**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| **UNITED STATES**, *Appellee* | ) | BRIEF ON BEHALF OF THE UNITED STATES |
| v. | ) | Crim. App. No. 40185 |
| Airman First Class (E-3) **MICHAEL A. VALENTIN-ANDINO** United States Air Force *Appellant.* | ) | USC Dkt. No. 24-0208/AF |
| | ) | 5 December 2024 |

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# BRIEF ON BEHALF OF THE UNITED STATES

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REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 37747

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JENNY LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 35837

MATTHEW TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

## INDEX OF BRIEF

# TABLE OF AUTHORITIES

## SUPREME COURT OF THE UNITED STATES



## COURT OF APPEALS FOR THE ARMED FORCES

**AIR FORCE COURT OF CRIMINAL APPEALS**



**SERVICE COURTS OF CRIMINAL APPEALS**



**STATUTES**

## OTHER AUTHORITIES

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

## ISSUES PRESENTED

**I.**

**WHETHER "APPROPRIATE RELIEF" FOR EXCESSIVE POST-TRIAL DELAY UNDER ARTICLE 66(d)(2), UCMJ, ALSO REQUIRES "MEANINGFUL RELIEF."**

**II.**

**WHETHER THE AIR FORCE COURT ERRED BY FAILING TO AWARD "MEANINGFUL RELIEF" DESPITE FINDING THAT RELIEF WAS WARRANTED PURSUANT TO ARTICLE 66(d)(2), UCMJ, AND UNITED STATES v. TARDIF, 57 M.J. 219 (C.A.A.F. 2002), FOR UNREASONABLE POST-TRIAL DELAY.**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

## STATEMENT OF THE CASE

Appellant's statement of the case is correct.

## STATEMENT OF THE FACTS

On 19 May 2021, Appellant was convicted of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ). (JA at 44). Appellant was sentenced on 20 May 2021 to a mandatory dishonorable discharge, confinement for 90 days, and reduction to the rank of Airman Basic (E-1). (JA at 45-46). Initially, the record of trial (ROT) was docketed with the Air Force Court of Criminal Appeals (AFCCA) on 6 October 2021. United States v. Valentin-Andino, 83 M.J. 537, 540 (A.F. Ct. Crim. App. 2023). Following ten enlargements of time, Appellant filed his first assignment of errors brief with AFCCA on 31 October 2022. (App. Br. at 4). On 30 January 2023, about 16 months after docketing, AFCCA found that the ROT was substantially incomplete and remanded the case for correction. Valentin-Andino, 83 M.J. at 541, 544.

The record was re-docketed with AFCCA on 20 April 2023. (JA at 20). At that point, documentation showing that the convening authority served Appellant with victim matters and Appellant's updated deferment request to the convening authority were missing from the ROT. (JA at 7). AFCCA issued a Show Cause Order on 28 September 2023, requiring that the Government show "good cause as to why [AFCCA] should not remand the record for correction again or take other corrective action." (JA at 7, 19).

On 10 October 2023, the Government responded with a declaration from the Chief of Military Justice at RAF Lakenheath. (JA at 21-23, 30). The Chief of Military Justice was able to locate the missing documents and provided them, which the Government attached to their response to the Show Cause. (JA at 21, 30). AFCCA published their second opinion in this case on 7 June 2024, about 13.5 months after the second docketing. (JA at 1).

AFCCA did not find a due process violation or prejudice to Appellant for the post-trial delays under United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). The court also found that the delay was not "so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system" under United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). (JA at 10). However, using the factors set out in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), AFCCA found that sentencing relief was

warranted under Article 66(d)(2) or United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002) for "gross indifference to post-trial processing" and "a systemic problem indicating institutional neglect." Id. AFCCA did not disturb Appellant's dishonorable discharge and confinement of 90 days. (JA at 12). But the court disapproved part of Appellant's reduction in grade, affirming reduction only to E-2, rather than to E-1, as he was originally sentenced. (Id.)

## SUMMARY OF THE ARGUMENT

Courts of Criminal Appeal (CCAs) may grant "appropriate relief" under Article 66(d)(2), UCMJ for excessive delay in the processing of a court-martial after entry of judgment. But "appropriate" is not synonymous with "meaningful," despite Appellant's attempt to extrapolate such an interpretation from United States v. Pflueger, 65 M.J. 127 (C.A.A.F. 2007). Instead of adopting Appellant's argument, this Court should reiterate the observations it has made in United States v. Toohey, 63 M.J. 353 (C.A.A.F. 2006) and/or United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006): that "meaningful" relief might not necessarily be "appropriate." Rather than requiring a CCA to provide "meaningful" relief for post-trial delay under Article 66(d)(2), this Court should hold as follows: First, that "meaningfulness" is one factor that a CCA can consider in deciding whether granting relief would be "appropriate;" and second, that even when "meaningful" relief could be provided, a CCA has discretion *not* to grant such "meaningful"

relief if it would be inappropriate under the circumstances. Such holdings are proper because (1) Pflueger was incorrectly decided; (2) Pflueger's holding should not be expanded to Article 66(d)(2) under stare decisis because meaningful relief will not always be appropriate; (3) the plain meaning of "appropriate" is not "meaningful;" and (4) other statutory construction arguments do not support that "meaningful" and "appropriate" are synonymous.

As for Appellant's specific case, AFCCA did not abuse its discretion by granting Appellant sentencing relief for excessive post-trial delay through restoration of one of his reduced grades (E-1 to E-2). Appellant suffered no prejudice from the post-trial delay, and other relief would have been disproportionate considering the lack of harm caused by the delay. Even if this Court were to require "meaningful" relief for post-trial delay, this Court should hold that "meaningful" relief does not necessarily require a monetary benefit to the appellant. Here, disapproval of the reduction in grade provided Appellant with the benefit of a less-stigmatizing punishment. It was well within AFCCA's broad discretion to award such relief. As a result, this Court should affirm the decision of the Air Force Court of Criminal Appeals.

## ARGUMENT

### I.

**"APPROPRIATE RELIEF" AND "MEANINGFUL RELIEF" ARE NOT SYNONYMOUS UNDER ARTICLE 66(d)(2), UCMJ, BECAUSE SOME "MEANINGFUL" RELIEF MAY NOT BE "APPROPRIATE." A COURT OF CRIMINAL APPEALS HAS DISCRETION TO CHOOSE NOT TO AWARD "MEANINGFUL" RELIEF FOR EXCESSIVE DELAY UNDER ARTICLE 66(d)(2), IF SUCH RELIEF IS NOT APPROPRIATE UNDER THE CIRCUMSTANCES.**

#### *Standard of Review*

Questions of statutory interpretation are reviewed de novo. United States v. Flores, 84 M.J. 277, 280 (C.A.A.F. 2024).

#### *Law and Analysis*

In the *Manual for Courts-Martial, United States* (2019 ed.) (MCM), Congress added Article 66(d)(2), *Error Or Excessive Delay*:

> In any case before the Court of Criminal Appeals under subsection (b), the Court may provide *appropriate* relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c).

(Emphasis added).

Appellant argues that Pflueger should control this Court's interpretation of

Article 66(d)(2) and that "appropriate" relief requires "meaningful" relief. But this Court's interpretation of the term "appropriate relief" in Article 66(d)(2) must be more nuanced than Appellant suggests and should recognize that sometimes "meaningful" relief might not be "appropriate" for a CCA to grant. This Court should conclude that "meaningfulness" is one factor that a CCA can consider in deciding whether to grant "appropriate" relief, but that a CCA is not required to grant "meaningful" relief if it would not be appropriate to do so. This Court should reach that conclusion because (1) Pflueger was incorrectly decided; (2) Pflueger's holding should not be expanded to Article 66(d)(2) under stare decisis because meaningful relief will not always be appropriate; (3) the plain meaning of "appropriate" is not "meaningful;" and (4) other statutory construction arguments do not support that "meaningful" and "appropriate" are synonymous.

A. Pflueger incorrectly directed the CCA to provide "meaningful" relief for post-trial delay, when it should have given the CCA more discretion.

Appellant's case rests heavily on the theory that Pflueger definitively found "appropriate" meant "meaningful" in the context of sentencing relief and that this definition carried over into Article 66(d)(2). But Plueger never explicitly held the two words were synonymous, and in any event, Pflueger was poorly reasoned and erroneously decided.

In Pflueger, this Court addressed whether NMCCA granted "meaningful relief" when it disapproved the appellant's adjudged bad conduct discharge that had previously been suspended and remitted by the convening authority prior to NMCCA's opinion. Id. at 128. NMCCA found sentencing relief was appropriate under United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), but it provided sentencing relief by approving the appellant's confinement and reduction to E-1 and disapproving appellant's bad conduct discharge (BCD). Id. Because the convening authority had already suspended and then remitted the appellant's BCD by the time NMCCA considered the appellant's case on appeal, this relief had no impact on Appellant. Id.

This Court reviewed whether NMCCA provided the appellant with "meaningful sentencing relief." Id. The Court reviewed de novo whether relief was meaningful as a question of law. Id. To answer that question, this Court compared appellant's situations both before and after NMCCA found there was a Tardif error. Id. at 130. This Court found there was no difference because, with or without NMCCA's relief, appellant would not have received the BCD because it was already remitted. Id. Because of that, this Court found that NMCCA's ruling did not provide the appellant with "meaningful relief." Id. This Court remanded the case to NMCCA and instructed the lower court "to determine and award

meaningful sentence relief to Appellant pursuant to its powers under Article 66(c) and the principles set forth in [Tardif]." Id. at 131. Pursuant to this directive, NMCCA reduced appellant's confinement period and his reduction from E-1 to E-2 so that appellant would receive the difference in pay. United States v. Pflueger, 2008 CCA LEXIS 392, at *5 (N-M Ct. Crim. App. Nov. 13, 2008) (unpub. op).

The first concerning feature of the Pflueger opinion is the origin of the term "meaningful relief." It is unclear where the requirement for "meaningful" relief stemmed from; Pflueger cited Tardif as the basis for providing meaningful sentencing relief despite no prejudice, id. at 130, but Tardif did not dictate that sentencing relief be meaningful in those circumstances. The word "meaningful" does not appear at any point in the Tardif opinion. In that opinion, this Court said that the CCAs "may grant appropriate relief through its review of sentence appropriateness under Article 66(c)." Tardif, 57 M.J. at 221. For relief for post-trial delays, this Court found CCAs should neither "tolerat[e] the intolerable" nor give "an appellant a windfall." Id. at 225. The CCAs are to "to tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id.

Pflueger's unexplained focus on "meaningful" relief is also incompatible with two opinions issued the prior year: United States v. Toohey, 63 M.J. 353 (C.A.A.F. 2006) and United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006), both of which were cases published by this court the year prior. In Toohey,

this Court remanded the case back to NMCCA for consideration of sentencing relief for a post-trial due process violation. 63 M.J. at 363. This Court specifically said that it "[would] not attempt to craft any relief [itself] and [it would] leave that determination to the court below." Id. This Court then directed NMCCA to "afford the parties the opportunity to address the issue of meaningful relief in light of the due process violation and the circumstances of this case." Id. When addressing the six-year delay in that case, this Court pointed out that "meaningful options for relief, *if appropriate*, [were] now limited." Id. (Emphasis added).

In Rodriguez-Rivera, this Court declined to grant sentencing relief for a prejudicial due process violation following a six-year appellate delay. 63 M.J. at 386. The Court reached that decision because, after "consider[ing] the totality of the circumstances and the types of relief that may be appropriate here," it found that "to fashion relief that would be actual and meaningful in this case would be disproportionate to the possible harm generated from the delay." Id. It granted no additional "appropriate" relief for the post-trial delay. Id.

Both Toohey and Rodriguez-Rivera confirm that there is a difference between "meaningful" relief and "appropriate" relief – and that "meaningful" relief might not always be "appropriate" for the CCA to grant. But despite the language in both these cases, this Court did not address the requirement that relief be

"appropriate" when directing NMCCA to provide relief in Pflueger. It only directed NMCCA to provide "meaningful" relief, without any explanation of where that requirement came from. Pflueger, 65 M.J. at 131. Pflueger's lack explanation or authority for requiring "meaningful," rather than "appropriate" relief on remand makes the opinion poorly reasoned.

The next concerning feature of Pflueger is the standard of review used. It is unclear why this Court applied only a de novo standard of review in Pflueger in evaluating the relief for post-trial delay provided by the CCA. The Court, quoting United States v. Bodkins, 60 M.J. 322, 324 (C.A.A.F. 2004), noted that the Courts of Criminal Appeal have "broad discretion to grant or deny relief for unreasonable or unexplained [post-trial] delay." 65 M.J. at 128. Despite the CCA's discretion in granting relief, Pflueger decreed that whether sentencing relief was meaningful was a question of law reviewed de novo. The Court provided no case law to support that principle. At best, this Court applied the de novo standard because it was addressing specifically whether the disapproved BCD had any effect on the appellant as a matter of law, as shown by this Court's analysis of Article 58b and Article 71 concerning automatic forfeitures. Plueger, 65 M.J. at 129-130. But such an analysis disregards the highly discretionary nature of the CCA's authority to grant sentence relief under Article 66, UCMJ. Even if this Court found that the CCA in Pflueger had not granted "meaningful" relief as a matter of law, the

overarching question should have been whether the CCA abused its discretion in granting the relief that it did.

This Court reviews "a Court of Criminal Appeals' sentence appropriateness determination for abuse of discretion." United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016) (citing United States v. Nerad, 69 M.J. 138, 142 (C.A.A.F. 2010)). *See also* United States v. Harris, 53 M.J. 86, 88 (C.A.A.F. 2000) ("This Court will set aside a sentence reassessment by a Court of Criminal Appeals only when necessary to correct an obvious miscarriage of justice or an abuse of discretion.") Caselaw after Pflueger continues to support this Court using an abuse of discretion standard, rather than a de novo standard of review. *See* United States v. Flores, 84 M.J. 277, 282 (C.A.A.F. 2024) ("In reviewing the exercise of this power, we ask if the CCA abused its discretion or acted inappropriately—i.e., arbitrarily, capriciously, or unreasonably—as a matter of law,'" (quoting Nerad, 69 M.J. at 142)).

The third concerning aspect of Pflueger is the Court's remand order to NMCCA. This Court should not have directed NMCCA to provide the appellant with "meaningful" relief, because it should "not attempt to craft any relief [itself] and [it should] leave that determination to the court below." Toohey, 63 MJ at 363. Instead, if the Court believed that the CCA abused its discretion by providing relief that had no practical effect, it should have directed NMCCA to perform

another Article 66 review of the sentence with the understanding that disapproval of the BCD did not provide any actual relief to the appellant. Pflueger, 65 MJ at 130. That order would have given NMCCA the opportunity to evaluate whether it could grant other forms of sentence relief that were *appropriate* under the circumstances. After all, like in Rodriguez-Rivera, it is possible that any meaningful relief NMCCA could have given would have been inappropriate for that particular appellant. *See* 63 M.J. at 386 (recognizing in the Moreno context that meaningful relief would have been "disproportionate to the possible harm generated from the delay," and therefore would have been inappropriate). In the context of Tardif relief, it should have been the CCA's role to decide if meaningful relief was appropriate, rather than this Court dictating that the CCA must provide some sort of "meaningful" relief.

B. Under a stare decisis analysis, this Court should disregard or overturn Pflueger.

This Court should decline to apply Pflueger to Appellant's case under stare decisis. While the "doctrine of stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003), this principle "is not an inexorable command; rather, it is a

principle of policy and not a mechanical formula of adherence to the latest decision." United States v. Falcon, 65 M.J. 386, 390 (C.A.A.F. 2008) (internal citation omitted). "[S]tare decisis is a principle of decision making, not a rule, and need not be applied when the precedent at issue is "unworkable or poorly reasoned." United States v. Cabuhat, 83 M.J. 755, 766 (A.F. Ct. Crim. App. 2023) (citing United States v. Quick, 74 M.J. 332, 336 (C.A.A.F. 2015) (footnote omitted)).

When analyzing precedent under stare decisis, this Court considers four factors: (1) "whether the prior decision is unworkable or poorly reasoned;" (2) "any intervening events;" (3) "the reasonable expectations of servicemembers;" and (4) "the risk of undermining public confidence in the law." United States v. Blanks, 77 M.J. 239, 242 (C.A.A.F. 2018) (internal citations omitted).

This Court should decline to follow Pflueger because (1) the opinion was poorly reasoned and is unworkable in practice; (2) Article 66(d)(2) represented an intervening event; (3) abandoning Pflueger would not alter the expectations of servicemembers; and (4) there is a greater risk to public confidence if all sentencing relief must be meaningful rather than appropriate.

1. *The requirement for meaningful relief was poorly reasoned and is presently unworkable under both Tardif and Article 66(d)(2).*

As described at length above, many aspects of Pflueger were poorly reasoned. But they will also prove unworkable in practice too.

If this Court uses Pflueger to direct a CCA to provide "meaningful relief" it would hamstring the "broad discretion" authority held by the service Courts of Criminal Appeals to award sentencing relief. Bodkins, 60 M.J. at 324. Article 66(d)(2) says the Courts of Criminal Appeal *may* award appropriate relief, and relief under Tardif was similarly highly discretionary. Under either Article 66(d)(2) or Tardif, even if the lower court finds that the post-trial delay was unreasonable, the lower court is *still* not obligated to award sentencing relief, let alone relief that is "meaningful" as Appellant would have it defined. The CCAs should retain that discretion as it is provided in Article 66(d)(2) and Tardif, without Pflueger's suggestion that CCAs must provide meaningful relief, even if it is not appropriate.

The de novo standard of review used in Pflueger is also unworkable. Since under Tardif and Article 66(d)(2) a CCA *may,* but is not required to, provide relief for post-trial delay, the decision is still discretionary. Such a discretionary decision should not be reviewed de novo when this Court cannot itself provide relief for non-prejudicial post-trial delay. These unworkable aspects of Pflueger weigh in favor of overruling the opinion or declining to follow it going forward when interpreting Article 66(d)(2).

2. *A significant intervening event occurred when Congress created Article 66(d)(2).*

The creation of Article 66(d)(2) was a significant intervening event. Looking at the simple language of Article 66(d)(2) indicates that Congress did not intend to codify Pflueger. There is no mention of "meaningful" in Article 66(d)(2), only "appropriate." Congress had the chance to say "meaningful" when creating a standard for providing relief within Article 66(d)(2) and it did not; instead, Congress continued to give the military appellate courts wide discretion regarding sentencing relief for post-trial delays by stating that a CCA *may* grant *appropriate* relief. If anything, Article 66(d)(2) came into existence to codify Tardif, but that does *not* mean it meant to codify every case that succeeded Tardif, which is why sentencing relief is directed to be "appropriate." Congress did not substitute "meaningful" for "appropriate" because it had no intention to codify whatever principles might be gleaned from Pflueger. Congress's choice of language in Article 66(d)(2) calls into questions Pflueger's continued viability.

3. *The reasonable expectations of servicemembers will not be upset by following the plain meaning of "appropriate" in Article 66(d)(2).*

Declining to follow Pflueger will not upset reasonable expectations of servicemembers. Post-trial delay is usually caused by the government, and so the provision of relief is typically tied to actions taken by the government – not the servicemember. It will be unlikely that any servicemember will have behaved in a

certain way in reliance on the idea that this Court might review a CCA's grant of sentencing relief for post-trial delay de novo or that this Court will at some point direct a CCA to provide him "meaningful relief" for post-trial delay.

4. *Requiring sentencing relief to be "meaningful" instead of "appropriate" would undermine public confidence.*

Abandoning Pflueger would not undermine public confidence in the law. In fact, the public would have less confidence in the law if Courts of Criminal Appeal were *required* to provide meaningful sentencing relief, as occurred in Pflueger, even if that relief is not "appropriate." Toohey called for meaningful relief only "if appropriate." 63 MJ at 363. As pointed out in Rodriguez-Rivera, even a lengthy post-trial processing delay may not warrant relief if the only relief available is "disproportionate to the possible harm generated from the delay." 63 MJ at 386. The public should have confidence that appellants will not receive a windfall in sentencing relief under Article 66(d)(2), especially if there has been no showing of prejudice.

In conclusion, to the extent Pflueger suggested that a CCA must provide "meaningful" sentencing relief for post-trial delay, regardless of whether that relief is "appropriate," its reasoning should be abandoned.

C. The plain meaning of "appropriate" is not "meaningful."

Appellant also bases his argument on several theories of statutory

constructions surrounding the word "appropriate" in Article 66(d)(2). (App. Br. at 10-14). Appellant insists "appropriate" must mean "meaningful." However, each of his arguments is unpersuasive.

First, Appellant argued that this Court's reasoning in Pflueger applies to Article 66(d)(2) because the plain meaning of "appropriate" is "meaningful." (App. Br. at 9). But this claim does not survive scrutiny. This 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." United States v. Pease, 75 M.J. 180, 184 (C.A.A.F. 2016). "The ordinary-meaning rule is the most fundamental semantic rule of interpretation." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (Thomas/West 2012) (internal citations omitted). "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Id.

Following this guidance, the Court should first consider the plain meaning of both "appropriate" and "meaningful." *See* Cabuhat, 83 M.J. at 767 ("We begin with statutory construction. First, we apply the plain meaning of the phrase.").

Contrary to Appellant's assertions (App. Br. at 9), no dictionary defines

"appropriate" and "meaningful" the same way[1]:

| | Merriam-Webster | Cambridge | Dictionary.com |
|---|---|---|---|
| **Appropriate** | Especially suitable or compatible; fitting | Suitable or right for a particular situation or occasion. | Suitable or fitting for a particular purpose, person, occasion, |
| **Meaningful** | Having a meaning or purpose. | Intended to show meaning; useful, serious, or important. | Full of meaning, significance, purpose, or value. |

Each definition for appropriate and meaningful is *different* from the other, even when comparing them within the same dictionary. The single portion they share, "purpose," is not used in the same way between the two definitions. "Appropriate" is consistently defined as something "suitable," while "meaningful" only needs to have "meaning" without caveat. By these definitions, though something may be "meaningful" and have a purpose, that thing may not be "suitable" to a specific situation, and therefore might not be "appropriate."

[1] *See Merriam-Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/appropriate (last visited Dec. 3, 2024); *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/meaningful (last visited Dec. 3, 2024); *Cambridge Online Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/appropriate (last visited Dec. 3, 2024); *Cambridge Online Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/meaningful (last visited Dec. 3, 2024); *Dictionary.com*, https://www.dictionary.com/browse/appropriate (last visited Dec. 3, 2024); *Dictionary.com*, https://www.dictionary.com/browse/meaningful (last visited Dec. 3, 2024).

In light of these differences, Appellant's argument that appropriate's plain meaning is "meaningful" fails. The definitions do not share enough in common to support Appellant's contention.

D. Other statutory construction canons do not create a requirement that "appropriate" means "meaningful."

1. *"Appropriate" has no settled meaning as "meaningful" under the prior construction canon.*

Appellant argues that Pflueger "settled" the meaning of "appropriate" as "meaningful" under the prior construction canon, which means the UCMJ must also define it as such. (App. Br. at 10). The prior construction canon says "[i]f a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction, or has been given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Scalia & Bryan A. Garner, 324.

This canon does not support Appellant's argument because Pflueger is the only case Appellant cites to allege that "appropriate" had a settled meaning as "meaningful." (App. Br. at 10). But even in Pflueger, this Court did not definitively state that "appropriate" meant "meaningful." Tardif, the case that spawned Pflueger, did not call for "meaningful" sentencing relief; it only found that courts could provide "appropriate" relief even when there was no prejudice. Toohey and Rodriguez, although they used the term "meaningful relief," did not do

so without caveats. Toohey called for meaningful relief "if appropriate." 63 MJ at 363. Rodriguez-Rivera would not grant meaningful relief that was disproportionate to the harm caused by the post-trial delay because it was not "appropriate." 63 MJ at 386. Following the line from Tardif to Toohey and Rodriguez-Rivera, relief must be "appropriate," but not all "meaningful" relief will be "appropriate." These cases do not support that there is a uniform understanding in military courts that "meaningful" and "appropriate" are synonymous.

Since Pflueger never explicitly stated that "meaningful" relief and "appropriate" relief were synonymous, this Court should reject the notion that Congress intended the terms to be synonymous in Article 66(d)(2). And since Congress specifically chose to incorporate the term "appropriate relief" (rather than "meaningful relief") into the statute, this Court should conclude that, consistent with Toohey and Rodriguez-Rivera, Congress intended to signify that some "meaningful" relief might not be "appropriate" in certain circumstances.

2. *"Appropriate" does not mean "meaningful" under the presumption against implied repeal.*

Appellant next argued that because Congress did not expressly repeal Pflueger in Article 66(d)(2), appropriate must mean meaningful under that case. (App. Br. at 12-13). But the presumption against implied repeal also provides no help to Appellant. As discussed above, Pflueger did not explicitly hold that "meaningful" and "appropriate" relief were synonymous. So even if the canon

applies to statutes that adopt judicial holdings, Article 66(d)(2) could not repeal a holding that never existed.

3. *"Appropriate" is not a term of art with an imputed common law meaning*

Finally, similar to the argument for prior construction, Appellant argues that "appropriate" means "meaningful" under the common law established by Pflueger. (App. Br. at 13-14). The canon of imputed common-law meaning has a "limited scope." Carter v. United States, 530 U.S. 255, 264 (2000). It is presumed that, when "Congress borrows *terms* of art in which are accumulated the legal tradition and meaning of centuries of practice," it also "knows and adopts the cluster of ideas that were attached to each borrowed word." Id., citing Morissette v. United States, 342 U.S. 246, 263 (1952) (emphasis added). The kind of terms of art contemplated under this canon include "assault, child, defraud, estate, forge, fraud, next-of-kin, and record of conviction." Scalia & Bryan A. Garner, 320 (internal citations omitted).

"Appropriate" should not be considered a "term of art" under this canon, nor has it "accumulated settled meaning under . . . the common law" as Appellant contends. Neder v. United States, 527 U.S. 1, 21 (1999) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)). "Appropriate," as explained above, is a standard word with a plain, dictionary meaning. It is dissimilar to the terms of art listed in Scalia & Bryan A. Garner, which constrained the type of technical

verbiage found in legal texts rather than ordinary writing. "Appropriate" has not accumulated a settled meaning as "meaningful" after Pflueger, and Appellant has not provided a string of later cases citing Pflueger that would demonstrate such a settled meaning. Even United States v. Morris, cited by Appellant, did not equate "meaningful" and "appropriate." In Morris, the Army Court of Criminal Appeals (ACCA) noted in a footnote that the appellant in that case *requested* "meaningful relief." 2023 CCA LEXIS 197, at *1 n.4 (A. Ct. Crim. App. May 8, 2023) (unpub op.). However, ACCA made no other reference of meaningful throughout their opinion. Instead, they discussed only appropriate relief and could "identify no appropriate relief available." Id. at *3.

In sum, Pflueger and the cases citing it do not support that there is a military common law understanding that "appropriate" and "meaningful" relief are synonymous. Thus, the canon of imputed common law meaning does not apply to Article 66(d)(2). And taking all of these statutory construction canons into consideration, this Court should recognize that sometimes "meaningful" relief for post-trial delay will not be "appropriate" under the circumstances.

E. "Meaningfulness" can be a consideration for a CCA in granting relief for post-trial delay, but it should not be dispositive.

All of the above is not to suggest that whether relief is "meaningful" has no significance at all in a CCA's decision to grant Tardif or Article 66(d)(2) relief. But instead of equating "meaningful" and "appropriate," this Court should view

whether relief is "meaningful" as a factor a CCA may use to determine whether that relief is "appropriate" under the circumstances. This Court should endorse the Air Force Court's approach in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). In Gay, the court said there are six "factors relevant in considering whether Tardif relief is appropriate." Id. Discussed further below, Gay's sixth factor asks, "[g]iven the passage of time, can [the CCA] provide meaningful relief in this particular situation?" Id. AFCCA analyzed the delay in Gay and found meaningful relief was appropriate in that case. Id. This approach is consistent with Toohey's and Rodriguez-Rivera's recognition that sometimes "meaningful" relief for post-trial delay will not be appropriate for a particular appellant.

With these principles in mind, going forward, this Court should review a CCA's decision to grant certain relief for post-trial delay (under Tardif or Article 66(d)(2)) using an abuse of discretion standard. In reviewing whether a CCA abused its discretion, this Court can look at whether the CCA considered the "meaningfulness" of the relief it was providing. But should this Court decide that the CCA abused its discretion in providing relief, it should not remand with an order directing the CCA to provide "meaningful" relief. Any remand order should leave room for AFCCA to decide that any "meaningful" relief it could provide would not be "appropriate" under the circumstances.

## II.

## THE AIR FORCE COURT DID NOT ABUSE ITS DISCRETION BY NOT AFFIRMING PART OF APPELLANT'S REDUCTION IN GRADE AS SENTENCING RELIEF PURSUANT TO ARTICLE 66(d)(2), UCMJ, AND UNITED STATES v. TARDIF, 57 M.J. 219 (C.A.A.F. 2002), FOR UNREASONABLE POST-TRIAL DELAY.

### *Standard of Review*

This Court reviews a Court of Criminal Appeal's sentence appropriateness determination for abuse of discretion. United States v. Flores, 84 M.J. 277, 282 (C.A.A.F. 2024) (citing United States v. Nerad, 69 M.J. 138, 142 (C.A.A.F. 2010)). "[T]his Court reviews the sentencing decisions of the Courts of Criminal Appeals for "obvious miscarriages of justice or abuses of discretion." Tardif, 57 MJ at 223-24 (citing United States v. Jones, 39 M.J. 315, 317 (C.M.A. 1994)). "[U]nder an abuse of discretion standard, there must be more than a mere difference of opinion; the challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. United States v. Hasan, 84 M.J. 181, 210 (C.A.A.F. 2024) (citing United States v. Black, 82 M.J. 447, 451 (C.A.A.F. 2022)).

### *Law and Analysis*

The decision to grant sentencing relief by the Courts of Criminal Appeal must remain discretionary. Article 66(d)(2) specifically says that the courts "*may* provide appropriate relief" for excessive post-trial delay. (emphasis added). This

language does not create an obligation on the part of the Courts of Criminal Appeal to grant meaningful relief in every case where they found excessive post-trial delay; instead, it calls for the lower courts to analyze each case individually to determine whether certain relief is "appropriate."

AFCCA's decision to restore Appellant by one grade (from E-1 to E-2) was not an abuse of discretion because AFCCA properly considered the circumstances surrounding Appellant's case under Tardif and Article 66(d)(2). (JA at 10).

A. AFCCA's relief was appropriate because it acknowledged wrong done to Appellant through post-trial delay when there was no prejudice or harm to Appellant.

AFCCA found that there was no presumption of unreasonable delay because both AFCCA decisions in Appellant's case were issued within 18 months of their "respective docketing dates." Id. In support of this, AFCCA cited to United States v. Phillips, which previously found there was no presumption of facially unreasonable delay when it issued its initial and post-remand decisions "within 18 months of the respective docketing dates." 2019 CCA LEXIS 102, at *28 (A.F. Ct. Crim. App. Mar. 8, 2019) (unpub. op.) (citing United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006) ("[W]e will 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 Court of Criminal Appeals.")). AFCCA further found there was no "particularized prejudice" and that the delay

would not "adversely affect the public's perception of the fairness and integrity of the military justice system," so there was "no due process violation." (JA at 10).

"This Court's precedents do not require a CCA to explain its reasoning when assessing the reasonableness of a sentence." Flores, 84 M.J. at 282, (citing United States v. Winckelmann, 73 M.J. 11, 16 (C.A.A.F. 2013) ("The Court of Criminal Appeals did not detail its analysis in this case; nor was it obligated to do so.")). Despite this, AFCCA outlined its rationale under United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App. 2015). (JA at 9-10). While not handed down by this Court, Gay has provided the Air Force Court a solid framework for determining whether sentencing relief is appropriate for post-trial delays with no finding of prejudice.

In deciding whether to invoke Tardif to grant "appropriate" sentencing relief as a "last recourse," Gay laid out a non-exhaustive list of factors to be considered:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;

> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

Id. at 744.

As captured in the sixth factor, Gay does not *ignore* the concept of whether relief could be meaningful. It asks the CCA to consider whether meaningful relief is possible in each case given the length of time that has passed between sentencing and appellate review. It does not *require* the CCA to grant "meaningful" relief, even if the CCA finds that relief might be appropriate – granting relief is always discretionary. And Gay does not require that the CCA grant "meaningful" relief, if that relief is not appropriate.

This Court should endorse the six factors outlined in Gay when considering whether sentencing relief is "appropriate," and consider the possibility of meaningful relief as only one, non-controlling factor for the Courts of Criminal Appeal to review. Under Gay, whether the relief was "meaningful" was not "dispositive" of whether relief should be granted. Id. at 744. This aligns it more closely with Toohey and Rodriguez-Rivera, both of which clarified that relief should be appropriate and not disproportionate to the harm caused. It also helps Courts of Criminal Appeal address the "totality of the circumstances" in each appellate case. Rodriguez-Rivera, 63 MJ at 386.

In light of Gay, Appellant's sentencing relief was not an abuse of discretion or a miscarriage of justice. AFCCA stated it focused on the second and fifth Gay factors for why relief in this case was appropriate, despite finding no prejudice. (JA at 10). AFCCA found "gross indifference" under the second factor and "evidence of institutional neglect" under the fifth. (JA at 10). Accordingly, AFCCA restored one grade to Appellant in light of those factors. (JA at 12).

The decision to restore Appellant's rank was appropriate given AFCCA's focus on the institutional neglect in post-trial processing. (JA at 10-12). In a recent AFCCA case, the court pointed out that when relief "is premised upon the Government's dereliction rather than upon prejudice to Appellant, we deem it important to modulate the relief we award." United States v. Cassaberry-Folks, 2024 CCA LEXIS 500, at *64 (A.F. Ct. Crim. App. Nov. 22, 2024) (unpub op.). That rationale is appropriate here as well. AFCCA already found that Appellant was not prejudiced by the post-trial delay (JA at 10), and so any appropriate relief for Appellant should have been minor and not disproportionate considering the lack of harm suffered. That AFCCA granted Appellant any relief is significant and not a miscarriage of justice.

B. If any sentence relief granted must be "meaningful," "meaningfulness" should not be limited to monetary benefit to appellants; the reprieve on reduction in rank AFCCA granted here *was* meaningful.

Relying on Plueger, Appellant argues that his confinement should be disapproved so that he will receive meaningful relief through financial compensation for his post-trial delay. (App. Br. at 18). Even if there were a requirement that any sentence relief granted must be meaningful, that should not limit the Courts of Criminal Appeal to only granting relief when it would give Appellant a financial boon. In this case, restoring Appellant's grade to E-2 does provide Appellant with some benefit going forward: Appellant will no longer have the stigma of separating from the military as only an E-1; instead, his records will reflect that he was separated as an E-2. Just because Appellant might prefer a different form of relief, such as monetary relief, does not mean the relief granted has no meaning at all. Here, the relief granted has some benefit to Appellant and was not a miscarriage of justice that warrants reversal under an abuse of discretion standard.

In the alternative, if disapproving part of the reduction in rank is not "meaningful," then it would have been reasonable for AFCCA to provide Appellant with no relief at all. In this instance, awarding Appellant with full confinement credit so that he receives back-pay from his automatic forfeitures would be disproportionate to any harm he suffered – which AFCCA found was no

harm at all. Applying United States v. Harris, Appellant's convicted offense is another factor to be considered. 66 M.J. 166, 169 (C.A.A.F. 2008) (finding that, "in light of the offenses," all proposed relief requested by appellant would be disproportionate to any harm suffered.) Appellant was convicted of the serious offense of sexual assault. (JA at 44). He penetrated the vagina of another airman with his finger without her consent. (JA at. 4).

Above all, relief must still be *appropriate.* Toohey called for meaningful relief "if appropriate." 63 MJ at 363. Rodriguez-Rivera explained that meaningful relief (in the context of Moreno) will not be granted when the benefit is disproportionate to the harm caused. 63 MJ at 386. Even in United States v. Roche, 69 M.J. 94, 94 (C.A.A.F. 2010), a case about pretrial confinement credit that Appellant cites (App. Br. at 19), this Court remanded the case back to NMCCA to order "further appropriate relief unless any meaningful relief would be disproportionate to any harm Appellant may have suffered." Under the reasoning in Roche, if the restoration of one grade was meaningless, then AFCCA had discretion to grant no relief because anything else would have been disproportionate considering the lack of harm suffered by Appellant. To reimburse Appellant for automatic forfeitures, as Appellant recommends, AFCCA would have needed to disapprove his full 90 days of confinement. (App. Br. at 18). But time in confinement and the accompanying forfeitures were absolutely appropriate

for a sexual offense committed against a fellow airman. Appellant's requested relief would be disproportionate to any harmed caused to Appellant by his post-trial delay, because he does not deserve to have his sentenced confinement stripped away in the name of financial compensation.

Here, AFCCA was not required to provide in depth analysis of its sentence appropriateness decision. Since it would have been reasonable for AFCCA to find other forms of sentence relief inappropriate, this Court should find no abuse of discretion and decline to remand the case for any further analysis.

C. At most, this Court should only remand to AFCCA for further analysis of why other relief was inappropriate in this case.

In the event this Court believes AFCCA abused its discretion in its Article 66(d)(2)/Tardif analysis, this Court should not remand to AFCCA with an order for the court to provide "meaningful relief." (App. Br. at 20). It should only remand the case back to AFCCA to clarify whether greater relief in this case would be disproportionate to the harm Appellant may have suffered in light of the offense for which he was convicted. *See* Roche, 69 MJ at 94; Harris, 66 M.J. at 169 (finding that, "in light of the offenses," all proposed relief requested by appellant would be disproportionate to any harm suffered.)

In conclusion, this Court should find that AFCCA did not abuse its discretion by granting relief through the restoration of one grade to Appellant and should decline to remand the case for further analysis.

## CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 37747

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

JENNY LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34917

MATTHEW TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33364

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division on 5 December 2024.

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 37747

## CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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/s/ Regina Henenlotter, Maj, USAF

Attorney for the United States (Appellee)

Dated: 5 December 2024