UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

IVOR G. LUKE
HOSPITAL CORPSMAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 200000481
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 February 1999.
Military Judge: Capt C.A. Porter, JAGC, USN.
Convening Authority: Commander, Naval Base Hawaii, Pearl Harbor, HI.
Staff Judge Advocate's Recommendation: LT K.D. Phillips, JAGC, USN; **SJAR Addendum:** LCDR R.W. Ridgway, JAGC, USN.
For Appellant: Capt Sridhar Kaza, USMC.
For Appellee: LCDR Paul Bunge, JAGC, USN.

31 July 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of two specifications of indecent assault in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for two years and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

This case is now before us for a third time. In our initial consideration of this case, we affirmed the findings and the sentence and found no error materially prejudicial to the

substantial rights of the appellant. *United States v. Luke*, No. 200000481, 2004 CCA LEXIS 218, unpublished op. (N.M.Ct.Crim.App. 28 Sep 2004). On 25 August 2005, following the Court of Appeals for the Armed Forces' (CAAF) grant of the appellant's petition for review but before adjudication of that appeal, the United States Army Criminal Investigation Laboratory (USACIL) issued a memorandum to all staff judge advocates stating that a forensic chemist, Mr. Phillip Mills, had been suspended from DNA casework due to his improper practices as an examiner on USACIL's staff. *United States v. Luke*, 63 M.J. 60, 61-62 (C.A.A.F. 2006). Because Mr. Mills had worked on the appellant's case and testified for the Government, the appellant alleged that the results of his trial were unreliable in view of the newly discovered evidence relating to DNA analysis. *Id.* at 63 (citing *United States v. Murphy*, 50 M.J. 4, 15-16 (C.A.A.F. 1998)). On 7 April 2006, CAAF ordered an evidentiary hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), be conducted to determine whether the DNA analysis in the appellant's case was contaminated or the test results otherwise falsified. *Id.* Even though CAAF deferred its consideration of the issues raised in the appellant's original petition, the court set aside our first decision in this case, returned the record of trial to the Judge Advocate General of the Navy for submission to an appropriate convening authority to conduct the *DuBay* hearing, and directed that the record then be returned directly to CAAF for further Article 67, UCMJ, review. *Id.*

A *DuBay* hearing was conducted on 2 and 8 June 2006, from which the military judge made findings of fact and submitted those findings to our superior court. First *DuBay* Hearing Record at 1, 112. On 9 March 2007, CAAF remanded this case to us for further consideration in light of the findings in the *DuBay* hearing. *United States v. Luke*, 65 M.J. 5 (C.A.A.F. 2007) (summary disposition). During the first *DuBay* hearing, the military judge determined that USACIL was conducting an internal investigation including a review and assessment of all of Mr. Mills' prior work. At the time the first *DuBay* was concluded, this investigation was expected to be completed by September 2006. First *DuBay* Hearing Record at 136-37. In May 2008, we returned the record to the Judge Advocate General for remand to an appropriate convening authority for another *DuBay* hearing to, *inter alia*, determine the status of USACIL's internal investigation into Mr. Mills' serology[1] work. *United States v. Luke*, No. 200000481, unpublished op. (N.M.Ct.Crim.App. 27 May 2008). On 8 August 2008, a second *DuBay* hearing was held, and on 28 October 2008 this court was provided a copy of the final USACIL investigation relating to Mr. Mills. Second *DuBay* Hearing Record at 1.

[1] Serology analysis involves the identification and preparation of stains to determine whether genetic material exists that can be used for further DNA analysis. First Dubay Hearing Record at 269-71.

The appellant now alleges that his conviction cannot be affirmed in light of newly discovered evidence revealed by USACIL's investigation.[2] Appellant's Brief on Supplemental Issue of 24 Nov 2008 at 1. The appellant also alleges that he has been denied his right to speedy post-trial processing of his case, due to the amount of time the Government has taken to complete the USACIL investigation. *Id.* at 16. Having considered the record of trial, the results of both *DuBay* hearings, the excellent pleadings of both the Government and the appellant on the supplemental issue, and the final USACIL report regarding Mr. Mills' case work, 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. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was convicted of the indecent assault of a shipmate, Seaman Recruit N (SR N), while performing a "medical examination" as a Hospital Corpsman aboard the USS PORT ROYAL (CG 73). In addition to the testimony of SR N, the Government sought to corroborate the evidence against the appellant at trial by introducing forensic evidence that DNA consistent with the appellant and SR N was found on the bra cup worn by SR N and the bed sheet upon which SR N lay at the time of the assault.

The DNA analysis presented at the appellant's trial was conducted by USACIL. Mr. Mills was the forensic chemist tasked to perform the serological analysis of the bra and the sheet in the appellant's case. Record at 585. Examination revealed two stains on the bed sheet, one of which contained amylase[3], and one stain on the bra containing amylase. *Id*. at 589, 593. Mr. Mills forwarded the one stain from the sheet and the stain from the bra to Ms. Marilyn Chase, another USACIL forensic chemist, for DNA analysis. *Id*. at 591, 594. In addition to those items, Ms. Chase's analysis extended to SR N's underwear, swab samples from the wall adjacent to the bed, and blood samples from the appellant, SR N, and Fireman A (FN A), who was SR N's boyfriend at the time of the alleged offense. *Id*. at 632, 644, 645. Ms. Chase's analysis concluded that the DNA profile present in the sheet stain was a mixture of the DNA profiles of the appellant and SR N. *Id*. at 630. The analysis of the bra stain showed a DNA profile consistent with a mixture of the appellant's, SR N's, and FN A's DNA. *Id*. at 632. Both Mr. Mills and Ms. Chase testified at the appellant's trial. *Id*. at 580, 618.

Following the appellant's conviction in 1999, USACIL discovered deficiencies in the work of Mr. Mills as a DNA

[2] We previously addressed the USACIL investigation into Mr. Mills' work in *United States v. Carlson*, 67 M.J. 693 (N.M.Ct.Crim.App. 2009).

[3] Amylase is an enzyme found in bodily fluids, including saliva and vaginal secretions. Record at 584.

Examiner, a position he advanced to within USACIL after the appellant's conviction. First *DuBay* Hearing Record at 124. Specifically, in December of 2003, Mr. Mills was found to have contaminated DNA samples during a DNA analysis. *Id*. at 124. As a result of this incident, Mr. Mills was suspended from his position at USACIL from January to September of 2004. *Id*. at 129. Upon discovery of two instances of Mr. Mills falsifying data in 2005, Mr. Mills was indefinitely suspended from USACIL on 3 June 2005 and subsequently resigned his position in lieu of being fired. *Id*. at 122, 132-136.

Based upon the discrepancies revealed in Mr. Mills' DNA analysis, in April of 2005 USACIL ordered a formal retrospective review of all of Mr. Mills' work at USACIL since 1995. Second *DuBay* Hearing Record at 73. In order to accomplish that review, USACIL contacted all staff judge advocates of the military branches and law enforcement agencies that submitted evidence during the relevant period, requesting that any evidence examined by Mr. Mills be returned to USACIL for re-examination. *Id*. Over the course of the USACIL review, it was determined that Mr. Mills had worked on 463 cases during the relevant period. *Id*. at 108. Physical evidence was returned to USACIL by the submitting agencies in 77 of those cases and re-examination occurred on 59 of the 77 cases.[4] *Id*. at 108-09. None of the evidence originally tested by USACIL in the appellant's case was returned or retested as it was destroyed by the Naval Criminal Investigative Service (NCIS) prior to the issuance of USACIL's notification. *Id*. at 117.

The USACIL review focused on whether, and to what extent, Mr. Mills engaged in protocol violations and false documentation.[5] Appellant's 22 Oct 2002 Motion to Attach the USACIL Quality Manager's Final Report – Mr. Phillip Morris, DNA Examiner's Misconduct (USACIL Final Report) of 30 Sep 2008 at 9. Included in the USACIL review was an examination of Mr. Mills' serological analysis work. *Id*. at 22. The review concluded that Mr. Mills had multiple protocol violations during DNA analysis in 2001, 2002, and 2003, and had falsified data on a case he worked on in 2005. *Id*. at 10. The review also determined that Mr. Mills had contaminated a DNA analysis in 2003 through "sample switching and/or tube to tube contamination." *Id*. at 9. As for discrepancies in Mr. Mills' serological analysis, the review

[4] According to USACIL officials, the disparity between the number of cases with physical evidence available for re-testing and the number of cases actually re-tested was the result of a "legal review" in which it was determined which cases would be re-examined. Second *Dubay* Hearing Record at 97.

[5] Mr. Mills was also the subject of a Standards of Conduct Office (SOCO) investigation in October 2005. USACIL Final Report at 4. The SOCO inquiry concluded that Mr. Mills twice falsified data regarding his work and on one occasion violated standards designed to protect against contamination. *Id*. A separate SOCO inquiry later determined that the USACIL DNA Branch Chief, Mr. Smetana, was derelict in his duties in connection with his failure to report samples improperly retained by Mr. Mills following DNA analysis. *Id*.

found that Mr. Mills' major flaw was a failure to locate stains. Second *DuBay* Hearing Record at 60. In that the physical evidence related to the appellant's case had been destroyed, there was no ability for USACIL to re-test Mr. Mills' serological analysis. *Id.* at 80, 117. However, a review of Mr. Mills' portion of the appellant's case file did not reveal "any obvious or blatant discrepancies." *Id.* at 118. While an outside scientist contracted by USACIL to review Mr. Mills' work, Dr. Schuler, opined that Mr. Mills exhibited "intellectual dishonesty," his opinion was based upon his finding that Mr. Mills "rushed cases" when conducting his analysis. *Id.* at 28, 29. The USACIL investigation revealed no evidence that Mr. Mills falsified any serology data in this or any other case.

Discussion

The issue before us in this case is closely related to that recently decided by us in *United States v. Carlson,* 67 M.J. 693 (N.M.Ct.Crim.App. 2009). Like *Carlson,* Mr. Mills conducted serology analysis of DNA evidence used by the Government to corroborate the testimony of a victim in a sexual assault case, and the appellant challenged his conviction, in part, as a result of the USACIL investigation of Mills' conduct. Unlike *Carlson,* the issue of Mr. Mills' participation in this case was not raised until after another panel of this court had already conducted an Article 66, UCMJ, review, and affirmed the appellant's conviction.

As a predicate matter, we note that the Government challenges this court's jurisdictional basis for considering the appellant's assigned error because the appellant failed to petition the Judge Advocate General for a new trial within the statutory timeline set forth in Article 73, UCMJ, and by RULE FOR COURTS-MARTIAL 1210, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Government's Brief on Supplemental Issue of 7 Jan 2009 at 2. The Government's position is consistent with the concept that, in a system with statute-based jurisdictional limitations like courts-martial, "courts have no authority to create equitable exceptions to jurisdictional requirements" such as the two-year time limit imposed on petitions for a new trial under R.C.M. 1210(a). *Cf. United States v. Rodriguez,* 67 M.J. 110, 113 (C.A.A.F. 2009)(quoting *Bowles v. Russell,* 551 U.S. 205, 214 (2007)).

However, under the circumstances of this case, we are constrained to exercise jurisdiction to consider the appellant's petition by the remand of our superior court. *Luke*, 63 M.J. at 63. We are confident that CAAF's remand effectively rejects the jurisdictional bar to our consideration of the appellant's supplemental assigned error, including his assertion of untimely post-trial delay. *Id.*; *see also United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005).[6] Even if we agreed with the Government that

[6] Acknowledging that when new evidence is discovered after the Court of Criminal Appeals has concluded its review under Article 66, UCMJ, notwithstanding the expiration of the Article 73 time period to petition for a

we lack jurisdiction under R.C.M. 1210(a), the appellant could still obtain review from this court by re-styling his petition as one seeking a writ of error *coram nobis*. *See United States v. Denedo,* 129 S. Ct. 2213, 1246 (2009). Furthermore, given that CAAF has vacated this court's prior decision, we are again in the position of reviewing this case under Article 66, UCMJ. In light of the procedural posture of this case and the clear remand of CAAF, we conclude that we have jurisdiction.

R.C.M. 1210 provides "a clear rule for testing whether the result obtained in the court-martial proceeding is a reliable result" when assessing newly discovered evidence. *United States v. Murphy*, 50 M.J. 4, 15 (C.A.A.F. 1998). This rule requires that we examine the record, and in this case the records of the multiple *DuBay* hearings, to determine whether:

> [t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Id. at 14 (quoting R.C.M. 1210(f)). Requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored; relief is granted only if manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence. *United States v. Johnson*, 61 M.J. 195, 199 (C.A.A.F. 2005).

Our inquiry is narrowly focused to "further consideration in light of the findings of the *Dubay* hearing." *Luke,* 65 M.J. at 5. This inquiry must logically consider whether the fact of Mr. Mills' conduct, when viewed within the context of his participation in the appellant's case, would "make a more favorable result probable" for the appellant. *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998). We are mindful that "new evidence which is merely cumulative or impeaching is not . . . an adequate basis for the grant of a new trial." *United States v. Thomas*, 11 M.J. 135, 138 (C.M.A. 1981)(quoting *Mesarosh v. United States*, 352 U.S. 1, 9 (1956)(internal quotation marks omitted)). Newly discovered evidence "only becomes an adequate basis for a new trial when it relates directly to a material issue" *Carlson*, slip op. at 5 (citing *United States v. Williams*, 37 M.J. 352, 357 (C.M.A. 1993), and courts will not view such evidence through a prism of "far-reaching speculation concerning the probable impact of newly discovered evidence," *Williams*, 37 M.J. at 360.

A. Findings of Fact

Having reviewed the entire record, including both *DuBay*

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new trial, a remand to the Court of Criminal Appeals allows "that court to apply its fact-finding authority to the new evidence, an opportunity not previously provided to it." *Harris*, 61 M.J. at 397.

hearings, we conclude that the judges' findings of fact in both hearings are supported by the record. We, therefore, adopt them as our own.

B. DNA Analysis Deficiencies

The facts elicited both during the USACIL review of Mr. Mills' work and during the *DuBay* hearings demonstrate that Mr. Mills' DNA analysis while at USACIL suffered from a number of errors. Notwithstanding the seriousness of these errors, as appropriately commented on by the military judge during the second *DuBay* hearing, Second *DuBay* Hearing Record at 66, there is no evidence that Mr. Mills had any involvement in the appellant's case beyond the serological analysis. Mr. Mills's first instance of DNA analysis contamination occurred four years after the appellant's conviction.[7] Moreover, the distinct complexity of DNA analysis from that of serology is worthy of observation. See *Carlson*, slip op. at 7. As a result, the evidence relating to deficiencies in Mr. Mills's DNA analysis would be of limited probative value in assessing the accuracy of his serological examination in the appellant's case and, albeit potential impeachment evidence, would not "probably produce a substantially more favorable result for the accused." R.C.M. 1210(f)(2)(C).

C. Serology Analysis Deficiencies

As previously noted, the USACIL review of Mr. Mills' work, although primarily focused on his work as a DNA examiner, also considered the reliability of his serology analysis. We acknowledge that any new evidence regarding deficiencies in Mr. Mills' serology work is potentially more pertinent to the appellant's case given Mr. Mills' role in the serology analysis. USACIL's review of Mr. Mills' serological work included re-tests of samples of evidence in cases on which Mr. Mills worked as a serology examiner. USACIL Final Report at 22. Those re-tests did expose gaps in Mr. Mills' work that could be attributed to Mr. Mills' failure to identify stains in his serology examinations, and failure to consider all probative evidence as a result of his apparent penchant for rushing cases.[8] *Id.* at 23; Second *DuBay*

[7] While not dispositive, we note that the closeness in time of alleged misconduct is a factor in assessing the probative value of that misconduct. See *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006)(stating that "the fact that someone acts in a particular manner does not mean that they have always acted in that manner, or for that matter that they always will").

[8] An example of this tendency by Mr. Mills occurred in this case. After oral swabs of the appellant's mouth were taken by NCIS, the appellant expressed concern to his officer-in-charge, a medical doctor, that the oral swab would contain "Surgilube," a medical lubricant. Record at 572. The appellant explained that after he encountered SR N in the medical spaces, he went to the back room of the clinic, used Surgilube to masturbate, then fell asleep while sucking his thumb. *Id.* at 571. SR N testified that the appellant had provided her Surgilube to lubricate her vagina before he penetrated her with his fingers, and before he placed his mouth on her vagina. *Id.* at 361-64. Despite a request by the NCIS case agent to test the appellant's oral swabs

Hearing Record at 29. Nonetheless, USACIL's review concluded that any differences in the results of Mr. Mills' original test and the re-test could also be attributed to degradation of the samples tested, insufficient portions of the samples remaining to adequately test, and alternate light source models used for the screening of evidence by Mr. Mills and the re-test examiners. USACIL Final Report at 23.

To be sure, the USACIL review of Mr. Mills' serology work demonstrates a possible lack of proficiency in identifying stains. The report on Mr. Mills' work, however, includes no finding of specific instances of contamination or falsification of serology results. Nor does the report or record of either *DuBay* hearing relate any evidence of deficient serology examination by Mr. Mills in the appellant's case for the samples he processed.[9] If this new data of Mr. Mills' work were admissible, it would be admissible as impeachment evidence, used to attack the credibility of Mr. Mills' work while he was employed at USACIL as a serologist.[10] Moreover, assuming that this new evidence was admitted, we are convinced that any impeachment value rendered from this new evidence is insufficient to "make a more favorable result probable." *Brooks*, 49 M.J. at 69. Relevant in this regard is the strength of the Government's case independent of the forensic evidence relied upon at trial. *See Carlson*, slip op. at 10.

D. Strength of Government's Case

We are persuaded that the Government presented a sufficiently convincing case at trial that, irrespective of the forensic evidence, proves the appellant's guilt beyond a reasonable doubt by legal and competent evidence. SR N's testimony regarding the collateral events of the alleged indecent assault was corroborated by her boyfriend, FN A, and by an

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for Surgilube, Defense Exhibit A at 2, Mr. Mills testified that he did not perform any testing to find Surgilube, *id.* at 600-01, nor is there any indication in the record that he tested the oral swabs of the appellant at all. The discovery of Surgilube on the appellant's oral swab would have been consistent with SR N's allegation of oral sodomy, an offense of which the members acquitted the appellant.

[9] Ms. Glidewell, lead biologist at USACIL and formerly a lead forensic scientist in the fields of serology and DNA, testified at the first *DuBay* hearing in this case that, having read every page of Mr. Mills' serology report in the appellant's case, her professional assessment was that there were no technical anomalies in how Mr. Mills handled his examination. First *DuBay* Hearing Record at 282.

[10] We note that, at trial, the defense counsel questioned both Mr. Mills and Ms. Chase regarding the quality assurance measures taken at USACIL to ensure accuracy of results. Record at 585, 626. In fact, the defense counsel did attempt to impeach Mr. Mills' testimony regarding what items were screened during the serology examination and forwarded on for DNA analysis. *Id.* at 606-07. The evidence gleaned from the USACIL report would merely be relevant to buttress any impeachment of USACIL's and Mr. Mills' procedures without more in the way of specific deficiencies relating to the appellant's case.

impartial bystander, FN M. Record at 441, 461. Particularly convincing was SR N's almost immediate report to the ship's Command Duty Officer (CDO) of the assault, at risk to her own career given the nature of her relationship with FN A as a violation of a ship anti-dating policy, and FN A's apparent emotional reaction to learning of the alleged assault. *Id.* at 349, 367, 443. Additionally, FN A testified that the appellant advised FN A that he should conduct a medical examination of SR N because he had diagnosed FN A with a sexually transmitted disease. *Id.* at 456. The Government presented testimony from the appellant's supervisor that he was not qualified to conduct such an examination and had been explicitly instructed against doing so. *Id.* at 561-62. Moreover, the appellant's apparent pretext for the examination of SR N, that FN A had a sexually-transmitted disease, was rebutted by the Government through FN A's testimony that he was later determined not to be infected. *Id.* at 462-63.

After weighing the strength of the Government's case, the marginal nature of the defense case, and the limited probative value of the new impeachment evidence of Mr. Mills as it relates to Ms. Chase's DNA testing, we conclude that the additional impeachment evidence regarding Mr. Mills would not have probably influenced the fact finder to render a substantially more favorable result, even if they had completely disregarded the forensic evidence. *Harris*, 61 M.J. at 397; *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999); *Carlson*, slip op. at 12. While we clearly recognize the significant negative impact of Mr. Mills' misconduct upon the reputation of USACIL as a forensic laboratory, we note that his deficiencies were discovered primarily in his performance as a DNA analyst, years after his serology work in the appellant's case occurred. As we determined in *Carlson,* the simple assertion that "Mr. Mills cannot be trusted," standing alone, provides insufficient logic for us to conclude that the forensic evidence in the appellant's case is *per se* not credible. *Carlson*, slip op. at 9. In the absence of sufficient evidence to conclude that Mr. Mills contaminated the appellant's DNA samples, or otherwise falsified pertinent test results in his analysis related to the appellant's case, we can find no grounds to set aside the findings of guilty.

E. Post-Trial Delay

The appellant asserts that he has been denied his right to the speedy post-trial processing of his case, due to the amount of time the Government has taken to complete the USACIL investigation. He further asserts that this has led to prejudice, because the forensic evidence in his case has been destroyed and is no longer available for retesting.

In light of *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we will assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. However, based on the totality of the circumstances, we conclude that the appellant has not suffered any specific

prejudice as a result of the delay. Primary among the circumstances is that the appellant has not prevailed on any meritorious issue that would require retrial. As a result, the appellant's ability to defend himself at such a retrial has not been compromised by the unavailability of the forensic evidence. Second, we again note that the appellant raised the potential for cross-contamination at trial, whereupon Ms. Chase testified that she specifically tested for cross-contamination and found none. Record at 626, 656, 665. Third, this record contains no direct evidence that contradicts Ms. Chase's testimony or compromises the integrity of her DNA testing in this case. We conclude that any assertion or implication that the forensic evidence, if available for retesting, would lead to additional evidence favorable to the appellant is speculation. We, therefore, hold that any due process violation that may have occurred in processing this case was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008).

We have also examined the issue of post-trial delay in this case pursuant to the authority contained in Article 66(c), UCMJ, the guidance in *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); and the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*). Again, after examining the totality of circumstances, we conclude that the delay in completing our second review of this case was principally related to the time USACIL required to complete their inquiry. As is abundantly clear from the record, this was a complex, expensive, and technically laborious undertaking. The process suffered from a number of setbacks, including unresponsive contractors and dereliction of duty by a supervisory staff member. We conclude on this record that USACIL had substantial motives to properly investigate this matter, and ultimately succeeded in doing so in good faith. As we are confident that the vigilance of the courts in enforcing their orders has allowed the appellant a full and fair opportunity to present his case on appeal, we conclude that the delay in this case has no affect on the findings and sentence that should be approved.

F. Original Assignments of Error

We have considered the appellant's original assignments of error anew, including the two issues that were later granted review by CAAF.[11] *Luke,* 63. M.J. at 61 n.1. For the reasons set forth in the prior opinion of this court, we conclude that none

[11]

I. WHETHER THE LOWER COURT ERRED WHEN IT UPHELD THE TRIAL JUDGE'S EXCLUSION, DURING CROSS-EXAMINATION, OF AN ALLEGED VICTIM'S ABORTION AFTER IT BECAME RELEVANT AND MATERIAL REBUTTAL TO THE VICTIM'S TESTIMONY.

II. WHETHER THE LOWER COURT ERRED WHEN IT UPHELD THE GOVERNMENT'S FAILURE TO DISCLOSE EVIDENCE THAT IT HAD PREPARED TO USE ON RE-DIRECT EXAMINATION OF A GOVERNMENT WITNESS.

of them have merit. *United States v. Reed,* 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias,* 25 M.J. 356, 363 (C.M.A. 1987)); *see also United States v. Webb,* 66 M.J. 89 (C.A.A.F. 2008)(Government discovery obligation); *United States v. Banker,* 60 M.J. 216 (C.A.A.F. 2004)(evidence of victim's prior sexual history); *United States v. Gonzalez,* 62 M.J. 303 (C.A.A.F. 2006)(rebuttal evidence); *United States v. Moran,* 65 M.J. 178 (C.A.A.F. 2007)(improper argument); *Allison,* 63 M.J. at 365 (expert opinion evidence); and *United States v. Beatty,* 64 M.J. 456 (C.A.A.F. 2007)(factual sufficiency).

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

Chief Judge O'TOOLE and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court