reference to his ruling." Appellant's Brief of 18 May 2006 at 16 (citing Record at 232-33). The military judge clearly and emphatically withheld his ruling. The appellant obviated a need for a ruling on the Government's introduction of the prior conviction by introducing the issue to the members himself. Record at 232.

That the appellant was convicted for the molestation of JR is clearly an adjudicative fact, in other words, a fact of the case that is normally resolved by the factfinder. STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL 201.02 (5th ed. 2003). The military judge accurately determined the fact of the appellant's conviction by reviewing the earlier decision of this court and the results of trial. Record at 475. The military judge also considered that by taking judicial notice of the conviction, he would preclude the members' consideration of the results of trial and therefore avoid other concerns of cumulative evidence and misleading the members under MIL. R. EVID. 403. *Id.* The military judge's instruction made it clear that the members had discretion in their application of the judicially-noticed fact, and were not required to find that JR was, in fact, molested. *Id.* at 477, 479. By taking judicial notice of the appellant's prior conviction, the military judge used the least prejudicial yet accurate method of informing the members of the conviction referred to during the trial defense counsel's own opening statement. We find that the military judge appropriately instructed the members on the proper use of this evidence on three occasions.

The evidence of the appellant's sexual molestation of JR was clearly admissible against him as probative of his propensity to engage in other acts of child sexual abuse under MIL. R. EVID. 414. We conclude that the military judge did not abuse his discretion by taking judicial notice of the appellant's prior conviction for his molestation of JR, or by giving the members an instruction to that effect, and thus no error was committed. Even if we were to conclude otherwise, we are convinced that such error would be harmless, beyond a reasonable doubt, in light of the trial defense counsel's affirmative waiver of this issue during his opening statement.

#### Use of the Term "Conviction"

The appellant also claims the military judge erred by using the term "conviction" in reference to the findings of guilty from the appellant's first trial for his molestation of JR. The appellant cites MIL. R. EVID. 609(f) and R.C.M. 1001(b)(3)(A) to define "conviction" as "when a sentence has been adjudged," and argues that because we set aside the sentence from the appellant's first trial, the appellant was not "convicted" of his molestation of JR until he was sentenced at the rehearing. Appellant's Brief at 18-19.

In a child sex offense case involving sentencing, our superior court held that, "[f]or the purpose of admitting a prior conviction into evidence, a court-martial 'conviction' occurs 'when a sentence has been adjudged.'" *Tanner*, 63 M.J. at 447 (quoting R.C.M. 1001(b)(3)(A)). One court has held that "it is not necessary that a sentence be imposed for a civilian conviction before it may be used to impeach a witness under MIL. R. EVID. 609." *United States v. Stafford*, 15 M.J. 866, 869 (A.C.M.R. 1983). Black's Law Dictionary defines "conviction" as "the act or process of judicially finding someone *guilty* of a crime; the state of having been proved *guilty*," and "the judgment (as by a jury verdict) that a person is *guilty* of a crime." BLACK'S LAW DICTIONARY 335 (7th ed. 1999)(emphasis added).

In the circumstances of this case, the use of the word "conviction" by the military judge was correct, and we do not find that the military judge's use of the term was prejudicial to the appellant. As the military judge correctly pointed out, the vast majority of cases that apply either MIL. R. EVID. 414 or 404(b) to prior sexual conduct of the accused do not involve rehearings; indeed, *Ruppel* appears to be the closest factual analogy in our military jurisprudence. But that case is distinguished from the case *sub judice* because there, the military judge "specifically ordered the Government to refrain on findings from any mention of the fact that appellant had been convicted" of the MIL. R. EVID. 414 offense during the initial proceedings. *Ruppel*, 49 M.J. at 249.

At the time of trial, the findings related to the appellant's molestation of JR were approved by our earlier

decision, and a sentence had been adjudged by a court-martial. The fact that the sentence for the appellant's offenses related to JR was set aside in no way diminishes the validity of the evidence that finding represents, or the fact that the appellant was found guilty by another panel of members. Moreover, the members for the rehearing were informed of most aspects of the appellant's first trial by trial defense counsel during his opening statement. Record at 373-74.

In light of the trial defense counsel's opening statement and other trial tactics, the legal nuance between the terms "conviction" and "found guilty" as used by the military judge and the Government trial counsel is of no real distinction in the mind of a layperson serving as a court-martial member. We therefore conclude that the military judge's use of the term "conviction" was not error. Even if we assume, *arguendo*, that the use of the term "conviction" was error, we are convinced such error was harmless beyond a reasonable doubt, in light of all the evidence presented at trial, the appellant's own introduction of the same matter in opening statements, and the appellant's own statements on direct examination by his attorney. *See United States v. Pablo*, 53 M.J. 356, 359 (C.A.A.F. 2000).

#### Post-Trial Delay

The appellant's fifth and sixth AOE's allege that the appellant was denied speedy post-trial processing.

In this case, the following dates pertain:

EVENT	DATE	TIME	TOTAL TIME
Court-Martial	19 Nov 1998	0	0
Authentication	14 Jan 1999	56	56
SJAR	22 Feb 1999	39	95
SJAR Served	24 Feb 1999	2	97
Addendum SJAR	20 Apr 1999	55	152
CA Action	20 Apr 1999	0	152
Docketed NMCCA	30 Jun 1999	71	223
Appellant's Brief filed	21 Feb 2001	602	825
Government's Brief filed	18 Jun 2001	117	942
NMCCA decision	25 Oct 2002	494	1436
Motion for <i>en banc</i> reconsideration	15 Nov 2002	21	1457
Motion denied	19 Dec 2002	34	1491
Rehearing ordered	15 Apr 2003	117	1608
Rehearing completed	1 Jul 2003	77	1685
Authentication	24 Mar 2004	267	1952
SJAR	13 Jul 2005	476	2428
SJAR Served	13 Jul 2005	0	2428
Addendum SJAR	14 Oct 2005	93	2521
CA Action	25 Oct 2005	11	2532
Docketed NMCCA	18 Jan 2006	85	2617

Appellant's Brief filed	18 May 2006	120	2737
Government's Brief filed	14 Sep 2006	119	2856

### First Trial Delay

In his fifth assignment of error, the appellant claims that his due process right to timely review of his conviction was violated because it took 1,436 days to complete the appellate review of his first court-martial. We disagree.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation. *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006). In extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey I*, 60 M.J. at 102). We look at "the totality of the circumstances in a particular case" in deciding whether relief is warranted. *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006).

If we ultimately conclude the appellant's due process right to speedy post-trial review and appeal has been violated, we will generally grant relief unless we are convinced beyond a reasonable doubt that the constitutional error is harmless. *Id* at 370. We may also initially assume a constitutional due process violation, yet deny relief after concluding that the error was harmless beyond a reasonable doubt. *Id*. The standard of review for a claim alleging denial of speedy post-trial review and appeal is de novo. *United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006)(citations omitted).

#### 1. Length of Delay

After the appellant's first court-martial, there was a delay of 1,436 days (almost four years) from the date of sentencing to the date of our decision. The record of trial for the appellant's first court-martial is 471 pages long, and involves complicated issues of evidence and procedure. However, despite the complexity of the record, we find that the length of delay in this case after the appellant's first trial is facially unreasonable, thus triggering a due process review.

## 2. Reasons for the Delay

Regarding the second factor, reasons for delay, we look at each stage of the post-trial period, at the Government's responsibility for any delay, and at any explanations for delay. *United States v. Toohey (Toohey II)*, 63 M.J. 353, 359 (C.A.A.F. 2006). In its brief, the Government provides no specific explanation for the 223 day delay in processing the appellant's first court-martial from trial to docketing with this court. The appellant, without reference to any evidence, claims that the reason for the 602 day delay for filing his initial brief was the appellate defense counsels' caseloads were too heavy for them to work on the appellant's case in a timely fashion, thus causing them to file fourteen enlargements of time. Appellant's Brief at 8-9.<sup>8</sup>

We note that the bulk of delay in processing the first court-martial (1,213 days or almost three years and four months) is attributed to the time after the case was docketed and before our decision was issued. It took appellate defense counsel 602 days to file the appellant's brief and assignments of error, and the record contains no explanation for this period of delay other than the *pro forma* averments of counsel in their motions for enlargement of time. The 494 days it took for this court to render our decision after briefs were filed warrants a "more flexible" review, due to the exercise of our judicial decision-making authority. *Moreno*, 63 M.J. at 137 (citing *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34, 39-40 (C.A.A.F. 2003)); *Dearing*, 63 M.J. at 486 (C.A.A.F. 2006)). However, based upon the precedent set by our superior court, we are constrained to not hold the appellant "responsible for the lack of 'institutional vigilance' that should have been exercised in this case." *Dearing*, 63 M.J. at 486. We find, therefore, that the reason for delay in processing the appellant's first court-martial is a factor that weighs heavily in favor of the appellant.

## 3. Assertion of Right to a Timely Appeal

Turning to the third factor, we find no assertion of the right to a timely appeal prior to the filing of the appellant's brief and assignments of error with this court on 18 May 2006.<sup>9</sup> While this factor weighs against the appellant, the weight against him is slight, because the primary responsibility for speedy processing rests with the Government. *Moreno*, 63 M.J. at 138.

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<sup>8</sup> We note that the appellant's claim is based upon his appellate defense counsels' assertions contained in their "boilerplate" motions for enlargement of time, and not upon any sworn affidavits or other sources of evidence.

<sup>9</sup> Absent evidence to the contrary, we see no reason why the appellant could not have asserted his right during his first appeal with this court, at his trial on the rehearing, or in his clemency petition to the convening authority under R.C.M. 1105, submitted after the rehearing.

However, under the unique circumstances of this case, the appellant's failure to raise a known issue of post-trial delay at his rehearing is a factor that weighs heavily against him in determining whether there has been a due process violation. By the time of the appellant's rehearing, MR's recantation of her prior testimony was well-known to the appellant, and any potential prejudice (as alleged in the appellant's present assignment of error) could have been raised before the trial court in a motion for appropriate relief. All of the facts supporting such alleged prejudice could have been developed and considered by the military judge at the rehearing, but due to the appellant's inaction, they were not, leaving this court in the position of ruling on counsel's untested assertions rather than facts developed through the adversarial process.

We will not elevate the appellant's failure to raise post-trial delay at the rehearing into a conclusive basis for denying relief in an effort to find waiver of this issue. *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) (*per curiam*) (citing *Toohey I*, 60 M.J. at 102-03). However, we are mindful that "[i]f an appellant does experience problems in preparing for trial due to the delay, a Sixth Amendment speedy trial motion could appropriately be brought at the trial level." *Moreno*, 63 M.J. at 141 n.19.

In this case, we will weigh the appellant's assertion of his right to a timely appeal as a factor heavily against the appellant in our decision whether to grant relief for post-trial delay. *United States v. Bryant*, 61 M.J. 323 (C.A.A.F. 2005) (summary disposition) (Crawford, J., dissenting); *see also United States v. Bell*, 60 M.J. 682, 689 (N.M.Ct.Crim.App. 2004) (Villemez, J., concurring) (citing *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002)).

#### 4. Prejudice

Concerning the fourth factor, the appellant claims the appellate delay before the rehearing was responsible for MR not being able to "remember any facts involving the elements of the crimes [a]ppellant was charged with" and denying that the appellant had abused her, therefore setting the stage for the military judge to allow the Government to introduce MR's civil court transcripts and deposition testimony. Appellant's Brief at 10. Citing *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005), the appellant also claims a presumption of prejudice exists solely due to the inordinate delay in this case. *Id.*

This case is not one where the post-trial delay is so extreme so as to "give rise to a strong presumption of evidentiary prejudice." *Jones*, 61 M.J. at 83 (citations omitted). As for the appellant's assertion of actual prejudice, we find that MR's lack of memory and denials of abuse were not caused by the appellate delay in reviewing the appellant's first court-martial. To the contrary, we find that her recollection was

heavily influenced by her mother's attempts to get MR to change her testimony.<sup>10</sup> Record at 698-711, 765-70; Prosecution Exhibits 4 and 5.

While we recognize the appellant prevailed in his first appeal, resulting in half of the offenses against him and his sentence being set aside, the issue is still whether that delay prejudiced his trial on the rehearing regarding the testimony of MR. We find that it did not. We conclude that, based upon the record before us, the appellant was not prejudiced by the post-trial delay after his first court-martial, and consider this a factor that weighs heavily in favor of the Government.

## 5. Conclusion

Balancing all four factors, we conclude there has been no due process violation resulting from the post-trial delay in processing the first court-martial in this case. We do not find the delay in this case "so egregious that tolerating it would adversely effect the public's perception of the fairness and integrity of the military justice system." *United States v. Haney*, 64 M.J. 101, 108 n.36 (C.A.A.F. 2006)(quoting *Toohey II*, 63 M.J. at 362)(further citation omitted)). Even if we were to find a due process violation, such error would be harmless beyond a reasonable doubt and no relief would be warranted. *Toohey II*, 63 M.J. at 363; see *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)(citing *Chapman v. California*, 386 U.S. 18, 24 (1967)); see also *Allison*, 63 M.J. at 370. Further, any relief we could fashion would be disproportionate to the possible harm generated from the delay. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

### Rehearing Post-Trial Delay

The appellant's seventh assignment of error asserts that 1,052 days elapsed between the conclusion of his rehearing and the docketing of this case, and thus his due process right to speedy post-trial review was again violated. We are unable to determine how the appellant calculates it took 1,052 days between the conclusion of his rehearing on 1 July 2003 and the docketing of this case on 18 January 2006. We calculate 933 days and have used that number for our analysis.

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<sup>10</sup> Prosecution Exhibit 4 was a letter written by MR when she lived in a foster home in May, 1999, seven months after the appellant's conviction in his first court-martial. In the letter, MR claims she and JR both lied about their allegations against their father. Prosecution Exhibit 5 is an affidavit by MR, prepared by the appellant's trial defense counsel two weeks before trial, wherein she disavows all her allegations against the appellant. The Government called an NCIS agent, Master Sergeant Bradford, who testified MR told him and the trial counsel three months before trial that her earlier allegations of molestation by the appellant were true, and that her mother pressured her to recant her story. Record at 765-70.

The record of trial for the rehearing contains 1,203 pages, and involves complex issues regarding procedure for rehearings, application of new rules of evidence, and extensive pretrial litigation. While we are concerned about the 267 days it took to authenticate the record, the Government has provided a specific explanation that the delay was caused when the record was returned three times before missing exhibits, charge sheets, and convening orders could be accounted for. Declaration of Capt T.M. Avery of 28 Apr 2005. The Government also asserts a general averment by the review office regarding the lack of manpower as a result of Operation Iraqi Freedom II. *Id.* See also *United States v. Canchola*, 64 M.J. 245, 247 (C.A.A.F. 2007)(citing *Moreno*, 63 M.J. at 137)(general reliance on budgetary and manpower constraints will not constitute reasonable grounds for delay nor cause this factor to weigh in favor of the Government).

We are most disturbed that it took 476 days for the staff judge advocate's recommendation (SJAR) to be completed, even though it addressed a complex issue raised by trial defense counsel in clemency regarding an alleged instructional error by the military judge during sentencing. The SJAR acknowledges this issue and the post-trial delays in this case. We can presume these issues were considered by the convening authority because he affirmatively states he considered the SJAR and all clemency matters submitted by the trial defense counsel before he took his action. Convening Authority's Action of 25 Oct 2005. This presumption is buttressed by the fact that the convening authority reduced the appellant's period of confinement from 50 years (as adjudged by the members on rehearing) down to 20 years, which is 5 years less than was adjudged by the members in the appellant's first court-martial. The appellant has made no claim of specific prejudice. We find this period of delay is not "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey II*, 63 M.J. at 362.

Assuming, without deciding, that the appellant was denied the due process right to speedy post-trial review of his rehearing, we conclude that any error in that regard was harmless beyond a reasonable doubt. *Allison*, 63 M.J. at 370. Again, even if such error were not harmless, any relief we could fashion would be disproportionate to the possible harm generated from the delay in light of the appellant's offenses. *Rodriguez-Rivera*, 63 M.J. at 386. We are aware of our authority to grant relief under Article 66, UCMJ, and in this case we choose not to exercise it. *United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006); *Toohey I*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*).

### **Conclusion**

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

VOLLENWEIDER, Senior Judge, concurring, with STOLASZ, Judge, joining:

I concur fully in Judge Couch's well-reasoned opinion. I write to emphasize two aspects of the post-trial delay issue that arise in this and other cases: reasons for delay and prejudice.

### Reasons for Delay - Defense Enlargements

As noted in Judge Couch's opinion, a large part of the time between docketing and decision on the appellant's first appeal was due to enlargements of time requested by appellate defense counsel. I agree with the Court of Appeals for the Armed Forces' statement that "[T]he Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006). However, where, as here, the record contains only boilerplate unsworn statements from appellate defense counsel that other caseload commitments prevent the timely filing of a brief in a particular case, the record does not contain facts from which to draw a rational determination that the Government failed in its duty.<sup>1</sup>

My sense is that as this court's rules have changed to require recitation of specific facts in order for a party to establish good cause for an enlargement of time, counsel have focused on proper prioritization of their time, resulting in far fewer motions for excessive enlargements. A requirement that allegations of post-trial delay be similarly supported by facts would, I believe, result in fewer non-meritorious allegations of post-trial delay error, and a better record from which to rule on those allegations of post-trial delay error that are filed. *Cf. United States v. Tippit*, 65 M.J. 69, No. 06-0914, 2007 CAAF LEXIS 747, at 18 (C.A.A.F. June 12, 2007) ("Requiring a litigated Article 10 motion fosters the prompt disposition of military justice cases promoting the development of an adequate record at trial on the issues to be addressed under Article 10.")

### Prejudice

The term "delay" that courts use in analysis of this issue is somewhat misleading. It implies something that has been put off or postponed, with or without good reason. The term does not convey the reality that in all cases, there will be some period

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<sup>1</sup> I observe that the cases cited on this point by the court in *Moreno* ruled on records replete with developed facts, not mere assertions from counsel. *See, e.g., Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994) (including the caseload of appellate public defenders in Oklahoma, the methods those attorneys used to manage that caseload, data on filing times, the funding and appointment system, testimony from the Chief Judge of the Oklahoma Court of Criminal Appeals, and findings of fact from the federal district court below); *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990) (reasons for delay fully set forth in the record).

of time between trial and appellate decision. Perhaps a better way to express the issue is to refer to "delay" as only that period after a reasonable and necessary processing time.

I make this observation in discussing prejudice because the Government should be held responsible only for harm caused by delay beyond reasonable and necessary processing times. Under the facts presented in this case, even if the appellant had shown prejudice, it would be complete speculation to find that the prejudice arose after a reasonable processing time. The recantation of the victim took place within seven months after the appellant's first trial. There is no way to tell if the alleged harm arose before or after, for example, the time periods established in *Moreno* for cases tried after 10 June 2006: twenty-three months from sentencing to Court of Criminal Appeal decision. *Moreno*, 63 M.J. at 142-43.<sup>2</sup>

In this case, the appellant has not shown that he suffered harm as a result of processing times exceeding the normal and reasonable. If such a showing could have been made, the appellant certainly could have raised it at his retrial. This would have allowed the record to be developed so that the appellate courts would have facts on which to rationally base their decisions. *See id.*

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>2</sup> To which time a reasonable period for remand and commencement of a new trial must be added in this case.