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

Before
R.E. VINCENT, J.E. STOLASZ, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ERIC B. LOBSINGER
CULINARY SPECIALIST FIRST CLASS (E-6), U.S. NAVY

NMCCA 200700010
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 January 2006.
Military Judge: CDR John Maksym, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: LCDR I.C. Le Moyne, Jr., JAGC, USN (6 Oct 2006); **Supplemental:** CDR G.R. Hancock, JAGC, USN (14 Apr 2009); **Addendum:** LT H. Larsen, JAGC, USN (5 May 2009).
For Appellant: Frank J. Spinner, Esq; Maj Richard Belliss, USMC; LT Gregory Manz, JAGC, USN.
For Appellee: Capt Geoffrey Shows, USMC; Capt Roger Mattioli, USMC.

27 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant, contrary to his pleas, of two specifications of indecent acts with a minor child and wrongful possession of child pornography, in violation of Article 134,

Uniform Code of Military Justice, 10 U.S.C. § 934.[1] The appellant was sentenced to confinement for 10 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

On 10 March 2009, we returned this case to the Judge Advocate General for remand to the CA since his original action did not indicate whether he considered the military judge's clemency recommendation prior to taking his action. On 8 May 2009, the CA completed his new action. In an exercise of clemency, he deferred all automatic and adjudged forfeitures from 14 days after the date of sentence, 27 January 2006, until the date of his new action, 8 May 2009.

The appellant raises five assignments of error. In his initial assignment of error, he contends that the evidence at trial was not legally and factually sufficient to prove his guilt to any of the charges and specifications. The appellant's second assignment of error asserts that the military judge abused his discretion by admitting residual hearsay into evidence. His third assignment of error also asserts that the military judge abused his discretion by authorizing the use of one-way remote testimony.

The appellant's fourth assignment of error alleges that the record of trial is not verbatim. His final assignment of error, contends that the staff judge advocate's recommendation (SJAR) is defective because it contains incorrect information and fails to note the military judge's clemency recommendation regarding forfeiture of pay and allowances. We note that the court's 10 March 2009 order returning this case to CA and his 8 May 2009 action corrects the defects alleged and renders this final assignment of error moot.

We have carefully reviewed the record of trial, the appellant's four remaining assignments of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

[1] The sole specification under Charge I alleged sodomy with a child, in violation of Article 125, UCMJ. The appellant was found not guilty of this offense, but guilty of the lesser included offense of indecent act with a child, in violation of Art. 134.

Facts

On 5 December 2004, the appellant's daughter, [ML], informed her mother, that her vaginal area hurt because the appellant had recently "licked her shi".[2] On 9 December 2004, Mrs. Lobsinger brought [ML] to the emergency room at Naval Hospital Yokosuka and reported [ML]'s comment to hospital staff members. Shortly after this incident, the appellant's other daughter, [AL], informed her mother that the appellant had her sit down on his "shi". Additionally, Mrs. Lobsinger recalled that in the fall of 2001, she observed [AL] holding the appellant's penis while in the bathtub with the appellant. In December 2004-January 2005, both the Naval Criminal Investigative Service (NCIS) and Armed Forces Center for Child Protection at the National Naval Medical Center in Bethesda, Maryland commenced investigations concerning the sexual assault allegations against the appellant.

In his first assignment of error, the appellant's contends that the evidence at trial was not legally and factually sufficient to prove his guilt to any of the charges and specifications. Initially, we will address his allegations as it pertains to Specification 3 of Charge II (knowingly receiving child pornography). We note, however, that in order to resolve the remaining portions of this assignment of error, Specification 2 of Charge II (indecent act with [AL] on divers occasions) and the sole specification of Charge I (indecent act with [ML]), we must first resolve the appellant's other three assignments of error.

Legal and Factual Sufficiency as to Charge II, Specification 3 (Receipt of Child Pornography)

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether after weighing the evidence in the record of trial and recognizing that we did

[2] "Shi" was the word used by the appellant's children to describe both the male and female genital region.

not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562. Furthermore, this court, in its factfinding role, "'may believe one part of a witness' testimony and disbelieve another.'" *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999)(quoting *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979)).

The appellant asserts that while searching the internet for adult pornography, he inadvertently received child pornographic images and, accordingly, is not guilty of receiving child pornography. We disagree.

On 9-10 December 2004, the appellant, contrary to his assertion on appeal, informed NCIS Special Agents (SA) that he used his home computer to conduct internet searches for child pornography websites. Prosecution Exhibit 15 at 3, Record at 1403-1404. SA Gary Walker, an NCIS computer forensic examiner, testified that an analysis of the appellant's home computer indicated that internet searches for child pornography were conducted between 8-9 December 2004 and that the computer's hard drive contained 35 thumbnail child pornography images. Record at 1492-95, 1502-03, 1508-09, 1513-26, 1529-30, 1532-36, PEs 18-32. NCIS forwarded 17 of these images to Dr. Barbara Craig, a Government expert witness in the field of pediatrics and the Director of the Armed Forces Center for Child Protection. She testified that she reviewed 17 images found on the appellant's home computer and opined that 18 of the 23 individuals visible on the 17 images were young children. Record. at 909-15, PE 3.

Accordingly, we find that the evidence adduced at trial was both legally and factually sufficient to establish that the appellant wrongfully used his home computer to receive images of child pornography.

Residual Hearsay and Legal and Factual Sufficiency as to the sole Specification of Charge I (Indecent act with [ML])

A. Residual Hearsay

In his second assignment of error, the appellant asserts that the military judge abused his discretion by admitting residual hearsay into evidence. We disagree.

The military judge partially granted the Government's pretrial Motion In Limine ruling that one of [ML]'s statements to her mother was admissible under the residual hearsay exception, MILITARY RULE OF EVIDENCE 807, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Appellate Exhibit XXXII. Specifically, the military judge limited the admissible testimony to a comment that [ML] made to her mother on 5 December 2004. [ML] had a history of vaginal and rectal rashes that caused discomfort. When her mother asked her why she hurt on this occasion, [ML] replied that the appellant had recently "licked her shi" in her parent's bedroom with the door locked. AE XXXII, Findings of Fact 2-7, Conclusions of Law I.

The record of trial indicates that [ML] was three years old at the time of the alleged offense and four years old at the time of trial. The parties agreed that she was unavailable to testify as a witness under MIL. R. EVID. 601. Record at 195, AE XXXII, Finding of Fact 16. The Government offered [ML's] statement through the testimony of her mother as hearsay admissible under MIL. R. EVID. 807. Record at 195, AE XXXII, Finding of Fact 16.

We begin our analysis by confirming that the statements offered qualify as hearsay. It is undisputed that [ML's] statement was made out of court and, due to her unavailability to testify as a witness under MIL. R. EVID. 601, was subsequently repeated in court by her mother. Furthermore, there is no doubt that the Government offered her statements for the truth of the matter asserted. Therefore, [ML's] statement meets the definition of hearsay, and its admissibility depended on the hearsay exceptions provided for in the Military Rules of Evidence. MIL. R. EVID. 801(c); *see United States v. Taylor*, 61 M.J. 157, 159 (C.A.A.F. 2005).

The residual-hearsay exception, MIL. R. EVID. 807, applies to "highly reliable and necessary evidence." *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003)(quoting *United States v. Giambra*, 33 M.J. 331, 334 (C.M.A. 1991)). "A military judge's decision to admit residual hearsay is entitled to 'considerable discretion' on appellate review." *Id.* (citation omitted).

In order for a hearsay statement to be admissible under the residual hearsay exception, it must have equivalent circumstantial guarantees of trustworthiness commensurate with the other exceptions to the hearsay rule. *Giambra*, 33 M.J. at

334; *see also Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Additionally, "the court [must determine] that, (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence." MIL. R. EVID. 807. Finally, the proponent must provide timely notice of their intent to offer the evidence at trial. *Id.*

In testing whether a statement is supported by such guarantees of trustworthiness, a military judge or this court will look to all manner of reliability indicators including, but not limited to: (1) the mental state and age of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated. *United States v. Donaldson*, 58 M.J. 422, 488 (C.A.A.F. 2003) (citing *United States v. Grant*, 42 M.J. 340, 343-44 (C.A.A.F. 1995)).

Upon review of the record of trial, we agree with the military judge's findings of fact and conclusions of law. Most significantly, we note that [ML's] statement to her mother on 5 December 2004 was "clear, voluntary, uncontrived and spontaneous." AE XXIII at 4. Furthermore, Mrs. Lobsinger's inquiries were not posed in a suggestive manner and were not part of any effort to incriminate the appellant. Rather, [ML], who had a prior medical history of vaginal and rectal rashes, asked her mother to accompany her to the bathroom because she was in pain. We agree with the military judge's determination that it is unusual for a three-year-old child to associate the word, "licked" with her vaginal area. Finally, the expert testimony offered by Dr. Craig corroborated [ML's] hearsay statements by noting [ML] exhibited age-inappropriate knowledge and actions concerning sexual activity. AE XXXII, Finding of Fact 14; Record at 159-77.

The extrajudicial statements at issue met the necessary circumstantial guarantees of trustworthiness for admission as hearsay under MIL. R. EVID. 807. We concur with the military judge's conclusion that the Government met its burden to establish that [ML]'s statement to her mother on 5 December 2004 was offered as evidence of a material fact (i.e., an indecent act committed by the appellant upon [ML]) at issue in this trial and was more probative than any other evidence the Government could procure through reasonable efforts. Moreover, admission

of [ML]'s statement to her mother best serves the general purpose of the hearsay exception rules and the interest of justice. Finally, it is undisputed that the Government provided timely notice to the appellant of its intent to offer the statement as evidence at trial.

However, our determination that [ML's] statements to her mother qualify as admissible hearsay does not end our inquiry. In *Crawford v. Washington,* 541 U.S. 36 (2004), the Supreme Court determined that testimonial out-of-court statements may not be admitted against a defendant unless the defendant has actually cross-examined the declarant, irrespective of whether the statement falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. *Id.* at 68-69. Notably, the *Crawford* court specifically declined to provide a definition of what constitutes a testimonial statement, but noted that testimonial statements are those made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Id.* at 52, 68.

In *United States v. Coulter*, 62 M.J. 520 (N.M.Ct.Crim.App. 2005), we addressed a similar issue concerning a two-year-old child's statements to her parents concerning child sexual abuse accusations. After concluding her statements to her parents were admissible under MIL. R. EVID. 807, we addressed what impact the *Crawford* decision had on the admissibility of her statements. We held that her out-of-court statements to her parents were nontestimonial[3] and, accordingly, "our determination that the child's statements were admissible under the Supreme

[3] In our analysis of the facts in *Coulter*, we determined that the child's statements to her parents neither fell within, nor were analogous to, any of the specific examples of out-of-court testimonial statements outlined by the *Crawford* Court. At the same time, the circumstances under which this two-year-old declarant made her statements would not lead an objective witness to reasonably believe that the statements would be available for use at a later trial. The two-year-old child could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating. Furthermore, we did not find that her parents questioned her under circumstances that would have led a reasonable witness to foresee the possibility of the responses being used during a future trial. Unlike depositions, affidavits, police interrogations, and the like, the motivation behind the parents' questions was not to procure and preserve a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *See Crawford*, 541 U.S. at 51. Nor were the statements the product of a situation bearing any sort of "kinship to the abuses at which the Confrontation Clause was directed." *Id*. at 68. On the contrary, the questions that resulted in the child's extrajudicial statements were posed out of nothing more than the normal and expected parental instinct to protect their cherished offspring. *Coulter*, 62 M.J. at 528.

Court's decision in *Roberts* and the Military Rules of Evidence stands." *Id*. at 528 (footnote omitted).

In the instant case, we hold that [ML's] statement to her mother on 5 December 2004 was nontestimonial because her statement would not lead an objective witness to reasonably believe that it would be available for use at a later trial. [ML's] statement was in response to a question from her mother based on [ML's] prior history of vaginal and rectal discomfort. Accordingly, we conclude that the appellant has failed to demonstrate that the military judge abused his discretion by receiving [ML's] out-of-court statements into evidence.

B. Indecent Acts with [ML]

Having resolved the residual hearsay issue, we find that the evidence adduced at trial, including [ML's] 5 December 2004 statement to her mother, was both legally and factually sufficient to establish that the appellant committed an indecent act with [ML]. At trial, Mrs. Lobsinger testified that on 5 December 2004, [ML] informed her that the appellant had "licked her shi" in the bedroom while Mrs. Lobsinger was not present. Record at 631-33. At a later stage of the trial, Dr. Craig provided expert testimony that [ML] had age-inappropriate knowledge and behavior concerning oral-genital contact, masturbation, and insertion of her finger into her vagina. Record at 878-81. Dr. Craig further testified that [ML] informed Dr. Craig that her vaginal area hurt and that someone had touched her vaginal area. *Id.* at 961. [ML] also told Dr. Craig that she was fearful that she would get into trouble if she talked about this matter. *Id.* at 962. Accordingly, we conclude that this assignment of error is without merit.

Remote Testimony, Verbatim Record, and Legal and Factual Sufficiency as to the Specification 2 of Charge II (Indecent Act with [AL])

A. Remote Testimony

The appellant's third assignment of error alleges the military judge abused his discretion under RULE FOR COURTS-MARTIAL 914A, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), and the Confrontation Clause of the Sixth Amendment by authorizing the use of one-way remote testimony by [AL] and permitting the examination of [AL] to be conducted by her teacher rather than the military judge or defense counsel. We disagree.

Use of remote live testimony of a child witness is governed by *Maryland* v. *Craig*, 497 U.S. 836 (1990). The applicable rules of evidence and court-martial procedures used by a military judge to make a finding of necessity that the exigencies of the situation warrant the use of remote live testimony of a child witness are set forth in MIL. R. EVID. 611(d), and R.C.M. 914A, respectively. *See United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007). "A military judge's finding of necessity is a question of fact that will not be reversed on appeal unless such finding is 'clearly erroneous or unsupported by the record.'" *United States v. McCollum*, 58 M.J. 323, 332 (C.A.A.F. 2003)(quoting *United States v. Longstreath*, 45 M.J. 366, 373 (C.A.A.F. 1996)).

Prior to trial, the Government filed a Motion for Special Proceedings During Presentation of the Child Victims' Testimony. AE VII. In addressing this request, the military judge and counsel spent considerable time on the record and in R.C.M. 802 conferences discussing the appropriate procedure for obtaining the testimony of [AL]. Record at 17-19, 204-14, 563-83, 769-70, 1110-24, 1168-71, and 1175-1208. Additionally, Lieutenant Commander Shannon J. Johnson, MSC, USN, a Government expert witness in the fields of clinical and child psychology, testified that [AL] would suffer emotional trauma if she had to testify in court in front of the appellant. *Id.* at 94-97.

Based on the expert witness testimony and with the agreement of the parties, and in accordance with MIL. R. EVID. 611(d)(3)(B) and R.C.M. 914A, and consistent with *Maryland v. Craig*, the military judge made a finding of necessity that the exigencies of the situation warranted the use of videotaped, remote testimony of [AL]. He further determined, with the agreement of the parties, that one-way remote testimony with questioning conducted by [AL]'s teacher, Ms. [F], who would only ask written questions provided by both parties, was the best method for obtaining [AL]'s testimony. *Id.* at 1116-19, 1124. Finally, during [AL]'s remote one-way testimony, one of the appellant's trial defense counsel was just outside the room where [AL] provided her testimony and able to observe her while

she testified, while his other counsel remained in the courtroom with him. *Id.* at 1168-71. The appellant's trial defense counsel agreed that this procedure "guaranteed the Sixth Amendment rights of [the appellant] with regard to [AL]." *Id.* at 1126.

We conclude that the military judge's finding of necessity was amply supported by the record and not clearly erroneous. Furthermore, his finding was in accordance with the requirements of MIL. R. EVID. 611 (d)(3) and R.C.M. 914A, and consistent with pertinent case law, Accordingly, this assignment of error is without merit.

B. Verbatim Record

The appellant's fourth assignment of error alleges that the record of trial in this case is not verbatim. In his original pleading, the appellant contended that the authenticated record of trial was not verbatim because it did not include [AL's] testimony. The appellant modified this assignment of error in his supplemental pleading with the assertion that, notwithstanding the military judge's 19 March 2008 authentication of the portion of the record of trial pertaining to [AL's] testimony, the record of trial is not substantially accurate, verbatim, or complete.

The authenticated record of trial did not contain the testimony of [AL], which was conducted through the use of one-way remote videotaped testimony. On 11 February 2008, we ordered the Government to produce a verbatim transcript of the videotaped testimony of [AL], authenticated with a certificate of correction by the military judge prepared in accordance with *United States v. Mosely*, 35 M.J 693, 695 (N.M.C.M.R. 1992), and R.C.M. 1104(d). The Government filed its response on 20 March 2008.

The appellant challenged the accuracy of the transcript and certificate of correction and, in response to our 14 April 2009 Order, filed a supplemental pleading listing alleged discrepancies in the authenticated transcript of [AL's] testimony. On 1 May 2008, we ordered the Government to deliver a copy of the certificate of correction and a copy of the annotated transcript filed by the appellant to the military judge. The court's Order further directed the military judge to review the verbatim transcript of the videotaped testimony of [AL] accompanying his 19 March 2008 certificate of correction in light of the assertions of the appellant and make any changes to

the transcript he found warranted by the comments of the appellant. Additionally, we ordered the military judge to authenticate the transcript and deliver a new certificate of correction to the Government. On 29 May 2008, the Government filed its response to the 1 May 2008 Order and provided a copy of the military judge's second certificate of correction of 28 May 2008.

On 4 June 2008, the appellant again challenged the accuracy of the transcript and complained that the military judge had still not complied with R.C.M. 1104(d)(2). On 20 June 2008, we determined that, based on the military judge's second certificate of correction, the record of trial was complete. However, recognizing that the appellant was unable to review [AL's] verbatim testimony until completion of the certificates of correction, we afforded the appellant one further opportunity to file supplemental pleadings. The appellant filed his supplemental pleadings on 21 July 2008 and the Government filed its response on 20 August 2008.

A complete record of the proceedings and testimony must be prepared for any general court-martial resulting in a discharge. Art. 54(c)(1), UCMJ; R.C.M. 1103(b)(2)(A). Additionally, a verbatim transcript is required for any trial resulting in a bad-conduct discharge. R.C.M. 1103(b)(2)(B). A verbatim transcript includes all proceedings, arguments of counsel, ruling and instructions by the military judge, and matters which the military judge orders stricken from the record or discarded. *Id*., Discussion. However, a complete record does not necessarily mean that the entire record is verbatim. *United States v. McCullah,* 11 M.J. 234, 36 (C.M.A. 1981). Moreover, the Court of Appeals for the Armed Forces has long recognized that literal compliance with the verbatim requirement is impossible. *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982). Accordingly, a record of trial must be substantially verbatim. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *Id.* As we conduct our *de novo* review, we are mindful that "[t]he requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *Id*. (citations omitted). We also recognize that "[a] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *Id*.

at 111 (citations omitted). The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

In this case, the Government provided the videotaped testimony of [AL] and a verbatim transcript, which was authenticated with two certificates of correction by the military judge. Additionally, in accordance with the military judge's order, the record of trial contains the appellate exhibits used to conduct the remote one-way testimony by [AL]. AEs LXXXII-LXXXIV, CV-CXIV.

We also note that we reviewed [AL]'s videotaped testimony and we have determined the record of trial is verbatim in accordance with Article 66(c), UCMJ.

C. Indecent Acts with [AL]

Upon review of the record of trial, we find that the evidence adduced at trial, was both legally and factually sufficient to establish that the appellant committed indecent acts with [AL]. At trial, in response to questions conducted by Ms. [F], [AL] testified that she had previously sat on top of the appellant while both of them were undressed. Certificate of Correction of 19 Mar 2008, at 9-11. She further testified that she rode on the appellant's "shi" and it hurt. *Id.*

The appellant admitted to NCIS that he took baths while naked with [AL] when she was three years old. He further admitted that on two or three occasions, [AL] touched his penis while he bathed with her. PE 15 at 2. The appellant's wife also testified that in the fall of 2001, the appellant bathed, while naked, with both [AL] and [ML]. Record at 651, 753. She described an occasion where she entered the bathroom while the appellant was in the bathtub with [AL] and noticed that [AL] was holding the appellant's penis with both of her hands. *Id.* at 651-54, 753. She testified that she said, "[W]hat are you doing?" to the appellant and he told [AL] to stop it. *Id.* at 654, 657. Finally, she testified that, prior to December 2004, [AL] regularly masturbated on the floor, on the edge of a table and with a doll stand. *Id.* at 659, 668-69; PE 1.

Additionally, LCDR Meredith Carter, MC, U.S. Navy, a Government expert witness in pediatrics, testified that in December 2004, Mrs. Lobsinger had informed her about the bathtub incident involving [AL] and the appellant that had previously taken place. Record at 1142. She also testified that she had observed [AL] masturbate on three occasions and noted that masturbating in public was a concern. *Id.* at 1707.

LCDR Johnson, who was recalled as a defense witness, testified that she met with [AL] on numerous occasions in 2005. During both direct and cross-examination, LCDR Johnson testified that during an October 2005 session, [AL] informed her that the appellant "lets me ride on his front" and that it hurt her. *Id.* at 1672-73, 1710-12. She testified that [AL] drew a picture of the appellant with his pants open. *Id.* at 1673, 1712; PE 4.

Both Dr. Craig and LCDR Johnson testified that [AL] had age-inappropriate sexual knowledge and behavior. *Id.* at 878-81, 1712. Finally, Dr. Craig testified that a four-year-old masturbating with a doll stand was abnormal behavior. *Id.* at 878-80. Accordingly, considering all of the evidence adduced at trial, we find that this assignment of error is without merit.

Post-Trial Delay

Although the appellant does not allege any post-trial delay, we have decided to *sua sponte* analyze the post-trial history of this case since it was tried in January 2006. For our analysis, the following dates pertain:

EVENT	DATE
Court-Martial Conviction	27 Jan 2006
Authentication of Record	14 Sep 2006
SJAR	06 Oct 2006
SJAR Served on Defense Counsel	20 Oct 2006
New Civilian Counsel files Clemency Petition	20 Nov 2006
CA's Action	22 Nov 2006
Docketed at NMCCA	11 Jan 2007
Civilian Appellate Counsel requests and is granted 7 Enlargements of Time	Starting on 07 Mar 2007
Defense Brief Due	12 Oct 2007
Civilian Appellate Counsel files Appellant's Brief via Motion for Leave to File Out of Time	15 Oct 2007
Government Consent Motion to Attach DVD	10 Dec 2007

recording of [AL]'s testimony and authenticated transcript	(filed with Court)
NMCCA grants Consent Motion to Attach	11 Dec 2007
Government's Answer filed (1 Enlargement of Time granted)	14 Dec 2007
NMCCA Order for Government to Produce viewable copy of DVD submitted on 10 December 2007	18 Dec 2007
Government's response to NMCCA's 18 Dec 2007 Order	02 Jan 2008
Appellant's Motion to Return the Record of Trial to the CA for Proper Authentication	16 Jan 2008
NMCCA Order denying Appellant's 16 Jan 2008 Motion, but ordering Government to Produce a verbatim transcript of [AL's] videotaped testimony, authenticated with a certificate of correction by the military judge by 10 March 2008	11 Feb 2008
Government requests, and is granted, additional 10 days to respond to NMCCA's 11 Feb 2008 Order	10 Mar 2008
Government Response to NMCCA's 11 Feb 2008 Order	20 Mar 2008
Appellant's Second Motion to Return the ROT Trial to the CA for Proper Authentication	02 Apr 2008
Government's files Opposition to Appellant's 2 Apr 2008 Motion	04 Apr 2008
NMCCA Order denying Appellant's 2 Apr 2008 motion and directing Appellant to file supplemental pleading of discrepancies	14 Apr 2008
Appellant files Supplemental Notice of Discrepancies	24 Apr 2008
NMCCA Order directing Government to file a new certificate of correction by 2 Jun 2008	01 May 2008
Government Response to NMCCA Order of 1 May 2008	30 May 2008
Appellant's Response to NMCCA Order of 1 May 2008	04 Jun 2008
NMCCA Order permitting Supplemental Pleading	20 Jun 2008
Civilian Appellate Counsel requests and is granted 1 Enlargement of Time	27 Jun 2008
Government's Opposition to Appellant's Motion for Enlargement of Time	01 Jul 2008
Appellant's Supplemental Brief	21 Jul 2008
Government's Answer to Appellant's	20 Aug 2008

Supplemental Brief	
Case In Panel	20 Aug 2008
Remand for new CA's action	10 Mar 2009
New CA's action	8 May 2009
Case returned to NMCCA	29 May 2009
Appellant's Motion for Enlargement of Time to File Supplemental Brief is granted	23 Jun 2009
Appellant files Notice of Intent not to file Supplemental Brief	8 Jul 2009
Case in Panel	8 Jul 2009

The Court of Appeals for the Armed Forces has provided a clear framework for analyzing post-trial delay, utilizing the four factors established by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of delay; (2) reasons for delay; (3) the appellant's demand for speedy review; and (4) prejudice. *United States v. Moreno,* 63 M.J. 129, 135 (C.A.A.F. 2006); *see United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States (Toohey I)*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is "facially unreasonable," we must balance the length of the delay against the other three factors. *Jones,* 61 M.J. at 83. Each factor is weighed and balanced to determine if it favors the appellant or the Government, with no single factor being dispositive. *Moreno,* 63 M.J at 136.

Initially, we note that since the appellant's case was tried prior to the date our superior court decided *Moreno*, the presumptions of unreasonable delay that apply to post-trial processing by this court do not apply here. Nevertheless, we find that the 349-day delay between trial and docketing with this court, including 299 days between completion of the trial and the date of the CA's action, is facially unreasonable, triggering a due process review. *See United States v. Young*, 64 M.J. 404, 409 (C.A.A.F. 2007).

In evaluating the second factor, the reason for the delay, "we look at the Government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant. In assessing the reasons for any

particular delay, we examine each stage of the post-trial period because the reasons for the delay may be different at each stage and different parties are responsible for the timely completion of each segment." *Moreno,* 63 M.J. at 136.

We note that the CA's action was taken on 22 November 2006, a period of 299 days from the completion of trial and well beyond the 120 day period delineated in *Moreno. Id.* at 142. However, we recognize that the record of trial in this contested child molestation case is over 2150 pages in length and contains hundreds of documents and exhibits. In fact, it took 230 days to authenticate the record of trial after sentencing.

The SJAR was prepared 22 days after authentication and the CA's action was signed 47 days later. But, the appellant's civilian defense counsel took 31 of these 47 days to submit his R.C.M. 1105 matters. Finally, there was a 50-day delay between the CA's action and docketing before this Court, a period exceeding the 30 day period delineated in *Moreno. Id.* After taking into consideration the complexity of the case, the reasons for the delay, and the respective responsibilities for the delay, we conclude that the period of delay between trial and docketing weighs slightly in favor of the appellant.

After docketing, the appellant's civilian appellate defense counsel filed seven Motions for Enlargement of Time (EOT) totaling 274 days.[4] On each request, the appellant's civilian defense counsel informed the Court that the appellant agreed to the request and further submitted that his appellate practice workload necessitated the request for additional time.

In analyzing the reasons for post-trial delay in *Moreno* and *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003), the CAAF held the Government responsible for the delay attributable to military appellate defense counsel since the Government ultimately controls the staffing within the military Appellate Defense Divisions. Here, however, the appellant has exercised his right to hire civilian appellate counsel. Additionally, he acquiesced in seven requests for additional time, which were solely based on his civilian appellate counsel's workload. In our opinion, the appellant, rather than the Government, is responsible for this portion of the delay and, consequently, the delay weighs against him.

[4] After the appellant's seventh EOT was granted, his brief was due to be filed with the Court by 12 October 2007. The appellant missed this deadline and, on 15 October 2007, filed a Motion for Leave to File his Brief out of time, which we granted.

After the appellant filed his pleading, the Government was granted one EOT and filed its response on 14 December 2007. Between 14 December 2007 and early June 2008, we evaluated the record of trial and had to order the Government to produce testimonial evidence missing from the original ROT along with the requisite certificates of correction from the military judge.

On 20 June 2008, after receipt of the second certificate of correction, we provided the appellant the opportunity to file supplemental pleadings. The appellant's civilian appellate defense counsel requested and received one EOT and filed a supplemental pleading on 21 July 2008. The Government filed its response on 20 August 2008 and the case was received "in panel" by the Court on this date. On 10 March 2009, we remanded the case to the convening authority since his original action did not indicate whether he considered the military judge's clemency recommendation prior to taking his action. On 8 May 2009, the convening authority completed his new action.

We conclude that the Government is accountable for the delay in obtaining two certificates of correction since it is responsible for ensuring that complete records of trial are docketed before this court. *See* R.C.M. 1103. The Government is also responsible for the delay necessary to procure supplemental pleadings since they were based on the testimony contained in the second certificate of correction. Finally, the Government is responsible for the delay associated with remanding the case to the convening authority.

We conclude that the period of delay between trial and docketing weighs in favor of the appellant.

Upon evaluation of the varying lengths of the delay, we note that the appellant's EOT requests account for over 300 days of the delay between docketing and our decision. Accordingly, we conclude that the second factor weighs slightly in favor of the appellant.

Considering the third factor, there is no evidence that the appellant ever asserted his right to a timely appeal and, as aforementioned, he is accountable for a significant portion of the total delay. Under the guidance of our superior court, we conclude that this factor weighs against the appellant, but, under the circumstances of this case, not heavily. *Moreno,* 63

M.J. at 138; *United States v. Harvey*, 64 M.J. 13, 36 (C.A.A.F. 2006).

We evaluate the fourth factor, prejudice to the appellant, in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and, (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *United States v. Toohey* (*Toohey II*), 63 M.J. 353, 361 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 138)(quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir 1980)).

Based on our analysis of these interests, we conclude the appellant did not suffer oppressive incarceration or particularized anxiety, and suffered no impairment regarding his defenses or grounds for appeal. Therefore, in evaluating the fourth *Barker* factor, we conclude the appellant has failed to demonstrate he was prejudiced by the post-trial delay. This factor weighs against him.

In the absence of any actual prejudice, we will find a due process violation only if, in balancing the other three factors, the delay is "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. While the delay in this case is lengthy, we conclude the appellant is responsible for considerable portions of the delay and the overall delay is not so egregious that it undermines the public's perception of the fairness and integrity of the military justice system. We, therefore, find the appellant's right to due process has not been violated.

We also consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. *Moreno*, 63 M.J. at 129. Having considered the post-trial delay in light of our superior court's guidance in *Toohey I*, 60 M.J. at 102, and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors described in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we find the post-trial delay in this case does not impact the sentence that "should be approved." *See* Art. 66(c), UCMJ.

Conclusion

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

Judge STOLASZ and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge STOLASZ participated in the decision of this case prior to detaching from the court.