IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MAXWELL A. MATTHEW,
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. _____/AF

Crim. App. Dkt. No. 39796 (reh)

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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v.	)
	) Crim. App. Dkt. No. 39796 (reh)
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Staff Sergeant (E-5) **MAXWELL A. MATTHEW,** United States Air Force, *Appellant*.	))) January 25, 2025)

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER R.C.M. 1103(f)(2)[1] VIOLATES THE CONSTITUTION'S DOUBLE JEOPARDY PROTECTION EITHER GENERALLY OR WHERE AN APPELLANT IS RE-TRIED FOLLOWING ACQUITTAL OF A GREATER INCLUDED CHARGE.

II.

WHETHER THE CHARGES MUST BE DISMISSED, WITH OR WITHOUT PREJUDICE, IN LIGHT OF THE R.C.M. 707 DELAY PRESENT HERE.

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[1] Unless otherwise noted, all references in this filing to the Uniform Code of Military Justice (UCMJ), Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*).

III.

WHETHER APPELLANT'S CASE IS THE SUBJECT OF EXCESSIVE POST-TRIAL DELAY AND WHETHER THE AIR FORCE COURT ERRED IN HOLDING THAT DELAY FOLLOWING THE INITIAL HEARING AND THE RE-HEARING WERE SEPARATE PERIODS FOR *MORENO* PURPOSES.

IV.

WHETHER APPELLANT'S SENTENCE VIOLATES ART. 63, UCMJ, WHETHER "MORE SEVERE THAN" AND "IN EXCESS OF" REQUIRE SEPARATE ANALYSIS UNDER ART. 63, UCMJ, AND WHETHER THE CONVENING AUTHORITY RECEIVED MISADVICE CONCERNING ART. 63, UCMJ.

V.

WHETHER AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS CONSTITUTIONAL IN LIGHT OF RECENT PRECEDENT FROM THE SUPREME COURT OF THE UNITED STATES.

Reasons to Grant Appellant's Petition

This Court should grant Appellant's petition concerning the presented issues because they deal with matters on which this Court has not yet directly ruled but should.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2016). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On January 25, 2019, and June 19, 2019, a military judge sitting as a general court-martial in initial hearing tried Staff Sergeant (E-5) Maxwell A. Matthew [hereinafter Appellant]. Consistent with his pleas, the military judge convicted Appellant of one specification of attempted distribution of child pornography and one specification of possession of child pornography, in violation of Articles 80 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880 and 934 (2018). The military judge found Appellant not guilty of distribution of child pornography in violation of Art. 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced Appellant to confinement for seventeen months, reduction to the grade of Airman Basic (E-1), and to be dishonorably discharged from the military service The Military Judge entered a finding of Not Guilty as to Distribution of Child Pornography in violation of Art. 134, UCMJ, 10 U.S.C. § 934. (R. at 171)(original hearing).

On December 23, 2020, the Air Force Court ordered the record of trial returned to the Convening Authority because it was substantially incomplete. *United States v. Matthew,* No. ACM 39796, 2020 CCA LEXIS 486, at *2 (A.F. Ct. Crim. App. Dec. 23, 2020) (order). On March 4, 2021, the Judge Advocate General returned the record of trial to the Air Force Court because "[a]n authenticated transcript of Appellant's arraignment cannot be obtained because the audio recording of the hearing has been lost and no alternatives can be located." *United States v. Matthew*, 2022 CCA LEXIS 425 (A.F. Ct. Crim. App. July 21, 2022) [*Matthew I*]. The Air Force Court then set aside the finding (but did not dismiss the specifications) because it found that the record of trial was incomplete. *Id*.

On or about August 15, 2022, the Office of the Judge Advocate General forwarded the incomplete record to the Convening Authority, Space Operations Command, for further disposition. App. Ex. X at 7.

On September 12, 2022, Capt. Tucker Pryor informed Appellant by letter of the Air Force Court's decision and directed him to contact the Area Defense Counsel's office. App. Ex. X at 8.

On October 3, 2022, Convening Authority, Space Systems Command, received the Appellant's record of trial because the case was transferred to him from Convening Authority, Space Operations Command. App. Ex. XIV at 2.

On October 13, 2022, Appellant submitted a request pursuant to DAFI 36-3211, Military Separations, Chapter 6 to separate from the Air Force in lieu of trial at a re-hearing. App. Ex. X at 9.

On October 27, 2022, Lt. Gen. Michael Gutlein, the Convening Authority, Space Systems Command, ordered a re-hearing in this matter. App. Ex. X at 11.

On December 5, 2022, the Convening Authority disapproved Appellant's request for separation pursuant to DAFI 36-3211 and ordered his return to active duty. App. Ex. X at 12.

On December 5, 2022, the Convening Authority signed an additional memorandum directing the Air Force Personnel Center (AFPC) to reassign Appellant to an active-duty unit at Patrick Space Force Base until the completion of court-martial proceedings. App. Ex. X at 13.

On December 7, 2022, AFPC complied with the order and issued an authorization for a permanent change of station that reassigned Appellant to 5th Space Launch Squadron, authorizing four travel days and a report date of January 6, 2023. App. Ex. X at 15.

On December 22, 2022, Appellant again demanded speedy processing. App. Ex. X at 17.

On January 20, 2023, the Convening Authority purported to excuse 95 days of delay—3 October 2022 until 5 January 2023—from the R.C.M. 707 clock. App. Ex. X at 18.

On January 31, 2023, and May 30, 2023, a military judge sitting in rehearing as a general court-martial tried Appellant. Consistent with his pleas and a plea agreement, reserving to him the ability to raise the issues of violation of R.C.M. 707 and double jeopardy, the military judge convicted Appellant of one specification of possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. §§ 934 (2018). The military judge sentenced Appellant to confinement for twelve months, reduction to the grade of Airman Basic (E-1), to forfeit all pay and allowances, and to be discharged from the military service with a bad conduct discharge. R. at 76. The military judge dismissed one specification of distribution of child pornography, in violation of Art. 134, UCMJ, 10 U.S.C. 934, for former jeopardy.

The Air Force Court affirmed the remaining Specification and the sentence in *United States v. Matthew*, 2024 CCA LEXIS 460 (A.F. Ct. Crim. App. Oct. 31, 2024) [*Matthew II*]. On November 28, 2024, Appellant moved the Air Force Court to reconsider its decision. On December 19, 2024, the Air Force Court refused to reconsider its decision. This appeal followed.

Statement of Facts

The facts necessary for the disposition of this matter are included in the argument below.

Argument

I.

R.C.M. 1103(f)(2) VIOLATES THE CONSTITUTION'S DOUBLE JEOPARDY PROTECTION EITHER GENERALLY OR AS APPLIED WHERE AN APPELLANT IS RE-TRIED FOLLOWING ACQUITTAL OF A GREATER INCLUDED CHARGE.

Standard of Review

This Court considers a claim of double jeopardy a question of law that it must answer de novo. *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019).

Law and Analysis

A. R.C.M. 1103(f)(2) is generally unconstitutional because it permits the government a second chance to prove jurisdiction.

Rule for Court-Martial (R.C.M.) 1103(f)(2) unconstitutionally permits the Government a second chance to meet its burden of proof as to jurisdiction over the sentence. The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Fifth Amendment "shield[s] individuals from the harassment of multiple

prosecutions for the same misconduct." *United States v. Rice,* 80 M.J. 36, 40 (C.A.A.F. 2020) (quoting *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., with whom Thomas, J., joined, concurring)).

The Air Force Court's decision in *Matthew II* misdescribes Appellant's appeal as "unrelated to the sufficiency of the evidence." *Matthew II*, 2024 CCA LEXIS 460 at *2. This statement is incorrect because a claim of an incomplete transcript is a claim of insufficient evidence of jurisdiction. "The Government carries the burden of proving jurisdiction by a preponderance of the evidence." *United States v. Sullivan*, 2014 CCA LEXIS 336, *5 (N-M. Ct. Crim. App. May 29, 2014) (citing *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002)). "The lack of a verbatim transcript is a jurisdictional error that cannot be waived." *United States v. Tate*, 82 M.J. 291, 294 (C.A.A.F. 2022) (citing *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)). Court reporter error in losing a recording of proceedings is government error because the "actions of the court reporter [are] entirely under the Government's control." *United States v. Anderson*, 82 M.J. 82, 86 (C.A.A.F. 2022).

Here, the Government failed to provide a transcript that is substantially verbatim. The missing transcription therefore is a deficiency in the proof of a matter that the Government is required to prove–that it has met a jurisdictional

prerequisite. The Government may not cure the lack of that proof by causing Appellant to face a second court-martial.

The President's authorization to expunge a conviction and retry a Servicemember cannot escape an "iron-clad fact: [the President's rules] cannot supplant or supersede the Constitution of the United States." *B.M. v. United States*, 84 M.J. 314, 324 (C.A.A.F. 2024) (citing *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787-88 (N-M. Ct. Crim. App. 2017)). This Court should grant review for the purpose of addressing the constitutional permissibility of second court-martials to cure defects in the proof of jurisdiction over the sentence, a question of law that has not been, but should be, settled by this Court. C.A.A.F. R. 21(b)(5)(A).

B. Even if not generally unconstitutional, R.C.M. 1103(f)(2) is unconstitutional as applied because Appellant was acquitted of a greater included offense.

R.C.M. 1103(f)(2) is unconstitutional as applied because, as the Air Force Court noted, Appellant was acquitted of a distribution offense that was facially duplicative of the lesser included offense of possession of child pornography. "We agree with Appellant, and the Government also appears to agree, that Specification 1 is multiplicious with Specification 2." *Matthew II*¸ 2024 CCA LEXIS 460, *12. Possession of child pornography is multiplicious with distribution of child pornography when the charge involves the same images on the same dates. *United States v. Williams*, 74 M.J. 572, 575-76 (A.F. Ct. Crim. App. 2014). Charges that are multiplicious offend the Constitution's prohibition against

double jeopardy because they impose "multiple convictions and punishments under different statutes for the same act or course of conduct." *Id*. at 574 (citing *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)). In a case involving child pornography possession and distribution, where a Specification alleges only a date range and does not allege possession of specific images, double jeopardy attaches as to all child pornography images possessed or distributed within that same date range. *United States v. Rice*, 2020 CCA LEXIS 375, *4-5 (A. Ct. Crim. App. Oct. 22, 2020) (sum. disp. on further rev.).

The Air Force Court incorrectly found that Appellant "has never been acquitted" of possession. *Matthew II*, 2024 CCA LEXIS 460 at *13. In acquitting Appellant of Specification 2, without announcing a lesser included finding of guilt of possession within Specification 2, the military judge acquitted Appellant of **both** distribution **and** possession of child pornography, because possession is a lesser included offense of distribution. Acquittal of a greater offense is also an acquittal of a lesser included offense, unless the finder of facts returns a verdict of guilt as to the lesser included offense. *See, e.g., United States v. Ayalacruz*, 79 M.J. 747, 752-53 (N-M. Ct. Crim. App. 2020) (holding that the panel's failure to return a valid finding of guilty to any lesser included offense resulted in an acquittal as to that offense and all lesser included offenses). After an acquittal lifts jeopardy, "the common proposition, entirely in accord with *Blockburger* [*v. United*

States, 284 U.S. 299 (1932)] [is] that prosecution for a greater offense . . . bars prosecution for a lesser included offense." *Rice*, 80 M.J. at 50 (quoting *United States v. Dixon*, 509 U.S. 688, 705 (1993)). Where a verdict results in "both guilty and not guilty [findings] of the same offense… the principles underpinning the Double Jeopardy Clause" cause jeopardy to attach to both specifications and prevent a rehearing on them. *United States v. Stewart*, 71 M.J. 38, 43 (C.A.A.F. 2012).

Since the military judge both acquitted Appellant (in Specification 2, as a lesser included offense) of possession and convicted Appellant (in Specification 1) of the same offense, his retrial for possession was barred by double jeopardy.

In *Stewart*, members considered two specifications "that… alleged exactly the same offense." *Id*. at 42. They were instructed to consider lesser included offenses in both specifications. *Id.* The members acquitted the appellant of the specification and did not return a guilty finding for any lesser included offense. The members then convicted the appellant of the same offense within Specification 2. This Court held that a concurrent conviction and acquittal for the same offense was an acquittal as to both and caused double jeopardy to attach to both. *Id*. at 43.

Similar to *Stewart*, where two specifications were duplicative, the Air Force Court found that Specifications 1 and 2 are duplicative. Further similar to *Stewart*, in which the panel acquitted the appellant of one of the duplicative specifications,

71 M.J. at 42, here, the military judge acquitted Appellant of one of the two duplicative specifications. (R. at 43)(original hearing). As in *Stewart*, the military judge's concurrent acquittal and conviction of Appellant for duplicative specifications constituted an acquittal as to all. *Stewart*, 71 M.J. at 43. Double jeopardy therefore attached as to all.

To accomplish its apparent aims, the Government should have amended Specification 1 to transform it into an attempted distribution specification and dismissed the unamended distribution language. Such an amended specification would not be facially duplicative of Specification 2. The Government, however, did not do this. Instead, the Government opted to present no evidence as to Specification 2 and acquiesced to the military judge's entering of a finding of not guilty as to it. (R. at 43)(original hearing). This finding of not guilty attached to Specification 2 and to every lesser included offense within that specification to which the military judge did not return a lesser included finding of guilty. Since the military judge did not return a finding of guilty as to the lesser included offense of possession within Specification 2, he acquitted Appellant of possession as alleged within Specification 2 as a lesser included offense.

The Air Force Court held that "the Government is not prohibited from charging multiplicious specifications in the alternative," *Matthew II*, 2024 CCA LEXIS 460, *12 (citing *United States v. Earle*, 46 M.J. 823, 825 (A.F. Ct. Crim

App. 1997)). See, however, R.C.M. 907(b)(3)(B) for the proposition that where one charge subsumes the other, the subsumed charge should be dismissed before findings, contra *Matthew II*, 2024 CCA LEXIS 460, *9-10 (internal citations omitted). Even if the practice of charging multiplicious offenses is permissible, this case illustrates the risk in so doing. When the Government charges multiplicious specifications, an acquittal of one results in an acquittal of all. Trial counsel realized this but realized it too late and unsuccessfully moved the court-martial to reconsider its finding of not guilty as to distribution. (R. at 170) (original hearing). "A finding of not guilty—whether erroneous or not—is final, may not be appealed, and terminates jeopardy." *Matthew II*, 2024 CCA LEXIS 460, *9-10. This Court should grant review for the purpose to address this double jeopardy issue, a question of law that has not been, but should be, settled by this Court. C.A.A.F. R. 21(b)(5)(A). This Court should find that jeopardy attached and lifted when the military judge both acquitted and convicted Appellant of the same offense.

C. Even if Double Jeopardy did not attach to the possession specification when Appellant was acquitted of distribution, it attached when the Convening Authority expunged the findings as to Specification 2.

The Convening Authority's decision to expunge the previous finding of guilt as to Specification 2 caused jeopardy from Appellant's acquittal for original Specification 1 to attach to it. When the convening authority orders a re-hearing

under R.C.M. 1103(f)(2), the new proceeding is not a continuation of the previous one but a "start… anew." The previous proceeding is "expunged." *Tate*, 82 M.J. at 297. The prohibition against double jeopardy not only protects against multiple punishments for the "same offence," *Dixon*, 509 U.S. at 696 (internal quotation marks omitted) (citation omitted), but also "forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio*, 432 U.S. 161, 169 (1977). This is true irrespective of finality under Article 76, UCMJ, because an appellant has an "interest… in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made." *United States v. Scott*, 437 U.S. 82, 92 (1978).

Appellant's acquittal for Specification 2 and the subsequent expungement of the findings as to Specification 1 caused double jeopardy to attach to Specification 1 because Specification 1 is a lesser included offense of Specification 2. The Fifth Amendment "forbids successive prosecution… for a greater and lesser included offense." *Brown*, 432 U.S. at 169. Jeopardy attached at the taking of evidence as to Specification 2. It terminated once Appellant was acquitted of that charge. As a result, Appellant could not be placed in jeopardy again for Specification 2 or the lesser-included Specification 1.

Jeopardy for both specifications terminated because the rehearing was not a continuation but a "start anew" of a previously concluded court-martial. *Tate*, 82

M.J. at 297. Unlike cases in which a court sets aside a finding of guilty for legal error, here, the Air Force Court did not dismiss the findings as to any Specification. *Matthew I*, 2022 CCA LEXIS 425, *12. The Convening Authority, however, elected to "expunge" the findings from the original hearing and start anew. The Government may not begin a "new" second prosecution because Appellant was already tried for the greater included offense and found not guilty of it. It also may not expunge a conviction and then retry the Charge because jeopardy attached at trial and then terminated with the expungement.

"Reversal of a conviction by appellate authority and the direction of a rehearing of the case generally leaves the proceedings in the same position as before trial." *United States v. Cox*, 12 U.S.C.M.A. 168, 169 (C.M.A. 1969) (citing *Spriggs v. United States*, 225 F.2d 865 (9th Cir. 1955)(no pinpoint in original citation)). In this case, the Convening Authority reversed Appellant's convictions for possession and attempted distribution of child pornography. Appellant therefore entered rehearing in the same position as if he were never tried for possession with one exception – he was now acquitted of a greater included offense of distribution. The previous finding of guilt was no longer intact. It did not prevent jeopardy from attaching to proceedings such as this which "start anew" of the previously concluded court-martial. *Tate*, 82 M.J. at 297.

Therefore, this Honorable Court should grant review for the purpose of dismissing the Charge and its Specifications with prejudice to remedy the double jeopardy violation present here.

II.

THE CHARGES MUST BE DISMISSED, WITH OR WITHOUT PREJUDICE, IN LIGHT OF THE R.C.M. 707 DELAY PRESENT HERE.

The Air Force court incorrectly held that the Secretary of the Air Force cannot create greater regulatory rights for Appellant than those contained within R.C.M. 707. Even were that not the case, the Air Force Court deviated from the text of R.C.M. 707 in holding that the R.C.M. 707 clock started only after the Space Operations Command Convening Authority transferred the record of trial to the Space Systems Command Convening Authority.

Standard of Review

This Court conducts a de novo review of speedy trial claims. *United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016).

This court reviews questions of law *de novo*. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007).

Law and Argument

A. The Air Force Court incorrectly held that the Secretary of the Air Force cannot create greater regulatory rights for appellant than those contained within R.C.M. 707.

The Secretary of the Air Force had the power to create greater speedy trial rights than contained in R.C.M. 707. On the hierarchy of military authority, a higher source will prevail **"unless a lower source… provide[s] greater rights for the individual."** *United States v. Marrie*, 43 M.J. 35, 37 (C.A.A.F. 1995) (quoting *United States v. Taylor*, 41 M.J. 168, 169-70 (C.M.A. 1994)(emphasis added)). Here, the Secretary acted to create greater rights than contained within the text of R.C.M. 707. The Air Force Court erred when it held he could not. *Matthew II*, 2024 CCA LEXIS 460, *20.

R.C.M. 707 provides that "[i]f a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial **and** the opinion authorizing or directing a rehearing…." R.C.M. 707(B)(3)(D). The Secretary, however, exercised his discretion to provide greater rights and start the R.C.M. 707 clock upon receipt of the Air Force Court's decision alone.

> **Receipt of Decision and Speedy Trial Clock**: Receipt of decision by the SJA of the original convening authority (or the current convening authority if the original convening authority no longer exists) **triggers the speedy trial clock** for both rehearings on findings and rehearings on sentence only.

Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* (15 APR 21), para 26.8 (emphasis added).[2]

> In accordance with R.C.M. 810(f)…AFLOA/JAJM… sends a transmittal letter, and a copy of the pertinent decision… to the original court-martial convening authority's SJA.

Id. at para 14.30.1.

> The "original court-martial convening authority" is the convening authority who made a decision whether or not to act on the accused's sentence. The original court martial convening authority is also the responsible convening authority…

Id. at para. 14.30.1.1.

> If the accused is no longer under the jurisdiction of the original court-martial convening authority, the original convening authority decides whether to remain the responsible court-martial convening authority or to transfer responsibility for the case the officer presently exercising authority over the accused to convene the type of court-martial involved.

Id. at para. 14.30.1.2.

This Court need not doubt the authority of the Secretary to start the speedy trial clock in cases such as this because the President explicitly provided this authority. "If it is impracticable for the original convening authority to continue to exercise authority over the charges, the convening authority may cause the charges,

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[2] Although Appellant cites to the current version of AFI 51-201, at all relevant times, the relevant provisions, though re-numbered, are otherwise unchanged.

even if referred, to be transmitted to a parallel convening authority. This transmittal must be in writing and **in accordance with such regulations as the Secretary concerned may prescribe**." R.C.M. 601(g) (2016 ed.)(emphasis added).

The Air Force Court misconstrued *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (citation omitted), which discusses a conflict between the right to attorney client privilege and the right to produce witnesses and does not prohibit the Secretary from granting Appellant greater speedy trial rights. *Matthew II*, 2024 CCA LEXIS 460, *20. Although *Romano* discusses a conflict when "a lower source on the hierarchy may grant additional or greater rights than a higher source…," *Romano* is referring to a conflict between the personal rights of more than one individual – specifically, in the case of *Romano*, between the accused's constitutional right to the production of witnesses and the Manual's grant to a witness or complainant privilege to attorney-client communications. *Romano*, 46 M.J. at 273-74. *Romano* is inapplicable here because neither R.C.M. 707 nor AFI 51-201, para 26.8, convey a personal right on anyone besides Appellant, the government being not a person. The Air Force's Court's quotation of *Romano* is out of context and expands *Romano* to include Appellant's claim, which does not involve a conflict between the rights of two Servicemembers. *Romano* also does not discuss cases where, as here, there is a specific grant of authority from the

President to the Secretary to make rules. This Court should grant review for the purpose of clarifying *Romano*.

B. The Air Force Court improperly shifted the burden of proof to Appellant to show non-compliance with R.C.M. 707 where the record indicated that the Space Operations Command Convening Authority first received the record of trial.

The Air Force Court incorrectly shifted the burden of proof for compliance with R.C.M. 707 to Appellant. "When the defense moves to dismiss for lack of speedy trial, **the burden of persuasion is on the Government to justify the delay**. It is, therefore, incumbent upon the Government to make a proper record." *United States v. Cook*, 27 M.J. 212, 215 (C.M.A. 1988) (emphasis added). The Air Force Court, however, ignored the government's lack of proof for the sequence of forwarding the record of trial, and simply assumed that the record of trial did not go to Commander, Space Operations Command, prior to his forwarding it to Space Systems Command. This assumption is at variance with the record of trial and with Air Force regulatory guidance.

Even if receipt of the Air Force Court's decision and the record of trial are necessary to start the R.C.M. 707 rehearing clock, both prerequisites occurred. The Space Operations Commander received **both** the decision and the record in August 2022. This started the R.C.M. 707 clock because there is nothing in

R.C.M. 707(b)(3)(D) that re-starts or freezes the R.C.M. 707 clock when one Convening Authority relinquishes authority over a case to another.

Air Force regulations mandated the return of the record of trial to the original convening authority, Commander, Space Operations Command. The Air Force Court is to "presume the government carried out its business affairs in accordance with applicable rules and regulations." *United States v. Jones*, 47 M.J. 725, 726 (A.F. Ct. Crim. App. 1997). Here, the applicable rules and regulations requires "JAJM will return the record of trial along with the opinion directing or authorizing the further proceedings to the responsible convening authority's legal office via certified mail." AFI 51-201 at para 26.4. "JAJM sends a transmittal letter, and a copy of the pertinent decision, mandate, or order to the **responsible convening authority**'s SJA… **to be transmitted by JAJM with the remanded ROT**." *Id.* at para 26.4.4 (emphasis added).

It is undisputed that JAJM sent a transmittal letter to Commander, Space Operations Command. There is simply no evidence that JAJM did not also send the record of trial in compliance with applicable rules. App. Ex. XII indicates only that the Space Systems Command convening authority received the record of trial on or about October 3, 2022. It does not indicate from where or whom. Therefore, the Government failed to dispute Appellant's contention concerning the order of transmission.

At trial, the Government had the opportunity to dispute Appellant's contention that "TJAG designated [the Space Operations Command] Convening Authority and returned the AFCCA opinion **and the record of trial** to [Commander, Space Operations Command]. App. Ex. X, p. 3. The Government chose not to dispute this claim. Where assertions of fact are unchallenged in motions practice, this Court accepts them as true. *United States v. Steele*, 53 M.J. 274, 275 (C.A.A.F. 2000). On appeal, the Government points to nothing in the record that disproves Appellant's trial-level assertion. This Court should therefore accept Appellant's trial-level factual assertion as true: Consistent with Air Force regulatory authority, Commander, Space Operations Command, received both the Air Force Court's decision and the record of trial in August 2022, starting the R.C.M. 707 clock. He then forwarded the record of trial to Commander, Space Systems Command, when the former decided to relinquish authority over Appellant's case.

The Air Force Court's decision is based upon an incorrect burden shift to Appellant to disprove whether Commander, Space Operations Command, received the record of trial. The opposite is accurate. This Court should grant review because the Air Force Court misapplied the law to the facts.

C. The Convening Authority's blanket R.C.M. 707 excusal was invalid.

This Court should reach the issue of whether the Convening Authority's excusal of time was an invalid blanket excusal because it is a question of law which the Air Force Court failed to reach. This Court reviews a convening authority's decision to excuse pretrial delay for "both abuse of discretion and the reasonableness of the period of delay granted." *United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022). This Court should find that the Convening Authority abused his discretion in excusing a 95-day delay where no special circumstance caused the delay. The Convening Authority excluded the delay without evidence as to why a routine administrative action – the issuance of orders from the Air Force Personnel Center – required 95 days for completion. The request for an order recalling Appellant from appellate leave was signed on December 5, 2022. App. Ex. X. The orders were approved on December 7, 2022, and served in-person the next day, December 8, 2022. *Id.* Under these facts, the Convening Authority's exclusion of time was "rationalization for neglect or willful delay." *United States v. Thompson,* 46 M.J. 472, 475 (C.A.A.F. 1997).

The Convening Authority granted a blanket exclusion of time and the exclusion was not based upon intervals between events. A blanket exclusion "[does] not address an interval between events…. [A] convening authority's grant of a blanket exclusion of time, rather than a delay, exceed[s] his authority under

R.C.M. 707(c), and [is] an abuse of discretion. *United States v. Proctor*, 58 M.J. 792, 795-96 (A.F. Ct. Crim. App. 2003). An event "must be analyzed to determine whether the event is of the type that may justify a delay" – if it is not, the exclusion is a blanket exclusion and is ineffective. *United States v. Lilly*, 22 M.J. 620, 626 (N.M.C.M.R. 1986). Here, the Convening Authority justified an exclusion of time based upon two events purportedly requiring nearly 100 days: his receipt of the record of trial and Appellant's return from appellate leave. Both events did not justify the delay. "The plain meaning of [good cause] is an extraordinary situation, rather than the normal difficulties encountered by the Government in preparing for trial. A lesser standard could allow the exception to devour the rule." *United States v. Kuelker*, 20 M.J. 715, 716 (N.M.C.M.R. 1985). Neither event took anywhere close to the period of time the Convening Authority excused. Neither are any different from the routine administrivia which occur in almost all re-hearings for which the President has determine 120 days to be sufficient. R.C.M. 707(d).

This Court should treat the Government's *ex parte* application for approval of delay and the Convening Authority's after-the-fact excusal of the delay as additional indicia of abuse of discretion. The Government's request and the Convening Authority's approval "was not a request for a delay, because it did not address an interval between events. Instead, it was a request for a blanket

exclusion of time while the case would continue to be processed." *Proctor*, 58 M.J. at 795. This Court should therefore find that the Convening Authority abused his discretion because the excusal did not reference any actual event.

Finally, the military judge erred in applying the R.CM. 707(d) factors to Appellant. The military judge treated those factors as dispositive of whether "the Defense's requested remedy of dismissal… would be… appropriate in this case." App. Ex. XIV. The R.C.M. 707(d) factors determine whether or not dismissal will be *with prejudice*, **not** whether appellant receives any remedy at all. An R.C.M. 707 violation "requires the military judge to dismiss the case." *United States v. Dooley*, 61 M.J. 258, 264 (C.A.A.F. 2005). Therefore, this Court should find that the military judge applied the R.C.M. 707(d) factors for a purpose towards which they are not directed, whether he receives any relief at all.

The speedy trial clock started on or about August 15, 2022. Trial counsel were directly advised of this start date because the AF/JAJM Rehearing Letter, dated August 15, 2022, so advised them of it. Trial counsel did not heed the instructions provided to them and Appellant was not arraigned anywhere close to 120 days after the clock started. The Convening Authority's exclusion of time was an abuse of discretion and ineffective. Therefore, this Court should grant review for the purpose of setting aside and dismissing the Charge, either with or without prejudice.

III.

APPELLANT'S CASE IS THE SUBJECT OF EXCESSIVE POST-TRIAL DELAY. THE AIR FORCE COURT ERRED IN HOLDING THAT DELAY FOLLOWING THE INITIAL HEARING AND THE RE-HEARING WERE SEPARATE PERIODS FOR *MORENO* PURPOSES.

Standard of Review

This Court conducts a de novo review of whether post-trial delay violates an appellant's substantive rights. *United States v. Moreno*, 63 M.J. 129, 135 (2006).

Law and Argument

This Court should grant review because Appellant is due relief for post-trial delay. A delay is presumptively unreasonable when a decision extends eighteen months beyond docketing. *Moreno*, 63 M.J. at 143. Here, the delay is due to several periods, all of which are the responsibility of the Government or of the Air Force Court.

The first period of delay involves the Government's loss of the record of trial. The Government is responsible for the conduct of a court reporter. "[D]elay [that] resulted from the actions of the court reporter and the military judge… therefore was entirely under the Government's control." *Anderson*, 82 M.J. at 86. Delay caused by a loss of a recording is therefore attributable to the Government.

The second period of delay involved the period between when this matter was initially docketed before the Air Force Court and when that court rendered its decision.

There was a third period of delay between the return of this case to the Judge Advocate General and the arraignment. Appellant discussed the Government's non-compliance with R.C.M. 707 and the lack of documentation or excuse for the delay in returning him to active duty for purposes of arraignment in the previous assignment of error.

Finally, there is a fourth period of delay in the appellate processing of this case. The rehearing adjourned on May 30, 2023. Both military judges authenticated the record of trial by July 11, 2023. The Convening Authority, however, did not take action until February 2, 2024, over six months later. (No. ACM 39796 (reh.), Convening Authority's Action). Compounding the error, the Government waited until March 28, 2024 to return the record of trial to the Air Force Court. The Government neither completed the record of trial, obtained convening authority action, or returned the record of trial in a timely manner. This Court should therefore find that significant, unexplained delay has plagued the processing of this case.

This Court should grant review for the purpose of correcting the Air Force Court's holding that "there are two distinct post-trial and appellate periods" for

Moreno purposes. *Matthew II*, 2024 CCA LEXIS 460 at *29. This Court should grant review because the review in *Mattthew II* was a continuation of the review in *Matthew I*. "A [court-martial] re-hearing is a continuation [] of the original proceedings." *Reid v. Covert*, 351 U.S. 487, 491 (1956). "[T]he original court-martial here… and the rehearing… [are not] different cases on different timelines or tracks." *United States v. Johnson*, 45 M.J. 88, 90 (C.A.A.F. 1996). Following *Matthew I*, "appellate review not completed… within eighteen months of docketing the case before the Court of Criminal Appeals," *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), because the review in *Matthew II* was a continuation of the review in *Matthew I*.

It has been nearly five years since Appellant's court-martial adjourned. Appellant is not responsible for most of this period. The delay here is so significant that this Court should grant review to set aside the findings and dismiss the charges, with or without prejudice. *Moreno*, 63 M.J. at 143. In the alternative, this Court should grant review for the purpose of crediting Appellant with a one-month credit against his sentence to confinement for every year of delay, or fraction thereof, and should disapprove the adjudged forfeitures and the punitive discharge.

IV.

APPELLANT'S SENTENCE VIOLATES ART. 63, UCMJ. "MORE SEVERE THAN" AND "IN EXCESS OF" REQUIRE SEPARATE ANALYSIS UNDER ART. 63, UCMJ. THE CONVENING AUTHORITY RECEIVED MISADVICE CONCERNING ART. 63, UCMJ.

Standard of Review

This court reviews alleged errors in post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004).

Law and Analysis

The Staff Judge Advocate's Recommendation (SJAR) incorrectly advised the Convening Authority that he "does not have the authority to disapprove, commute, or suspend, in whole or in part," the confinement. (No. ACM 39796 (reh.), SJAR).

The SJA's Addendum compounded the prejudice by misstating Appellant's claim of error. Appellant advised the Convening Authority that he

> must exercise independent judgement to determine whether, in fact, the sentence here violates Art. 63, UCMJ. Contrary to Colonel Gawaran's advice, you must disapprove any portion of the confinement or punitive discharge which you find to be a sentence more severe than or in excess of the original.

(No. ACM 39796 (reh.), R.C.M. 1106(f)(3) submission).

The SJA's Addendum mischaracterized appellant's Article 63 claim as limited only to the adjudged forfeitures. This incorrect advice is an improper conflation of the convening authority's Art. 63 and Art. 66 authorities. It was not harmless. Unlike exercise of clemency authority, which is discretionary, protection under Art. 63, UCMJ, is a right. *United States v. Mills*, 9 M.J. 687, 690 (A.C.M.R. 1990). Further, although Congress placed significant limitations on convening authority clemency authority under Art. 66, UCMJ which are applicable to Appellant's case, his Article 63, UCMJ, protections are unchanged.

Congress's change to Article 63 to remove the words "may be approved" and substitute them with "may be adjudged" does not apply to Appellant. P. L. 114-328, 130 Stat. 2929 (2016), *see* Executive Order 13825, § 3(d) (8 Mar. 2018) (limiting the effect of amendments to the UCMJ under the Military Justice Act of 2016 to charges referred to trial after January 1, 2019). Appellant's charges were initially referred to trial prior to January 1, 2019. They were only referred to re-hearing after 2019. For a rehearing, "[t]he procedures applied shall be the same as in the original trial." DAFI 51-201, para. 26-9. Appellant was therefore entitled to have the convening authority apply the previous version of Article 63 to his post-trial action. The Staff Judge Advocate misadvised the convening authority when she indicated that he had no Article 63 authority to reduce the sentence to confinement. This Court should therefore grant relief.

A. This Court should conduct separate "in excess of" and "more severe" analyses.

"In excess of" and "more severe than" have different meanings. "[T]his court 'interpret[s] words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context… In any such analysis, this court 'should ... give meaning to each word' of the statute." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017)(internal citations omitted). Here, Art. 63, UCMJ, creates two protections for servicemembers because it utilizes two phrases. Article 63 both protects against a sentence which is "in excess of" **or** "more severe than" the original.

This Court should not treat the term "in excess of" as redundant with "more severe." "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Sager*, 76 M.J. at 162. Here, "in excess of" and "more severe than" are part of the same statutory scheme protecting Servicemembers from increased punishment at rehearing. In the absence of evidence of contrary Congressional intent, this Court must conclude that "in excess of" has a different meaning than "more severe." This Court must further give to the words "in excess of" their natural meaning. *Id.* at 161. "In excess of means more than a particular amount." *Collins English Dictionary* (2022), https://www.collinsdictionary.com/dictionary/english/in-

excess-of. "In excess of" is therefore a *quantitative* analysis, while "more severe" is a *qualitative* analysis.

B. The sentence was more severe than the original.

This Court must consider Appellant's significantly reduced punitive exposure in assessing whether his sentence is more severe. "[In] terms of relative severity, it is necessary to consider **all the circumstances in a particular case**." *United States v. Carter*, 45 M.J. 168, 170 (C.A.A.F. 1996) (internal citations omitted). Art. 63, UCMJ, requires consideration of a reduced sentencing landscape because of dismissed charges as a factor in determining whether a sentence is more severe than the original. *United States v. Williams*, ARMY 20130582, 2022 CCA LEXIS 345, at *11 (A. Ct. Crim. App. June 10, .2022) (mem. op.). This is consistent with this Court's sentence reassessment jurisprudence, in which courts consider whether there are significant "… changes in the penalty landscape and exposure" following the dismissal of charges on appeal. *United States v. Winkelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013). This Court utilizes other areas of law as instructive in determining whether a sentence on rehearing violates Art. 63, UCMJ. *United States v. Altier*, 71 M.J. 427, 428 (C.A.A.F. 2012). This Court should therefore utilize the *Winkelmann* factors to aid its consideration of whether the new sentence is more severe.

The maximum punishment at Appellant's [original] court-martial was a "[d]ishonorable discharge, total forfeiture of pay and allowances, 30 years confinement and a reduction to the grade of E-1. (No. ACM 39796, R. at 40). The maximum punishment at rehearing was a "[d]ishonorable discharge, total forfeiture of pay and allowances, 10 years confinement and a reduction to the grade of E-1." (No. ACM 39796 (reh.), R. at 46). With these maximums as guideposts, twelve months confinement against a ten-year maximum is surely a stiffer, more severe sentence than seventeen months confinement and where the maximum confinement is triple that.

The previous sentence was 4.6% of the maximum. The current sentence is 10% of the maximum, or more than double the percentage of the original. The sentence to confinement here is therefore more severe and violates Art. 63, UCMJ. For the same reasons as above, that the sentence is inappropriate under Article 66, UCMJ, and this Court should remand Appellant's case to the Air Force Court for correction.

V.

AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS UNCONSTITUTIONAL IN LIGHT OF RECENT PRECEDENT FROM THE SUPREME COURT OF THE UNITED STATES.

After his conviction, the Government made the determination that Appellant's case met the firearm prohibition under 18 U.S.C. § 922(g). General Court-Martial Order (GCMO) No. 1, 2 February 2024. The Government did not specify why, or under which section this case met the requirements of 18 U.S.C. § 922 (g). *See id*. Appellant challenged the firearm prohibition before the Air Force Court.

Standard of Review

"The constitutionality of a statute is a question of law; therefore, the standard of review is de novo." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

The test for applying the Second Amendment is:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (citation omitted). This Court should grant review because the Government's indexing violates the Second Amendment. *Id*.; C.A.A.F. R. 21(b)(5)(B)(ii).

Specifically, the Government has not demonstrated permanently barring Appellant from ever owning a firearm is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The historical tradition took a narrow view of firearm regulation for criminal acts than that reflected in 18 U.S.C. § 922:

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates a present *danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id*. at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under his control, a pistol or revolver.'" *Id*. at 701. A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, larceny, burglary, and housebreaking." *Id*. at 701 (cleaned up). Appellant's offense falls short of these.

The Supreme Court recently addressed the validity of 18 U.S.C. § 922(g)(8)(C)(i), which applies once a court finds a defendant "represents a credible threat to the physical safety" of another and issues a restraining order. *United States v. Rahimi*, 602 U.S. 680, 688 (2024). The Supreme Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id*. at 698.

But the historical analogue breaks down when applied here. In *Rahimi*, the Supreme Court noted that the "surety" and "going armed laws" supporting a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at 699. The Supreme Court also noted that surety bonds were of limited duration, similar to how 18 U.S.C. § 922(g)(8) only applies while a restraining order is in place. *Id*. Additionally, the majority pointed out that 18 U.S.C. § 922(g)(8) "involved judicial determinations," comparable to the historical surety laws' "significant procedural protections." *Id*. at 696, 699.

By contrast, this case never involved a threat with a weapon, was devoid of any procedural protection at the time the firearm prohibition was imposed, and the firearm prohibition under 18 U.S.C. § 922(g)(1) (the only possible applicable category) will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding: "[W]e conclude only this: An individual found by a court to

pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 602 U.S. at 702. Such a narrow holding cannot support the broad restriction encompassed here. This Court should grant review so it can correct this error of constitutional magnitude. C.A.A.F. R. 21(b)(5)(A).

Further, Appellant has standing to raise this issue. The injury, deprivation of his constitutional right to bear arms, is caused by the Government's unconstitutional indexing in the National Instant Criminal Background Check System (NICS) that is promulgated by the indorsement in the GCMO and prevents him from purchasing or possessing firearms. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (discussing standing requires (1) injury, (2) causation and (3) redressability). NICS is used nationwide by federal firearm licensees (FFL) to determine if someone is eligible to obtain a firearm. ABOUT NICS, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics
/about-nics (last visited Dec. 27, 2024). The Air Force reporting that Appellant cannot possess firearms would cause NICS to issue a "denied" response when Appellant attempted to acquire a firearm from an FFL. 28 C.F.R. § 25.6(c). This denial due to indexing has the practical effect of depriving Appellant of his right to bear arms. A finding that 18 U.S.C. § 922 does not apply to him would correct the erroneous NICS report because the Air Force is required to update NICS following

an appeal. Department of the Air Force Manual (DAFMAN) 71-102, at ¶ 4.4.3.1 (July 21, 2020) (incorporating guidance memorandum from Sept. 10, 2024), https://static.e-publishing.af.mil/production/1/saf_ig/publication/afman71-102/afman71-102.pdf (last visited Jan. 2, 2025); *see* NICS Indices, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/nics-indices (last visited Dec. 27, 2024) (noting it is the contributing agency's responsibility to remove an individual from NICS Indices if their prohibitor is no longer valid). Following this correction, NICS would not show Appellant's conviction as qualifying under 18 U.S.C. § 922, even if his conviction remains. He could then purchase and possess firearms. Therefore, correction of the erroneous indexing on the GCMO has a significant likelihood of securing the requested relief. *Utah v. Evans*, 536 U.S. 452, 464 (2002).

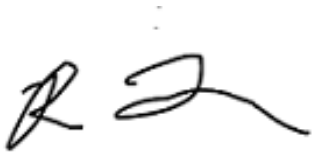
This Court has "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." *United States v. Lemire*, 82 M.J. 263, 263 at note (C.A.A.F. 2022). If this Court has the power to fix administrative errors as they relate to collateral consequences, then perforce, it also has the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence. Furthermore, the holding of *United States v. Williams*, __ M.J. __, No. 24-0015, 2024 CAAF LEXIS 501 (C.A.A.F. Sept. 24, 2024), does not apply to this case because *Williams* was

interpreting Article 66(d)(1)(A) and (2), UCMJ, 10 U.S.C. § 866 (2018), which does not apply to this case. *Id.* at *3. Therefore, this Court should grant review for the purpose of ordering correction of the order giving effect to appellant's court-martial.

Conclusion

WHEREFORE, Appellant respectfully requests that this Court grant his petition for review.

Respectfully Submitted,



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Certificate of Compliance with Rules 21 and 37

Pursuant to Rule 24(d), this Supplement to the Petition for Grant of Review complies with the type-volume limitation of Rule 21(b) because it contains 6,920 words and complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, the Government Trial and Appellate Operations Division, on January 26, 2025.

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APPENDIX A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39796 (reh)

UNITED STATES
Appellee

v.

Maxwell A. MATTHEW
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 31 October 2024

Military Judge: Matthew N. McCall (arraignment); Pilar G. Wennrich.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to E-1. Sentence adjudged on 30 May 2023 at Patrick Space Force Base, Florida.

For Appellant: Robert Feldmeier, Esquire.

For Appellee: Colonel Matthew D. Talcott, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, RICHARDSON, and KEARLEY, *Appellate Military Judges*.

Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge KEARLEY joined.

JOHNSON, Chief Judge:

Appellant's case is before this court for a third time. At Appellant's original court-martial, he was charged with one specification of wrongful possession of

child pornography on divers occasions (Specification 1) and one specification of wrongful distribution of child pornography on divers occasions (Specification 2), both offenses occurring between 30 August 2015 and 19 October 2017, and both in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] A general court-martial composed of a military judge alone found Appellant guilty, in accordance with his pleas, of wrongful possession of child pornography, as alleged in Specification 1, and attempted wrongful distribution of child pornography in violation of Article 80, UCMJ, 10 U.S.C. § 880, a lesser-included offense of the wrongful distribution offense alleged in Specification 2. After the Government informed the military judge it did not intend to offer proof of the greater offense, the military judge entered a finding of not guilty as to wrongful distribution of child pornography. The military judge sentenced Appellant to a dishonorable discharge, confinement for 17 months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant initially raised two assignments of error on appeal: (1) whether Appellant's guilty plea to attempted distribution of child pornography was provident; and (2) whether the record of trial was incomplete. During this court's initial review of the record, we determined the transcript of Appellant's arraignment was missing. Pursuant to Rule for Courts-Martial (R.C.M.) 1104(d)(1), this court remanded the record of trial for corrective action. *United States v. Matthew*, No. ACM 39796, 2020 CCA LEXIS 486, at *2 (A.F. Ct. Crim. App. 23 Dec. 2020) (order). The Government subsequently returned the record without correction, stating "[a]n authenticated transcript of Appellant's arraignment cannot be obtained because the audio recording of the hearing has been lost and no alternatives can be located." This court found the record was not verbatim as required by Article 54, UCMJ, 10 U.S.C. § 854, and R.C.M. 1103(b)(2)(B),[2] set aside the findings and sentence, and returned the record to The Judge Advocate General (TJAG) "for return to an appropriate convening authority for action consistent with R.C.M. 1103(f).[3]" *United States v. Matthew*, No. ACM 39796 (f rev), 2022 CCA LEXIS 425, at *16 (A.F. Ct. Crim. App. 21 Jul. 2022) (unpub. op.).

On remand, the convening authority referred the original Specifications 1 and 2 and the Charge to a second general court-martial. Pursuant to a pretrial

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[1] All references to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2012 ed.). Unless otherwise noted, all other references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] *Manual for Courts-Martial, United States* (2016 ed.).

[3] *Manual for Courts-Martial, United States* (2016 ed.).

agreement (PTA) between Appellant and the convening authority, the military judge accepted Appellant's conditional guilty plea to Specification 1 and the Charge. The military judge dismissed Specification 2 with prejudice pursuant to a defense motion. The military judge sentenced Appellant to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to the grade of E-1. The convening authority approved the rehearing sentence in its entirety.

Now again before us on appeal, Appellant raises five issues, which we have reordered and rephrased: (1) whether the Double Jeopardy Clause[4] prohibited a rehearing as to Specification 1 of the Charge; (2) whether the Charge and Specification 1 must be dismissed, with or without prejudice, due to violation of Appellant's R.C.M. 707 right to speedy trial; (3) whether Appellant's sentence violates Article 63, UCMJ, 10 U.S.C. § 863; (4) whether Appellant is entitled to relief for excessive post-trial delay; and (5) whether the Government can prove 18 U.S.C. § 922 is constitutional, meaning its application is consistent with the nation's historical tradition of firearm regulation, when Appellant was convicted of a nonviolent offense. We also address two matters the court identified in our review of the record: (6) an omission from the record of trial; and (7) an error in the court-martial promulgating order. We have carefully considered issue (5) and find it does not warrant discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We direct correction of the court-martial order in our decretal paragraph. As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

In April 2017, a computer application company self-reported multiple files of apparent child pornography, located on its servers and associated with a particular account, to the National Center for Missing and Exploited Children (NCMEC). NCMEC was able to identify an Internet Protocol (IP) address and email address associated with the reported account. NCMEC notified the Federal Bureau of Investigation, which obtained additional information associating Appellant with the IP address, email, and suspected child pornography. The Air Force Office of Special Investigations (AFOSI) initiated an investigation in October 2017. In November 2017, the AFOSI interviewed Appellant, who admitted to possessing and watching child pornography, including receiving and storing such material on the Internet and viewing such material on his cell phone. With Appellant's consent, the AFOSI searched his phone and found several files containing child pornography. The AFOSI also searched

[4] U.S. CONST. amend. VI.

Appellant's residence pursuant to a search warrant and found additional child pornography on electronic devices located there.

II. DISCUSSION

A. Double Jeopardy

1. Additional Background

After Appellant was arraigned for the rehearing, the Defense filed a pretrial motion to dismiss the Charge and both specifications on double jeopardy grounds. The Defense argued Appellant's re-prosecution for Specification 2 (wrongful distribution of child pornography) was barred because the military judge at the original court-martial had entered a finding of not guilty as to that specification. The Defense further argued Specification 1 (wrongful possession of child pornography) must be dismissed because Specification 1 was a lesser-included offense of, and multiplicious with, Specification 2, of which Appellant had been acquitted. In response, the Government argued neither specification was required to be dismissed because the convening authority's decision to order a full rehearing "expunged" the result of the first court-martial.

While the defense motion to dismiss was pending, Appellant and the convening authority entered a PTA which provided Appellant would plead guilty to Specification 1 and to the Charge, but not guilty to Specification 2. The PTA further provided that "upon the announcement of the findings of the court," the convening authority would "direct Trial Counsel to dismiss Specification 2 of the Charge, necessarily including its lesser included offense of attempted distribution of child pornography." The PTA further provided Appellant's guilty pleas were "conditioned on [Appellant's] ability to preserve for review the military judge's decisions concerning [Appellant's] motion to dismiss the Charge for violation of R.C.M. 707 and [his] motion to dismiss the Charge for double jeopardy."

When the court-martial reconvened on 30 May 2023, prior to entry of pleas, the military judge entered an oral ruling on the Defense's motion to dismiss for former jeopardy, which she subsequently supplemented in writing. The military judge granted the motion in part and denied it in part. She dismissed Specification 2 with prejudice, explaining "an announced decision to acquit is final" and "cannot be impeached, . . . withdrawn or disapproved." However, the military judge denied the motion with respect to Specification 1. She explained "[t]he Government is permitted to charge in the alternative as required by exigencies of proof," and that "[t]he judgment assessed at the original court-martial with respect to its finding as to [S]pecification 1 was not final, and the finding of the original [c]ourt as to [S]pecification 1 appropriately underwent appellate review and was appropriately referred for rehearing."

After the military judge announced her ruling, and following a short recess, trial counsel announced the convening authority intended "to proceed according with" the PTA, notwithstanding the ruling on the motion to dismiss. Appellant entered a plea of guilty to "the Charge and Specifications [sic]." After a thorough providency inquiry, the military judge found Appellant guilty of "Specification 1" and of the Charge. No findings were entered with respect to Specification 2.

2. Law

Double jeopardy is a question of law we review de novo. *See United States v. Driskill*, 84 M.J. 248, 252 (C.A.A.F. 2024) (citing *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019)).

> Three prohibitions against "double jeopardy" apply to courts-martial. *United States v. Rice*, 80 M.J. 36, 40 n.8 (C.A.A.F. 2020). The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Similarly, Article 44(a), UCMJ, provides: "No person may, without his consent, be tried a second time for the same offense." And Rule for Courts-Martial (R.C.M.) 907(b)(2)(C) requires dismissal of a charge or specification if "[t]he accused has previously been tried by court-martial or federal civilian court for the same offense."

Id. (ellipsis and alteration in original).

The United States Court of Appeals for the Armed Forces (CAAF) has explained "[a]pplying these three prohibitions requires multiple steps." *Id.* One question to be answered is whether the accused has been "tried twice." *Id.* This question involves determining whether jeopardy as to a particular offense has both "attached" and "terminated." "[O]nce jeopardy has attached, an accused may not be retried for the same offense without consent once jeopardy has terminated." *United States v. Easton*, 71 M.J. 168, 172 (C.A.A.F. 2012) (footnote omitted) (citing *Richardson v. United States*, 468 U.S. 317, 325 (1984)); *see also United States v. McMurrin*, 72 M.J. 697, 704 (N.M. Ct. Crim. App. 2013) ("A successful double jeopardy claim, therefore, must have two temporal components: first, that jeopardy attaches, and second, that it terminates." (citation omitted)).

In general, "jeopardy attaches pursuant to Article 44(a), UCMJ, 'when evidence is introduced.'" *Driskill*, 84 M.J. at 252 (quoting *Easton*, 71 M.J. at 172). As for termination, with regard to a finding of *guilty*, in general "[n]o proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of [Article 44, UCMJ,] until the finding of guilty has become final after review of the case has been fully

completed." 10 U.S.C. § 844(b). "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge." *United States v. Scott*, 437 U.S. 82, 90–91 (1978) (citing *Burks v. United States*, 437 U.S. 1, 1 (1978)). In contrast, a finding of *not guilty*—whether erroneous or not—is final, may not be appealed, and terminates jeopardy. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997); *United States v. Marcee*, ARMY MISC 20210550, 2022 CCA LEXIS 68, at *3–4 (A. Ct. Crim. App. 28 Jan. 2022) (unpub. op.).

In addition to attachment and termination, double jeopardy analysis requires determination "whether the accused is truly being tried twice 'for the same offense.'" *Driskill*, 84 M.J. at 252. Military courts generally apply the test announced in *Blockburger v. United States*, 284 U.S. 303, 303–04 (1932), to determine whether two offenses are the same for double jeopardy purposes, whereby the elements of each offense are compared to determine whether each offense requires proof of at least one element the other offense does not. *Driskill*, 84 M.J. at 252–53.[5] The prohibitions on double jeopardy "also 'forbid[ ] successive prosecution and cumulative punishment for a greater and lesser included offense.'" *Rice*, 80 M.J. at 40 (quoting *Brown v. Ohio*, 432 U.S. 161, 169 (1977)).

Related to the prohibition on double jeopardy is the concept of multiplicity. Multiplicity in violation of the Double Jeopardy Clause occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010) (emphasis and internal quotation marks omitted) (quoting *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)). The Government may properly charge multiplicious specifications in the alternative in order to "meet the exigencies of proof, . . . but if a

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[5] The CAAF has held "that only some 'differences are valid ones when determining what constitutes the same offense for purposes of a double jeopardy analysis involving Article 134, UCMJ.'" *Driskill*, 84 M.J. at 253 (quoting *Rice*, 80 M.J. at 43). The CAAF further noted that in *Rice* they

> held that the Double Jeopardy Clause precluded the [G]overnment from exploiting the unique nature of Article 134, UCMJ, to try a servicemember by court-martial for conduct that the [G]overnment had previously charged as violations of Title 18 offenses in federal civilian court "simply by removing a jurisdictional element" and refiling the charges under clause 1 or 2 of Article 134, UCMJ.

Id. at 256 (quoting *Rice*, 80 M.J. at 40–44).

conviction to both [specifications] ensues, one or the other must be dismissed." *United States v. Earle*, 46 M.J. 823, 825 (A.F. Ct. Crim. App. 1997) (citation omitted).

As charged in Appellant's case, the elements of the offense of distribution of child pornography (Specification 2) include that within the continental United States, on divers occasions between 30 August 2015 and 19 October 2017, Appellant: (1) "knowingly and wrongfully distributed child pornography to another," and (2) "under the circumstances, the conduct of [Appellant] was . . . of a nature to bring discredit upon the armed forces." *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*), pt. IV, ¶ 68b.b.(3). "'Distributing' means delivering to the actual or constructive possession of another." 2012 *MCM*, pt. IV, ¶ 68b.c.(3).

As charged in Appellant's case, the elements of the offense of possession of child pornography (Specification 1) include that within the continental United States, on divers occasions between 30 August 2015 and 19 October 2017, Appellant: (1) "knowingly and wrongfully possessed . . . child pornography," and (2) "under the circumstances, the conduct of [Appellant] was . . . of a nature to bring discredit upon the armed forces." 2012 *MCM*, pt. IV, ¶ 68b.b.(1). "'Possessing' means exercising control of something" and "may be direct physical custody . . . or it may be constructive . . . ." 2012 *MCM*, pt. IV, ¶ 68b.c.(5).

3. Analysis

Appellant contends his re-prosecution for Specification 1 of the Charge (wrongful possession of child pornography) was barred by the constitutional prohibition on double jeopardy. He argues Specification 1 was facially multiplicious with Specification 2 (wrongful distribution of child pornography). Therefore, he reasons, because the original court-martial acquitted him of wrongful distribution of child pornography, and this court's prior opinion expunged the guilty verdict as to the lesser included offense of possession (as well as to the lesser included offense of attempted distribution), jeopardy both attached and terminated as to Specification 1. However, we find no double jeopardy violation.

We agree with Appellant, and the Government also appears to agree, that Specification 1 is multiplicious with Specification 2. Both specifications identify identical locations and time spans for the alleged offenses. Neither specification identifies specific files or items constituting the child pornography in question. Moreover, in order to "distribute" child pornography—*i.e.*, to deliver it to the possession of another—it is necessary to exercise some control over it either physically or constructively—*i.e.*, to "possess" it. *See* 2012 *MCM*, pt. IV, ¶¶ 68b.c.(3), (5).

However, the Government is not prohibited from charging multiplicious specifications in the alternative. *Earle*, 46 M.J. at 825. Moreover, at his original court-martial Appellant was convicted of the separately charged lesser included possession offense; he has never been acquitted of it. Jeopardy attached as to the lesser included possession conviction when the military judge received evidence at the original court-martial, but it did not terminate because review of the case was never fully completed. *See* 10 U.S.C. § 844(b); *Driskill*, 84 M.J. at 252. In his initial appeal to this court, Appellant successfully appealed the conviction on grounds unrelated to the sufficiency of the evidence, which is no bar to his re-prosecution for that offense. *See Scott*, 437 U.S. at 90–91. This court's prior opinion and remand to the convening authority may have "expunged" the result of the original court-martial in the sense that the findings of guilty were set aside, but not in any sense that would bar Appellant's re-prosecution for Specification 1 of the Charge.

B. R.C.M. 707 Speedy Trial

1. Additional Background

a. Pre-Rehearing Processing

Appellant's original court-martial took place at Patrick Air Force Base, Florida, in June 2019. The original convening command, 14th Air Force, was redesignated as Space Operations Command (SpOC) in December 2019. In 2021, Space Systems Command (SSC) replaced SpOC as the general court-martial convening authority for the host unit of what is now Patrick Space Force Base (SFB).

On 21 July 2022, this court issued its prior opinion setting aside the findings and sentence and returning the record to TJAG for return to an appropriate convening authority. *Matthew*, unpub. op. at *16. On or about 15 August 2022, the Office of the Judge Advocate General delivered this court's opinion to the staff judge advocate (SJA) for SpOC. The case was subsequently referred to the commander of SSC.

On 3 October 2022, the legal office at Patrick SFB confirmed receipt of the record of trial. On 13 October 2022, the Government notified Appellant of the authorization for a full rehearing. The same day, Appellant submitted a request for administrative separation in lieu of court-martial pursuant to Chapter 6 of the Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*. On 27 October 2022, the convening authority at SSC ordered a rehearing.

On 5 December 2022, the convening authority disapproved Appellant's request for administrative separation and directed the Air Force Personnel Center (AFPC) to reassign Appellant to an active duty unit at Patrick SFB. On 7 December 2022, AFPC attached Appellant to a squadron at Patrick SFB and

established a report date of 6 January 2023. On 15 December 2022, the Government notified Appellant of his recall from excess leave and permanent change of station authorization.

Appellant demanded speedy trial on 22 December 2022.

On 20 January 2023, the convening authority excused 95 days of delay, including the period from 3 October 2022 until 5 January 2023, for purposes of the R.C.M. 707 speedy trial requirement.

Appellant was arraigned on 31 January 2023.

b. Defense R.C.M. 707 Motion to Dismiss

After the arraignment, the Defense moved to dismiss the Charge and specifications for violation of R.C.M. 707. The Defense contended the 120-day speedy trial "clock" began on or about 15 August 2022, when SpOC received this court's prior opinion authorizing a rehearing. *See Matthew*, unpub. op. at *16. In addition, the Defense contended the convening authority "abused his discretion in excusing a 95-day delay where no special circumstance caused the delay," and that the "[G]overnment's *ex parte* application for approval of delay and the [c]onvening [a]uthority's after-the-fact excusal of the delay" were "indicia of abuse of discretion." Because the R.C.M. 707 clock began on 15 August 2022 and the 95-day excusal was improper, the Defense concluded, the 120-day standard was greatly exceeded before Appellant was arraigned on 31 January 2023.

In response, the Government argued the R.C.M. 707 speedy trial clock did not start until 3 October 2022, when the record of trial was delivered to the legal office at Patrick SFB. Therefore, Appellant's arraignment on 31 January 2023 was on the 120th day and met the R.C.M. 707 standard. The Government further argued the convening authority's excusal of 95 days was reasonable and not an abuse of discretion.

The military judge denied the motion to dismiss. She agreed with the Government that the speedy trial clock began to run on 3 October 2022, when the convening authority received the record of trial; therefore, she found, Appellant was arraigned within 120 days as required by R.C.M. 707, regardless of the convening authority's exclusion of time.[6] In addition, the military judge found the convening authority excluded time "necessary to ensure [Appellant's]

[6] The military judge's written ruling contains an apparent typographical error. Her findings of fact erroneously refer to Appellant being arraigned on 24 January 2023. However, the military judge's conclusions of law refer to Appellant's arraignment on the correct date, 31 January 2023. We find this error does not substantially influence our review of this issue.

availability for trial" in accordance with R.C.M. 707(c), implying she found no abuse of discretion.

Appellant subsequently entered a PTA with the convening authority, agreeing to conditionally plead guilty to the Charge and Specification 1, but preserving appellate review of, *inter alia*, the military judge's denial of the R.C.M. 707 motion.

2. Law

In general, "[t]he accused shall be brought to trial within 120 days after the earlier of: [p]referral of charges; [t]he imposition of restraint . . . ; or [e]ntry on active duty under R.C.M. 204." R.C.M. 707(a). However,

> [i]f a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule *shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing*. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required . . . at the time of the first session under R.C.M. 803.

R.C.M. 707(b)(3)(D) (emphasis added). "[F]ailure to comply with this rule will result in dismissal of the affected charges," with or without prejudice. R.C.M. 707(d), (1); *United States v. Heppermann*, 82 M.J. 794, 803 (A.F. Ct. Crim. App. 2022).

"All . . . pretrial delays approved by a military judge or the convening authority shall be . . . excluded" for purposes of "determining whether the [120-day] period . . . has run." R.C.M. 707(c); *see also United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022) (quoting R.C.M. 707(c)). "[A] 'delay' under R.C.M. 707 [i]s 'any interval of time between events.'" *United States v. Proctor*, 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003) (quoting *United States v. Nichols*, 42 M.J. 715, 721 (A.F. Ct. Crim. App. 1995)). R.C.M. 707 does not prohibit after-the-fact approval of delays nor *ex parte* requests for excludable delay. *Guyton*, 82 M.J. at 151 (quoting *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997)); *Heppermann*, 82 M.J. at 803.

We review alleged R.C.M. 707 violations de novo. *Guyton*, 82 M.J. at 151 (citation omitted); *Heppermann*, 82 M.J. at 803 (citation omitted). However, "[w]e give substantial deference to findings of fact made by the military judge and will not overturn such findings unless they are clearly erroneous." *United States v. Fujiwara*, 64 M.J. 695, 697 (A.F. Ct. Crim. App. 2007) (citations omitted). We review a decision to approve a delay and exclude time from the 120-day period pursuant to R.C.M. 707(c) for an abuse of discretion. *See United States v. Lazauskas*, 62 M.J. 39, 41–42 (C.A.A.F. 2005). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the

court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citation omitted).

3. Analysis

The record indicates the convening authority received the record of trial on 3 October 2022. Therefore, in accordance with R.C.M. 707(b)(3)(D), this marks the earliest date the 120-day speedy trial clock would have begun to run for purposes of the rehearing. Appellant's arraignment occurred on 31 January 2023, exactly 120 days later. Therefore, the Government brought Appellant to trial for purposes of R.C.M. 707 within 120 days, and no violation of the rule occurred.

However, Appellant contends the 120-day clock actually began to run on 15 August 2022, the date SpOC received this court's opinion authorizing a rehearing. He cites DAFI 51-201, *Administration of Military Justice*, ¶ 26.8 (14 Apr. 2022),[7] which provides in part: "Receipt of decision by the SJA of the original convening authority (or the current convening authority if the original convening authority no longer exists) triggers the speedy trial clock for both rehearings on findings and rehearings on sentence only." Appellant argues the commander of SpOC was the "current convening authority" when the Office of the Judge Advocate General delivered the opinion to SpOC, and that R.C.M. 707 does not provide that the subsequent transfer of the case to another convening authority "resets" the clock. Moreover, Appellant notes DAFI 51-201, ¶ 26.8 provides the 120 days begins to run upon receipt of the appellate decision, without reference to delivery of the record of trial. Appellant further contends, as he did at his court-martial, the convening authority's excusal of 95 days of delay was an invalid blanket exclusion of time that was unwarranted by the circumstances and was an abuse of discretion. Accordingly, as the Defense argued before the military judge, Appellant contends the Government exceeded the 120-day R.C.M. 707 speedy trial clock, requiring the findings to be set aside and the charges dismissed, with or without prejudice.

We are not persuaded DAFI 51-201, ¶ 26.8 alters the two R.C.M. 707(e) requirements to start the 120-day clock for a rehearing. "The military has a

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[7] Appellant's brief purports to cite "the current version of DAFI 51-201, para. 26.8." Based on the paragraph reference, Appellant appears to be referring to the 14 April 2022 version of the instruction. However, we note that at the time Appellant submitted his brief on 28 May 2024, a new version of DAFI 51-201 had gone into effect. DAFI 51-201, *Administration of Military Justice* (24 Jan. 2024). Although it was not in effect at the times relevant to the instant appeal, we observe this newest version of DAFI 51-201 provides at ¶ 26.9 that the speedy trial clock begins once the responsible convening authority or a special trial counsel, as applicable, receives both the record of trial and the opinion authorizing or directing a rehearing.

hierarchical scheme as to rights, duties, and obligations," whereby the Manual for Courts-Martial takes precedence over service regulations. *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (citation omitted). To the extent a service regulation provides additional "rights" to a servicemember, those "rights may not conflict with a higher source." *Id.* R.C.M. 707(b)(3)(D) provides the 120-day clock for a rehearing begins when the convening authority has received *both* the appellate court decision *and* the record of trial. We find DAFI 51-201, ¶ 26.8 is best understood not as contradicting R.C.M. 707(b)(3)(D), but as providing additional guidance as to how one of the two criteria is to be interpreted, *i.e.*, receipt of the appellate decision. Specifically, DAFI 51-201, ¶ 26.8 explains the Rule's reference to "the responsible convening authority" means receipt by either "the original convening authority" or, if the original convening authority no longer exists, "the current convening authority." We do not understand the meaning of the provision is to dispense with the R.C.M. 707(b)(3)(D) requirement that the record of trial also be received in order to start the speedy trial clock. *Cf. United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018) (quoting *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)) (explaining courts "typically seek[ ] to harmonize independent provisions of a statute").

Because the Government initiated the rehearing within 120 days of the commencement of the speedy trial clock on 3 October 2022, it is unnecessary to address the convening authority's exclusion of time.

C. Article 63, UCMJ

1. Law

Article 63, UCMJ (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)),[8] provides that "[u]pon a rehearing . . . no sentence in excess of or more severe than the original sentence may be approved." As a general rule, "offenses on which a rehearing . . . has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial or rehearing." R.C.M. 810(d)(1). "In adjudging a sentence not in excess of or more severe than one imposed previously, a court-martial is not limited to adjudging the same or a lesser amount of the same type of punishment formerly adjudged." *United States v. Turner*, 34 M.J. 1123, 1125 (A.F.C.M.R. 1992) (quoting R.C.M. 810(d), Discussion (*Manual for Courts-Martial, United States* (1984 ed.))). "[T]he application of the Article 63[, UCMJ,] limitation in any case

[8] Based on the date of the offense, the version of Article 66, UCMJ, in the 2016 *MCM* applies in this case.

cannot be reduced to a specific formula." *United States v. Altier*, 71 M.J. 427, 428 (C.A.A.F. 2012) (citations omitted).

A general court-martial sentence that includes confinement for more than six months, or for any period of confinement in addition to a dishonorable or bad-conduct discharge or dismissal, results in forfeiture of all pay and allowances during any period of confinement or parole. 10 U.S.C. §§ 858b(a)(1), (2).

2. Analysis

As described above, Appellant's first court-martial convicted him of one specification of wrongful possession of child pornography on divers occasions and one specification of attempted wrongful distribution of child pornography on divers occasions, in violation of Articles 134 and 80, UCMJ, respectively. Appellant was originally sentenced to a dishonorable discharge, confinement for 17 months, and reduction to the grade of E-1. At his rehearing, the military judge found Appellant guilty of one specification of wrongful possession of child pornography on divers occasions and sentenced him to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to the grade of E-1.

Appellant contends the rehearing sentence violates Article 63, UCMJ, in two respects. First, he contends the adjudged forfeiture of all pay and allowances for 12 months resulted in a sentence impermissibly "in excess of" his original sentence, which included no adjudged forfeiture of pay or allowances. Second, Appellant contends the adjudged 12 months in confinement renders his rehearing sentence "more severe than" his original sentence which included 17 months of confinement because it represented a greater percentage of the maximum imposable term of confinement, which was only 10 years at the rehearing as compared to 30 years at the original trial. *See* 2012 *MCM*, pt. IV, ¶¶ 4.e., 68b.e. We address each argument in turn.

With regard to the adjudged forfeitures, we first note Article 63, UCMJ, applies to the "sentence" rather than to individual punishments. Moreover, the applicable precedent in this area indicates it is the original and rehearing sentences as a whole that are to be compared for purposes of Article 63, UCMJ, rather than the individual sentence components. *See, e.g.*, *Turner*, 34 M.J. at 1125. For example, in *Turner*, our predecessor court cited *United States v. Kelley*, 17 C.M.R. 259 (C.M.A. 1954), and *United States v. Smith*, 31 C.M.R. 181, 182 (C.M.A. 1961), for the proposition that where the original sentence included a bad-conduct discharge, any punishment less severe than a bad-conduct discharge could be adjudged at a rehearing, regardless of the fact it had not been imposed at the original court-martial. *Turner*, 34 M.J. at 1125. It follows that forfeitures being adjudged in the rehearing but not in the original proceeding does not necessarily indicate a violation of Article 63, UCMJ; a

more holistic assessment of each entire sentence is required. Notably, Appellant's original punishment of a dishonorable discharge was more severe than his rehearing punishment of a bad-conduct discharge, *see United States v. Mitchell*, 58 M.J. 446, 449 (C.A.A.F. 2003), and his original punishment of confinement for 17 months was more severe than his rehearing punishment of confinement for 12 months. In addition, we note the adjudged forfeiture at the rehearing would have little or no practical effect on Appellant, because Article 58b(a), UCMJ, 10 U.S.C. § 858b(a), would also have had the effect of forfeiture of all of Appellant's pay and allowances during his 12-month term of confinement (or parole).

With regard to the percentages of the maximum imposable sentences adjudged at each court-martial, Article 63, UCMJ, prohibits a rehearing "sentence in excess of or more severe than the original sentence." This indicates a direct comparison of the sentences from each proceeding. There is no "specific formula" for determining the relative severity of sentences, *Altier*, 71 M.J. at 428, to include no requirement to calculate relative percentages of maximum confinement terms where there has been a change in the convicted offenses for which the accused was sentenced. Appellant draws our attention to no case applying such an analysis. With this understanding, we find 12 months of confinement is in fact less severe than 17 months of confinement.

Accordingly, we find Appellant's rehearing sentence to a bad-conduct discharge, confinement for 12 months, total forfeiture of pay and allowances for 12 months, and reduction to the grade of E-1 is not in excess of or more severe than his original sentence to a dishonorable discharge, confinement for 17 months, and reduction to the grade of E-1 in violation of Article 63, UCMJ.

Appellant makes two related arguments that warrant brief mention. First, he contends the SJA's advice to the convening authority that the latter "d[id] not have the authority to disapprove, commute, or suspend, in whole or in part," Appellant's term of confinement was incorrect. In general, such advice is a correct statement of the limitation on a convening authority's ability to modify a sentence of confinement for more than six months. *See* 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*). However, Appellant contends such advice was incorrect in this case because the convening authority had an independent duty under Article 63, UCMJ, not to approve a sentence in excess of the one adjudged at the original court-martial. As described above, Appellant contends his 12-month term of confinement from the rehearing was in excess of his original 17-month term of confinement when measured as a percentage of the maximum imposable sentence. However, as we have determined Appellant's rehearing sentence did not violate Article 63, UCMJ, the convening authority had no cause to modify the sentence on that basis. Accordingly, the usual

Article 60, UCMJ, limitations on the convening authority applied, and Appellant is not entitled to relief on the basis of the SJA's advice.

Second, at the conclusion of Appellant's argument with respect to Article 63, UCMJ, he includes the following: "If this Court declines to give life to the phrase 'more severe' in Art[icle] 63, UCMJ, this Honorable Court should find, for the same reasons as above, that the sentence is inappropriate under Article 66, UCMJ[, 10 U.S.C. § 866,] and re-assess it to reach the same result." Here Appellant invokes this court's duty to affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Having given such individualized consideration to Appellant, we conclude Appellant's sentence is not inappropriately severe, either in light of the sentence originally adjudged or on any other basis.

D. Post-Trial Delay

1. Law

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial," "where the record of trial is not docketed by the [Court of Criminal Appeals (CCA)] within thirty days of the convening authority's action," or "where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA]." *Id.* at 142.[9]

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable

[9] In *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020), this court adapted the *Moreno* thresholds for facially unreasonable delay to the new post-trial processing regime that went into effect in 2019. Specifically, *Livak* established an aggregated 150-day standard for facially unreasonable delay from sentencing to docketing with the CCA for cases referred to trial on or after 1 January 2019. *Id.* at 633. However, the original *Moreno* standards apply in Appellant's case.

prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) "particularized" anxiety and concern "that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

We review de novo an appellant's entitlement to relief for post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

2. Analysis

Appellant contends he is "due relief for post-trial delay," citing the 18-month *Moreno* standard for facially unreasonable appellate delay. *See Moreno*, 63 M.J. at 142. He specifies four particular periods of delay which he contends are the responsibility of either the Government or of this court. First, Appellant cites "the [G]overnment's loss of the record of trial," referring to the court reporter's loss of the audio recording of the arraignment of his original court-martial, which ultimately resulted in this court setting aside the findings and sentence from that proceeding. Second, Appellant cites the lapse of time from when his original court-martial was initially docketed with this court on 23 October 2019 until it issued its prior opinion on 21 July 2022. Third, Appellant cites the delay between this court's return of the record to TJAG and his arraignment for the rehearing on 31 January 2023, addressed in more detail in our analysis of the alleged violation of R.C.M. 707 *supra*. Fourth, Appellant cites the delay between his rehearing sentencing on 30 May 2023 and the docketing of the record with this court on 28 March 2024. Appellant does not allege any specific prejudice from the delays he cites.

As an initial matter, we note Appellant appears to analyze the entire period of time from his original sentencing on 20 June 2019 onward as one extended post-trial period to be measured against the *Moreno* standards for facially unreasonable delay, and in particular the 18-month appellate delay standard. We disagree. In *Moreno*, the CAAF stated it would "apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA]." *Id.* This court previously rendered a decision on Appellant's appeal of his original court-martial, which resolved in his favor one of the issues he had raised to this court. *Matthew*, unpub. op. at *16. Therefore, we find there are two distinct post-trial and appellate periods for purposes of our *Moreno* analysis.

First we consider the post-trial and appellate delay preceding this court's prior opinion. The original convening authority took action on the sentence on 13 October 2019, less than 120 days from sentencing, and the record was docketed with this court on 23 October 2019, less than 30 days from action. Accordingly, there was no facially unreasonable post-trial delay at that point under *Moreno*, 63 M.J. at 142. However, this court did exceed the 18-month *Moreno* standard for appellate delay.[10] Because Appellant has not alleged qualifying prejudice under *Moreno*, and because we find none, a due process violation would exist only if the delay was so egregious as to negatively affect public perception of the fairness and integrity of the military justice system. *Toohey*, 63 M.J. at 362. We find it was not so egregious. Several factors contribute to this conclusion, including but not limited to the following. Appellant moved for and was granted eight enlargements of time in which to file his assignments of error. According to the defense filings, Appellant was released from confinement prior to the sixth motion for enlargement of time, submitted on 12 June 2020, well before he even submitted his original assignments of error. Accordingly, at no point has Appellant suffered oppressive incarceration as a result of appellate delay. In addition, over two months of delay was attributable to this court returning the record in an effort to correct the incomplete transcript; although this delay was not attributable to Appellant, remand was a reasonable measure to address a deficiency specifically raised by the Defense. Furthermore, this court's opinion set aside the findings and sentence in their entirety, leaving no sentence against which to award relief.

The next period of delay Appellant cites—the delay between this court's return of the record to TJAG and Appellant's arraignment for the rehearing—is not in fact a period of post-trial delay. At that point, Appellant's first appeal had been resolved in his favor, and his case was then in a pretrial posture preceding his rehearing. Delays during this phase are properly evaluated in light of pretrial speedy trial requirements, such as the alleged R.C.M. 707 violation Appellant raised separately which we analyzed *supra*, rather than under *Moreno*. Accordingly, we find no violation of Appellant's right to timely post-trial and appellate review on this basis.

Turning to the delay following Appellant's rehearing, Appellant was sentenced for a second time on 30 May 2023, and the convening authority took action on the rehearing 248 days later on 2 February 2024. This period significantly exceeded the 120-day *Moreno* standard for a facially unreasonable delay. In addition, Appellant's record was docketed with this court on 28 March

[10] We assume for purposes of our analysis that this court's order 23 December 2020 order returning the record to TJAG for corrective action was not a "decision" on the case within the meaning of *Moreno*, 63 M.J. at 142.

2024, 55 days after the convening authority took action, which exceeds the 30-day *Moreno* standard. Accordingly, we have considered the four *Barker* factors; but once again, because Appellant has not identified any cognizable prejudice and we perceive none, no due process violation exists unless the delay was so egregious as to impugn the fairness and integrity of the military justice system. *Toohey*, 63 M.J. at 362. As reasons contributing to the delay, the Government cites low paralegal manning in the servicing legal office; a complicated earlier court-martial that took priority in post-trial processing over Appellant's rehearing; and 61-day delay in delivering the record of trial to civilian trial defense counsel's overseas location due to armed conflict in the region. Although these cited reasons do not provide a complete or convincing explanation for the facially unreasonable delays, in the absence of prejudice to Appellant we do not find the delay so egregious as to constitute a due process violation.

Furthermore, recognizing our authority under Article 66, UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude no such relief is warranted.

E. Incomplete Record

1. Additional Background

Upon reviewing the record, this court noted an apparent omission in the record the parties did not identify. At one point in the court-martial, trial counsel offered for the record Appellate Exhibit (AE) XI, the Government's response to the Defense's motion to dismiss the Charge and specification for the alleged R.C.M. 707 violation, which we have analyzed *supra*. After some initial confusion and clarification by the military judge, trial counsel identified AE XI as a 27-page document, including 21 pages of attachments. However, the version of AE XI contained in the original record consists of only the six-page government response, which lists nine attachments that are not included.

On 30 September 2024, this court issued an order to the Government to "show good cause as to why this court should not remand the record for correction under [R.C.M.] 1112(d), or take other corrective action." In response, the Government moved to attach a 1 October 2024 declaration from the superintendent of the Patrick SFB legal office with an electronic version of what he asserts to be the 27-page version of AE XI, including the attachments. The declaration states this version was provided via email to the Government Trial and Appellate Operations Division on 1 October 2024. The Government's response to the show cause order asserts "there is no utility in returning the record for correction" at this point because this court can now review the

missing attachments and "assess whether Appellant was prejudiced by their omission." The Government further contends additional "delay is unnecessary in this case especially considering Appellant alleged unreasonable post-trial delay in his assignments of error." Appellant did not oppose the Government's motion to attach or otherwise respond to the Government's response to the show cause order. This court granted the Government's motion to attach.

2. Law

A complete record of the proceedings, including all exhibits, must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2); *see also* R.C.M. 1112(b)(6) (providing the record of trial shall include all exhibits). Whether a record of trial is complete is a question of law we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted).

"[A] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the [G]overnment must rebut." *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citation omitted), *aff'd*, 65 M.J. 190 (C.A.A.F. 2007). However, "[i]nsubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included). We approach the question of what constitutes a substantial omission on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted). "In assessing either whether a record is complete . . . the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *Davenport*, 73 M.J. at 377 (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)) (additional citation omitted). "Omissions are quantitatively substantial unless 'the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.'" *Id.* (omission in original) (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

3. Analysis

We begin with a clarification of the significance of this court granting the Government's motion to attach the declaration and purported correct version of AE XI. As we explained in similar circumstances in another case:

> We understand this to mean that we can consider the [attached matter] in deciding whether the Government has rebutted the presumption of prejudice on appeal. To be clear, we are not holding that the record of trial is now complete . . . . If the

> Government sought to make the record of trial complete, it should have requested our court order a certificate of correction.

United States v. King, No. ACM 39583, 2021 CCA LEXIS 415, at *29 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.), *aff'd*, 83 M.J. 115 (C.A.A.F. 2023).

In the instant case, we find the omission was substantial. The missing attachments presumably formed part of the basis for the military judge's findings of fact in her ruling on the R.C.M. 707 motion to dismiss, which was itself significant for our analysis of Appellant's assignment of error. However, we find the presumption of prejudice has been rebutted under the circumstances of this case. The facts that control our resolution of the R.C.M. 707 issue—notably including *inter alia* that the record of trial was delivered to Patrick SFB on 3 October 2022—are established by other exhibits in the record. Accordingly, we are able to complete our Article 66, UCMJ, review, and Appellant has not been prejudiced by the omission.

F. Court-Martial Order

The 2 February 2024 court-martial order promulgating the results of the rehearing contains an error. The order incorrectly indicates Appellant pleaded "not guilty" to Specification 2 of the Charge, which was subsequently "Withdrawn and Dismissed with Prejudice." As described *supra* in relation to Appellant's assertion of double jeopardy, the military judge dismissed Specification 2 with prejudice prior to Appellant entering his pleas. Appellant did not enter a plea of "not guilty," and the specification was not "withdrawn." Accordingly, we direct correction of the court-martial order in our decretal paragraph.

III. CONCLUSION

We direct publication of a new court-martial order with the following corrections with regard to Specification 2 of the Charge: for the "Plea," delete "NG" and replace with "None;" and for the "Finding," delete "Withdrawn and Dismissed with Prejudice" and replace with "Dismissed with Prejudice." The findings and sentence as approved are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c) (2016 *MCM*). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court