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

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**UNITED STATES**,

*Appellee*,

v.

**BRADLEY D. LAMPKINS**
Airman First Class (E-3),
United States Air Force,
*Appellant*.

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USCA Dkt. No. 24-0069/AF

Crim. App. Dkt. No. ACM 40135 (f rev)

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# SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

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**INDEX**

## TABLE OF AUTHORITIES

### CONSTITUTIONAL PROVISIONS



### STATUTES



### SUPREME COURT CASES



### COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

**SERVICE COURTS OF CRIMINAL APPEALS CASES**

**FEDERAL COURT CASES**



**STATE COURT CASES**



**RULES AND OTHER AUTHORITIES**

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

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| **UNITED STATES,** | ) | **SUPPLEMENT TO THE** |
| *Appellee* | ) | **PETITION FOR GRANT** |
| v. | ) | **OF REVIEW** |
| | ) | |
| **BRADLEY D. LAMPKINS** | ) | |
| Airman First Class (E-3), | ) | Crim. App. Dkt. No. ACM 40135 (f rev) |
| United States Air Force, | ) | |
| *Appellant* | ) | USCA Dkt. No. 24-0069/AF |
| | ) | |

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

## ISSUES PRESENTED

### I.

**WHETHER THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL TO A SERVICE COURT TOLLS THE PRESUMPTION OF UNREASONABLE POST-TRIAL DELAY, UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THE SERVICE COURT WAS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(b); 2) THE SERVICE COURT DEEMED THE OMISSION "SUBSTANTIAL" AND REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE TOTAL DELAY UNTIL THE GOVERNMENT RE-DOCKETED A COMPLETE RECORD OF TRIAL WAS 820 DAYS.**

## II.

## AS APPLIED TO AIRMAN FIRST CLASS LAMPKINS, WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE WAS NOT CONVICTED OF A VIOLENT OFFENSE.

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[2] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

## STATEMENT OF THE CASE

On 12 August 2020, at Minot Air Force Base (AFB), North Dakota, consistent with his pleas, a Military Judge convicted Airman First Class (A1C) Bradley D. Lampkins at a general court-martial of one charge and one specification of attempted larceny, in violation of Article 80, UCMJ, 10 U.S.C. § 880; one charge and two specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921; and one charge and 43 specifications of making, drawing, or uttering check,

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[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

[2] All references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) unless otherwise noted.

draft, or order without sufficient funds, in violation of Article 123a, UCMJ, 10 U.S.C. § 923. R. at 317.

The Military Judge sentenced A1C Lampkins to a reprimand, reduction to the grade of E-1, 46 months confinement, and a dishonorable discharge. R. at 381. The Convening Authority denied A1C Lampkin's request for deferment and waiver of automatic forfeitures and a deferment of reduction in grade. *Convening Authority Decision on Action*. The Military Judge recommended that all confinement in excess of 24 months be suspended for a period of two years and one month from the date of the findings to allow A1C Lampkins to pay restitution to one of the named victims. *Statement of Trial Results*. The Convening Authority accepted the Military Judge's recommendation and approved the rest of the sentence. *Convening Authority Decision on Action*. The Convening Authority took no action on the findings. *Id*.

On November 17, 2020, the Government determined that A1C Lampkins met the firearms prohibition in 18 U.S.C. § 922. *Entry of Judgment*. The Government did not specify which subdivision of § 922 A1C Lampkins met. *Id.*

On October 25, 2022, pursuant to an objection in A1C Lampkin's first Assignment of Error, the Air Force Court remanded his record of trial (ROT) to the Chief Trial Judge, Air Force Trial Judiciary. *United States v. Lampkins*, No. ACM 40135, 2022 CCA LEXIS 750 (A.F. Ct. Crim. App. Oct. 25, 2022) (Order) [hereinafter App. A]. This remand was to correct the record because it was missing

a required item under R.C.M. 1112(b) (the Military Judge's ruling on a Defense motion to dismiss for a violation of his speedy trial rights (App. Ex. XXVIII)), making the omission "substantial" under this Court's case law. *Id.* (quoting *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000)). The Government re-docketed the case with the Air Force Court on November 9, 2022. *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465 at *2 (A.F. Ct. Crim. App. Nov. 2, 2023) [hereinafter App. B]

On February 24, 2023, the Air Force Court denied A1C Lampkins' Motion for Leave to File a Supplemental Assignment of Error under *Grostefon* [*United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)] [hereinafter App. C]. A1C Lampkins wanted the Court to consider whether 18 U.S.C. § 922 was constitutional as applied to him given the Supreme Court's ruling in *Bruen* and the then-recent ruling in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *argued*, 143 S. Ct. 2688 (Nov. 7, 2023).

As explained below, on November 2, 2023, the Air Force Court affirmed the findings, but did not approve A1C Lampkins dishonorable discharge. App. B at 16. The Air Force Court only affirmed "so much of the sentence" that included a bad-conduct discharge. *Id.* The Air Force Court found the findings and the sentence as modified were "correct in law and fact." *Id.* On November 29, 2023, the Air Force Court denied A1C Lampkins motion to publish the opinion. *United States v.*

*Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465 (A.F. Ct. Crim. App. Nov. 29, 2023) (Order denying motion to publish) [hereinafter App. D].

## STATEMENT OF FACTS

The Military Judge sentenced A1C Lampkins on August 12, 2020. R. at 381-82. The Court Reporter originally certified the "[ROT] as accurate and complete in accordance with RCM 1112(b) and (c)(1)" on October 19, 2020. App. B at 4.[3] The Government did not originally docket A1C Lampkins' case with the Air Force Court until 30 July 2021—353 days from the date he was sentenced. *Id.*

On July 9, 2021, Assistant Trial Counsel provided an affidavit and case chronology explaining why it took the Government 353 days to originally docket A1C Lampkin's case with the Air Force Court. Below are some lowlights:

- On December 9, 2020, the date they mailed the [ROTs], the base legal office dropped the case from its weekly Automated Military Justice Analysis and Management System (AMJAMS) reports. Day 120.
- The Traffic Management Office (TMO) mailed the ROTs to the wrong locations. Day 120.
- TMO lost one of JAJM's copies of the ROT. Day 122.
- On February 11, 2021, 20 AF/JA received the ROTs from the base legal office, but there were documents missing from the ROTs. Day 184.
- After nearly two months, on April 6, 2021, 20 AF/JA returned the ROTs via mail to the base legal office because the corrections needed were "extensive." Day 238.

[3] The Air Force Court opinion incorrectly states that the Military Judge sentenced A1C Lampkins on August 10, 2022.

- On April 9, 2021, the base legal office put the original copy of the ROT inside the cubicle of the case paralegal who had since departed for a new assignment. Day 241.
- On June 21, 2021, a new paralegal moved into the prior case paralegal's cubicle and discovered the ROTs. The paralegal gave the ROTs to the Noncommissioned Officer in Charge (NCOIC) who said that the [*United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006)] date had been tolled so no time sensitive action was required. Day 315.
- On July 5, 2021, the NCOIC opened the box that contained the ROTs and discovered the original was in the box. He began running the ROT checklist the next day to fix errors in the ROTs. Day 328.
- On July 7, 2021, the base legal office determined, "all missing documents have been obtained for inclusion in the ROT." Day 330.
- On July 8, 2021, the NCOIC created a new ROT to replace the JAJM copy that TMO lost. Day 331.

*Post Sentencing, Declaration and Chronology*, dated 9 July 2021; *see also* App. B at 4-5. During this period, the base legal office represented to higher headquarters during their Staff Assistance Visit (SAV) and on their Article 6 checklist questions that the *Moreno* timeline had been met in the case. *Post Sentencing, Declaration and Chronology*, dated July 9, 2021, at 1, 4.

The Air Force Court found these post-trial delays "were egregious, not justified, and would adversely affect the public's perception of the fairness and integrity of the military justice system." App. B at 9. This delay amounted to a due process violation entitling A1C Lampkins to relief. *Id.* Instead of affirming his dishonorable discharge, the Air Force Court only approved a bad-conduct discharge for the post-trial delay. *Id.* at 16.

As to the current issue—and despite briefing it—the Air Force Court declined to consider whether docketing an incomplete ROT could stop the *Moreno* clock. App. B at 3. The Air Force Court only stated that "the record establishes that Appellant's case was docketed at 353 days." *Id.*

## REASONS TO GRANT REVIEW

*Issue I*

This Court ruled that it will apply "a presumption of unreasonable delay that will serve to trigger the *Barker* four-factor analysis where . . . the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action." *Moreno*, 63 M.J. at 142. In subsequent case law, this Court has not explained what it means to "docket" a case nor whether the docketing of an incomplete ROT tolls the "presumption of unreasonable delay that will serve to trigger the *Barker*" factors. *Id.* This case presents the opportunity to do so.

Over the past two years, the Government has consistently failed to docket complete ROTs with the Air Force Court, including the ROT in this case. The Air Force Court chose not to analyze whether the docketing of an incomplete ROT can toll the *Moreno* clock which, in practice, decided "a question of law which has not been, but should, settled by this Court." C.A.A.F. R. 21(b)(5)(A). Thus, A1C Lampkins received no relief for this issue even though "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal

Protection Clauses of the Constitution." *Moreno*, 63 M.J. at 135 (quoting *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)).

The docketing of incomplete ROTs is not unique to the Air Force, either: The Navy and the Marine Corps also have this problem, and the Navy-Marine Court of Criminal Appeals has likewise refused to act. The Government has docketed dozens of incomplete ROTs between the two Courts of Criminal Appeals (CCAs) and these courts are failing to exercise "institutional vigilance" by putting a stop to the practice. *Id.* at 137. It appears that incomplete ROTs, like the delays in *Moreno*, "have been tolerated at all levels in the military justice system so much so that in many instances they are now considered the norm." *Moreno*, 63 M.J. at 143. The Air Force Court recently removed all doubt that it would act to fix this issue:

> While we recognize that records of trial are remanded *on occasion* due to omissions or other defects, we decline to create a new requirement for cases that are docketed, remanded, and later re-docketed with this court. We find the original standards announced in *Moreno,* and its progeny, *adequately protect* an appellant's due process right to timely post-trial and appellate review.

*United States v. Gammage*, No. ACM S32731 (f rev), 2023 CCA LEXIS 528, at *6 (A.F. Ct. Crim. App. Dec. 15, 2023) (quotations and citations omitted) (emphases added).

This Court should grant review to state that the docketing of incomplete ROTs, like appellate delay, "will no longer be tolerated." *Moreno*, 63 M.J. at 143. This Court can do so by creating a bright-line rule that when the Government omits

a required item from a ROT under R.C.M. 1112 and the CCAs deem the omission "substantial," then the incomplete ROT does not toll the presumption of unreasonable delay. Unless this Court does so, there is nothing in the CCAs' jurisprudence or current outlook that prevents the Government from continuing to docket deficient ROTs merely to toll the *Moreno* clock.

*Issue II*

The Second Amendment plainly states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. AMEND. II. Yet, this is exactly what the Government did when it annotated a firearms ban on A1C Lampkins—via the Entry of Judgment—without "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. This Court should grant review not only because the issue is a weighty constitutional matter, but also because the issue is currently being decided by federal courts, the Air Force Court, and the Supreme Court in the wake of the watershed decision in *Bruen*. It is a rapidly changing area of the law and A1C Lampkins should get "the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019) (citation omitted). Finally, the *Manual for Courts-Martial* (*MCM*) has been updated so that a firearms prohibition falls within the jurisdictional bounds of a "sentence" as contained in Articles 66 and 67, UCMJ. Indeed, the firearms prohibition is part of the "sentence

set forth *in the entry of judgment*." Article 67(c)(1)(A), UCMJ, 10 U.S.C. § 867(c)(1)(A) (emphasis added).

A1C Lampkins faces a *lifetime* firearms ban for various financial crimes when no firearm was involved. That punishment is greatly disproportionate to the offense; is not aligned with the text, history, or tradition of firearms regulation; and has no temporal limitations.

## ARGUMENT

## I.

**THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL TO A SERVICE COURT DOES NOT TOLL THE PRESUMPTION OF UNREASONABLE POST-TRIAL DELAY, UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THE SERVICE COURT WAS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(b); 2) THE SERVICE COURT DEEMED THE OMISSION "SUBSTANTIAL" AND REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE TOTAL DELAY UNTIL THE GOVERNMENT RE-DOCKETED A COMPLETE RECORD OF TRIAL WAS 820 DAYS.**

### Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal de novo. *Moreno*, 63 M.J. at 135.

## Law and Analysis

The Government is failing to docket complete ROTs in a timely manner across the services and the CCAs are enabling this failure by not penalizing the Government for docketing incomplete ROTs. When an appellant, such as A1C Lampkins, raises this issue to the CCAs, the Government argues that it is not responsible for finding errors in ROTs—shifting blame to appellants—and the CCAs refuse to recognize that the docketing of incomplete ROTs is a problem. This Court should grant review to exercise its supervisory power over the CCAs to ensure the Government handles post-trial processing in accordance with its statutory obligations.

### 1. CCAs are Failing to Exercise "Institutional Vigilance," Making Docketing a "Meaningless Ritual"

This Court expects the CCAs to exercise "institutional vigilance" for the "disposition of cases docketed at the Courts of Criminal Appeals." *Moreno*, 63 M.J. at 137. One reason for this expectation is that "[d]ue process entitles convicted service members to a timely review and appeal of court-martial convictions." *Id.* at 123 (citation omitted). An appeal that is "inordinately delayed is as much a meaningless ritual as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." *Id.* at 135 (quotations and citations omitted).

In this case, the Government took 820 days to docket a complete ROT. Not only did the Air Force Court allow the Government to docket an incomplete ROT,

but it also chose to ignore the issue of ROT completeness despite A1C Lampkins' request for relief. The Air Force Court only said, "we decline Appellant's request to find that over 800 days had elapsed between announcement of the sentence and docketing his case with this court. Here, the record establishes that Appellant's case was docketed at 353 days." App. B at 3. The Air Force Court's cursory analysis is akin to a person saying that they need to go "see a man about a horse" or a police officer saying, "nothing to see here. Move along." The problem is, however, that there is a great deal to see when it comes to the Air Force Court's failure to engage on docketing incomplete ROTs; specifically, a two-year pattern of the Government docketing incomplete records and the Air Force Court allowing it to happen:

> *Gammage*, 2023 CCA LEXIS 528 (requiring a second remand for noncompliance with initial remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. Dec. 5, 2023); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. Sep. 11, 2023) (remand order); *United States v. Gonzalez*, No. ACM 40375, 2023 CCA LEXIS 378 (A.F. Ct. Crim. App. Sep. 8, 2023); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. Aug. 1, 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. Jun. 27, 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. Jun. 15, 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. Jun. 5, 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. May 31, 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. May 12, 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537 (A.F. Ct. Crim. App. Jan. 30, 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. Dec. 7, 2022)

(remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. Nov. 17, 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. Nov. 8, 2022) (remand order); *United States v. McCoy*, No. ACM 40119, 2022 CCA LEXIS 632 (A.F. Ct. Crim. App. Oct. 31, 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. Sep. 22, 2022) (remand order); *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. Aug. 30, 2022) (remand order) (requiring a second remand for noncompliance with initial remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. Apr. 28, 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. Apr. 22, 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. Mar. 17, 2022); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. Jan. 6, 2022); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. Jan. 5, 2022).

App. E.

Not only does the Government struggle to *initially* docket a complete or correct ROT, but it also fails to do so *after* the Air Force Court issues a remand order detailing exactly what is missing or wrong. *Gammage*, 2023 CCA LEXIS 528 (requiring a second remand for noncompliance with initial remand order); *Goldman*, 2022 CCA LEXIS 511 (requiring a second remand for noncompliance with initial remand order).

Unfortunately, the docketing of incomplete ROTs is also a problem in other services, such as the Navy and Marine Corps:

> *United States v. McNulty*, NMCCA No. 202300070 (N.M. Ct. Crim. App. Jan. 3, 2024) (order correcting post-trial processing errors); *United States v. Kapayou*, NMCCA No. 202300145 (N.M. Ct. Crim. App. Dec. 7, 2023) (order to produce complete record of trial); *United States v. Roache*, NMCCA No. 202200128 (N.M. Ct. Crim. App. Oct. 18, 2023) (order to produce complete record of trial); *United States v. Harborth*, NMCCA No. 202200157 (N.M. Ct. Crim. App. Oct. 17, 2023) (order to produce complete record of trial); *United States v. Schmidt*, NMCCA No. 202300069 (N.M. Ct. Crim. App. Jun. 13, 2023); *United States v. Harvey*, NMCCA No. 202200040 (N.M. Ct. Crim. App. Jun. 28, 2023) (order to produce complete record of trial); *In Re B.M. v, United States*, NMCCA No. 202300050 (N.M. Ct. Crim. App. Mar. 8, 2023) (order to produce complete record of trial); *United States v. Grant*, NMCCA No. 202200168 (N.M. Ct. Crim. App. Feb. 24, 2023) (order to produce complete record of trial); *United States v. Rodriguez*, NMCCA No. 202200179 (N.M. Ct. Crim. App. Dec. 13, 2022) (order to produce complete record of trial); *United States v. Matossegura*, NMCCA No. 202200090 (N.M. Ct. Crim. App. Aug. 24, 2022) (order to produce complete record of trial); *United States v. Ntiamoa*, NMCCA No. 202200064 (N.M. Ct. Crim. App. Aug. 10, 2022) (order to produce complete record of trial)

App. F. Compounding the Navy and Marine Corps' failure to compile complete ROTs is a lack of transparency. The Navy-Marine Corps Court of Criminal Appeals does not publish its orders on its website or in legal database such as Lexis or Westlaw.[4]

In remanding these cases, the CCAs have a copacetic attitude about the deficiencies. They do not order a status conference inquiring why the ROT was deficient when it was first docketed, they do not remind the Government that they

[4] Undersigned Counsel searched at https://www.jag.navy.mil/about/organization/ojag/code-05/nmcca/ and the Navy-Marine Corps Court of Criminal Appeals' docket and could not locate the cited orders.

could issue sanctions for representing to the Court that the ROT was complete when the Government initially docketed it, nor do they reprimand the Government after multiple incomplete records have been docketed in a given timeframe. *See* Appendices E - F. The CCAs' tolerance of the filing of incomplete ROTs has turned docketing into a "meaningless ritual." *Moreno*, 63 M.J. at 135. That is especially true in this case where it took the Government more than *double* the time to docket a complete ROT (820-days) than the initial docketing (353-days). This Court should grant review because A1C Lampkin's incomplete ROT is not an outlier; it is an inveterate, multi-service problem that warrants this Court's supervisory attention.

**2. The Government is Efficiently Breaching and the Courts of Criminal Appeals are Allowing it**

An efficient breach is "based on the idea that a party might find it economically worthwhile to breach a contract because that breach yields economic benefits that exceed the value of the damages it must pay to the non-breaching party." *Leaf Invenergy Co. v. Invenergy Renewables Ltd. Liab. Co.*, 210 A.3d 688, 703 (Del. 2019). The Government has a statutory obligation to docket complete records of trial, but it has a demonstrated pattern of failing to do so. The reason for the pattern of failures is that the Government is—by analogy—efficiently breaching. The Government knows that it can docket an incomplete ROT with the CCAs and the "benefit" of doing so exceeds the "damages it must pay." *Id.* This is because the CCAs are not holding the Government accountable. The CCAs are tolling the

*Moreno* clock for the Government and, like this case, choosing not to analyze whether an incomplete ROT could be docketed at all. While it is disappointing that the CCAs are not doing more to hold the Government accountable, the most damaging aspect is that one person primarily bears the brunt of the suffering: the appellant. Efficient breach is tolerated in contract law because the breaching party "gains enough from the breach that he can *compensate the injured party for his losses* and still retain some of the benefits from the breach." *NAMA Holdings, LLC v. Related WMC LLC*, No. 7934-VCL, 2014 Del. Ch. LEXIS 232, at *1 (Ch. Nov. 17, 2014) (emphasis added). In military appeals, however, neither the Government nor the CCAs compensate an appellant for a statutory violation. Under modern regulations, Undersigned counsel is aware of no case where a Court of Criminal Appeals has given relief to an appellant for the Government's failure to docket a complete record of trial. *But cf. United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000) (not approving a bad-conduct discharge for missing exhibits because the then-current version of Article 19, UCMJ, 10 U.S.C. §819, prohibited doing so). Given that the CCAs are not recognizing the problem or the Government's behavior, this Court should grant review.

### 3. The Government is Shirking its Responsibility to Ensure ROTs are Complete

This case presents troubling insight into how the Government thinks about its docketing responsibilities. First, the Government believes that it is an appellant's

responsibility to identify incomplete ROTs; and second, the Government believes that the delay for its omissions should be held against the appellant who found said omissions and brought them to the attention of the Court of Criminal Appeals and the Government.

*a. The Government is attempting to pass its responsibility onto the Defense*

In its Answer to A1C Lampkin's Brief at the Air Force Court, the Government argued that the court should allow an incomplete ROT to toll *Moreno*'s presumption of unreasonable delay. Appellee's Answer at 7, *United States v. Lampkins*, No. ACM 40135 (f rev) (A.F. Ct. Crim. App. Nov. 2, 2023) [hereinafter App. G]. It went on to state:

> Accepting Appellant's argument that the delay in this case is still not over post-docketing because of a missing exhibit could incentivize appellants to delay bringing incomplete records to the Court's attention. That, in turn, will just further delay appellate review. After all, *if Appellant had brought the omission of the appellate exhibit to the Court's attention months ago, it could have already been remedied months earlier than it was*. While it is the Government's responsibility to compile a complete record of trial, Appellant should not be able to profit from *his choice* to delay raising the issue to the Court.

*Id.* (emphasis added). The Government also argued that if the Air Force Court ruled in A1C Lampkins' favor it would "incentivize appellants to delay bringing incomplete records to the Court's attention" and appellants will receive a "windfall." App. G at 7, 10.

It is ineluctable that the Government is responsible to not only docket a complete ROT with a Court of Criminal Appeals, but also to bring any omissions in said ROT to the Court of Criminal Appeals' attention on its own volition. R.C.M. 1112(b). The Government has approximately five levels of review to ensure the ROT is compiled correctly (the base legal office, the court reporter, the numbered Air Force, JAJM, and JAJG). Yet, the Government still argued that "if Appellant had brought the omission of the appellate exhibit to the Court's attention months ago, it could have already been remedied months earlier than it was." App. G at 7. Given the multiple levels of Government review and the arguments it made below, it appears that incomplete ROTs "have been tolerated at all levels in the military justice system so much so that in many instances they are now considered the norm." *Moreno*, 63 M.J. at 143.

*b. The Government is attempting to pass* Moreno *delays onto the Defense*

The Government also argued that it should not be responsible for any delay from enlargements of time (EOTs) that A1C Lampkins requested and that the Air Force Court granted. App. G at 6. The Government then wondered how this could be, "especially when only 15 days of total delay is attributable to the process of remanding Appellant's record for correction and then re-docketing with this Court." *Id.*

The answer to why the Government is still responsible for defense delays is simple: "The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *Moreno*, 63 M.J. at 137. In not holding Corporal Moreno responsible for "institutional vigilance," this Court stated, "[R]esponsibility for [the Appellate Defense delay] and the burden placed upon appellate defense counsel initially *rests with the Government* . . . Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals." *Id.* (citation omitted) (emphasis added); *see also United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013) ("In considering this factor, we have declined to attribute to individual appellants the periods of appellate delay resulting from military appellate defense counsels' requests for enlargements of time where the basis for the request is excessive workload"); *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014) ("[T]he responsibility for providing the necessary resources for the proper functioning of the appellate system . . . lies with the Judge Advocates General.").

If the Government does not think that the Appellate Defense Division is identifying *its* errors quickly enough, then it should "provide adequate staffing" so we can provide more "timely representation." *Moreno*, 63 M.J. at 137. From A1C Lampkins' perspective, it was not "his choice" to delay raising the issue of the

incomplete ROT to the Air Force Court; he had no choice because his counsel was reviewing other cases. App. G at 7. The solution is not for an appellant to find errors more quickly, but for the Government to docket a *complete ROT on-time*.

This Court should grant review so it can reject the Government's attempts to pass responsibility for a complete ROT onto A1C Lampkins. The Government's arguments evince its misunderstanding of the law and its inability to be accountable for assembling ROTs accurately. The Government's argument also show that the Air Force Government Trial and Appellate Operations Division is not reviewing ROTs before they are docketed nor before the Appellate Defense Division reviews them to catch the omissions. This is negligence at best, dereliction of duty at worst. Unless this Court acts on this issue, the Government's attitude and actions will persist as the Air Force Court has chosen to turn a blind eye to this issue.

**4. The Government Needs Additional Incentives to Ensure Complete and Timely Post-Trial Processing**

Because the existing incentive structure is not producing the intended effect of docketing complete ROTs, this Court should grant review to change the incentive structure by holding that an incomplete ROT does not toll the presumption of unreasonable post-trial delay. Such an action makes sense because "altering incentives . . . by changing the law, alters people's behavior because it changes the costs and benefits of making specific decisions." Diane H. Crawley, *America Invents Act: Promoting Progress or Spurring Secrecy?*, 36 HAWAII L. REV. 1, 1 (2014).

Stated differently, "incentives matter: when costs go up or down, people make different choices." Andrew P. Morriss, *The Preferential Option for the Poor: The Necessity of Economics: The Preferential Option for the Poor, Markets, and Environmental Law*, 5 U. ST. THOMAS L.J. 183, 188 (2008). If the penalty for docketing an incomplete ROT goes up, the Government will docket fewer incomplete ROTs. Such a change in the incentive structure is exactly what this Court did in *Moreno* with excessive appellate delays. Moreno, 63 M.J. at n. 22 ("We are mindful of the importance of providing a deterrent to improper Government action, including actions that delay post-trial and appellate processing.")

As this case demonstrates, the "benefits" of docketing a complete ROT, on time, are low for the Government—mere compliance with statutory and regulatory guidance. Likewise, the "costs" of not docketing a complete ROT are also low: being marked down a point or two on an Article 6, UCMJ, 10 U.S.C. § 806, inspection and having the Air Force Court remand the case without even a proverbial slap on the wrist. This Court can change the incentive structure by creating a bright-line rule that when the Government omits a required item from a ROT under R.C.M. 1112 and the CCAs deem the omission "substantial," then the incomplete ROT does not toll the presumption of unreasonable delay.

Creating a bright-line rule is not only within this Court's authority, but it is also necessary to ensure CCAs are exercising "institutional vigilance." *Moreno*, 63

M.J. at 135. This Court has found "lengthy delays" to be "particularly problematic given that the CCA is directly responsible for exercising institutional vigilance over [all] cases pending Article 66 review." *Id*. (quotations and citations omitted). Not only does this Court have the authority under Article 67 to re-align incentives, but such a ruling would be in line with precedent like *Moreno*. Furthermore, creating this proposed bright-line rule would comport with judicial minimalism given that the omission must be a required item under R.C.M. 1112(b). Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 842 (2022) ("Minimalist opinions exhibit two features. First, they are narrow rather than wide - that is, they 'decide the case at hand' and 'do not decide other cases too, except to the extent that one decision necessarily bears on other cases. Second, they are shallow rather than deep - that is, they eschew ambitious and abstract theoretical justifications.") (citations omitted).

A cost-benefit analysis reveals the marginal cost of implementing a bright-line rule is low, while the marginal benefit is high—indicating that this Court should grant review and make the change. Stated in law and economics terms, "When there are greater marginal benefits relative to marginal costs, more regulations provide net benefits." Jeff Schwartz, *The Law and Economics of Scaled Equity Market Regulation*, 39 IOWA J. CORP. L. 347, 351 (2014). Here, the marginal cost of adopting a bright-line rule is low for this Court, the CCAs, and the Government. For this Court

and the CCAs, a judicial interpretation requires no additional work apart from stating the rule in its opinion. For the Government, no process changes are required, just more attention to detail to ensure ROTs are complete the first time they are compiled and docketed with the CCAs. The benefit, however, is high for all parties involved: less squandering of both appellate and trial judiciary time and resources; more efficient use of both defense and government appellate counsel since there will be fewer mistakes to catch; more public confidence in the military justice system; and, for appellants, faster appellate review. *Moreno*, 63 M.J. at 135 ("This court has recognized that convicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.").

**5. Conclusion: This Case Represents the Next Step in *Moreno* Jurisprudence and this Court Should Grant Review for that Reason**

This case is the ideal vehicle to analyze ROT completeness: A1C Lampkins preserved this issue by objecting to the Government's attempt to complete the ROT through a Motion to Attach; the Air Force Court deemed the Government's omission "substantial;" and the Air Force Court remanded the case to the trial judiciary to be completed. App. B at 2. Additionally, given the number of incomplete ROTs that the Government is docketing throughout the services, this case presents a common sense, reasonable way to fix the fact that incomplete ROTs are now "the norm," which makes docketing a "meaningless ritual." *Moreno*, 63 M.J. at 135, 143.

**WHEREFORE**, A1C Lampkins respectfully requests that this Honorable Court grant his petition for review.

## II.

## AS APPLIED TO A1C LAMPKINS, THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" [5] WHEN A1C LAMPKINS WAS NOT CONVICTED OF A VIOLENT OFFENSE.

### Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

### Law and Analysis

This Court should grant review for four reasons. First, the Supreme Court has granted petitions of certiorari on this constitutional issue that could affect not only this case, but others as well that will be filed with this Court. Second, given the updates to the *MCM* and the realities of trial and appellate practice, the conclusion that a firearms prohibition is a "collateral consequence" is now a legal fiction. Third, this Court has identified and ordered that promulgating orders be corrected when

[5] *Bruen*, 142 S. Ct. at 2130.

said documents included erroneous collateral consequences. Fourth, A1C Lampkins faces undue prejudice: A lifetime firearms ban for financial crimes.

**1. The Supreme Court has Granted Review on this Issue and Additional Cases will be Filed with this Court on this Issue**

This Court should grant review because it is part of a wave of litigation in the wake of *Bruen*. The Supreme Court has granted certiorari and heard oral arguments on firearms prohibitions under 18 U.S.C. § 922. *Rahimi,* 61 F.4th 443, *argued*, 143 S. Ct. 2688 (Nov. 7, 2023). Furthermore, federal appellate courts are also deciding this issue in a variety of contexts. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *petition for cert. filed*, No. 23-374 (U.S. 5 Oct. 2023) (§ 922(g)(1) held unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps); *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023) (§ 922(g)(3) held unconstitutional for barring past drug usage). This Court should grant review because A1C Lampkins' case raises similarly constitutionally weighty issues unique to the military justice process, and A1C Lampkins should get the benefit of any changes to the law while on direct appeal. *Tovarchavez*, 78 M.J. at 462.

As part of this trend, this case is also one of several cases that have been filed with the Air Force Court specifically relying on *Rahimi* to illustrate why relief is warranted. Including this case, undersigned Counsel alone has five cases where he has raised this issue with the Air Force Court or tried to raise the issue with the Air

Force Court.[6] Other counsel have raised this issue, too.[7] Counsel has two cases pending a decision with this Court whether to grant review on this very issue.[8]

Given that this is a developing legal issue in both the Air Force and civilian practice, this Court should grant review. Moreover, this case provides a rare issue with contemporaneous tie-ins to litigation before the Supreme Court, and this Court holds "the key allowing access to the Supreme Court." S. Rep. No. 98-53, at 34 (1983).

Just getting the *opportunity* to petition the Supreme Court for review is extremely difficult and is statistically unlikely for an appellant. *See* Eugene R. Fidell

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[6] *United States v. Fernandez*, No. ACM 40290 (f rev), 2024 CCA LEXIS 7 (A.F. Ct. Crim. App. Jan. 9, 2024) (addressing the issue, but declining relief); *United States v. Saul*, No. ACM 40341, 2023 CCA LEXIS 546, at *2 (A.F. Ct. Crim. App. Dec. 29, 2023) ("With respect to issue (2) and consistent with our reasoning in *United States v. Lepore*, we find this court lacks authority under Article 66, UCMJ, 10 U.S.C. § 866, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition in the staff judge advocate's indorsement to the STR. 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc). Therefore, Appellant is not entitled to relief for this issue."); *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465 (A.F. Ct. Crim. App. Nov. 2, 2023) (motion to file supplemental AOE denied); *United States v. Casillas*, No. ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 15, 2023) ("We have carefully considered issues (1), (2), and (5) and find they do not require discussion or warrant relief."); *United States v. Jackson*, No. ACM 40310, *brief filed* (A.F. Ct. Crim. App. Mar. 23, 2023).

[7] *United States v. Conway*, No. ACM 40372, *brief filed* (A.F. Ct. Crim. App. Oct. 6, 2023); *United States v. Denney*, No. ACM 40360, *brief filed*, (A.F. Ct. Crim. App. Nov. 16, 2023).

[8] *United States v. Johnson*, No. 24-0004/AF, *petition filed*, 2023 CAAF LEXIS 689 (C.A.A.F. Oct. 3, 2023); *United States v. Maymi*, No. 24-0049/AF, *petition filed*, 2023 CAAF LEXIS 841 (C.A.A.F. Dec. 1, 2023).

et. al., *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J. F. 1, 10 (2021) (arguing it is "incomprehensible" that detainees at Guantanamo Bay have greater access to the Supreme Court than servicemembers). This Court has gone from reviewing an average of 280 cases per year in the five years preceding the passage of 28 U.S.C. § 1259 to an average of 44 per year between 2018-2021.[9] S. Rep. No. 98-53, at 34. Compounding the rarity of servicemembers satisfying the statutory threshold to appeal to the Supreme Court are two outside factors. First, the Solicitor General's position is that only *issues* for which this Court has granted review on can be reviewed by the Supreme Court—not the entire case. *See generally* Petition for a Writ of Certiorari at 11-13, *Johnson v. United States*, *cert. denied*, No. 23-371, 2023 U.S. LEXIS 4494 (Nov. 13, 2023). Second, out of 7,000-8,000 petitions filed, the Supreme Court only hears oral argument in about 80 cases. General Information, https://www.supremecourt.gov/about/faq_general.aspx.

This Court should be liberal in granting review in all cases, including ordering more summary affirmances and reversals, so appellants at least have the option to petition the Supreme Court, if necessary. Granting review in this case is particularly important given the emerging constitutional dimensions of the issue.

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[9] Undersigned counsel calculated this average using this Court's Annual Reports located at https://www.armfor.uscourts.gov/newcaaf/ann_reports.htm. Counsel used the statistical summary located in the appendices, specifically the "Petition granted from the petition docket" and the "Petitions for grant of review filed" to calculate the above numbers and percentages.

**2. Given the Updates to the *MCM*, this Court can Address this Issue and Should Grant to Clarify the CCAs' Power to Correct Entries of Judgment.**

Given that existing case law relied upon by the lower court to dispose of this issue without further discussion is outdated, this Court should grant review to clarify whether CCAs can consider firearms prohibitions. In *United States v. Lepore*, despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, the Air Force Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021). But the Air Force Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id*. at 763.

*Lepore*'s rationale is not applicable to this case given updates to the *MCM*. In *Lepore*, the Air Force Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. The Air Force Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). Yet since 2019, however, the Rules

have stated that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." Rules for Courts-Martial (R.C.M.) 1101(a)(6); 1111(b)(3)(F).

Following through on those changes to the *MCM*, the Department of the Air Force adopted a regulatory requirement related to firearms that was otherwise lacking in *Lepore*. Applicable to this case, Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 8 April 2022, paragraph 13.3 [hereinafter DAFI 51-201] required the Statement of Trial results to include "whether the following criteria are met . . . firearm prohibitions.". As such, the Air Force Court's analysis in *Lepore* is no longer relevant since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. This administrative change brings the firearms prohibition within the ambit of Article 66's jurisdiction because it is now part of the sentence, "set forth in the entry of judgment." Article 67(c)(1)(A), UCMJ, 10 U.S.C. § 867; DAFI 51-201, paragraph 20.41 (requiring the first indorsement where the firearms prohibition is annotated to be "attache[d] to the EoJ").

Even at a glance, the first indorsement reveals that the firearms prohibition is part of the Entry of Judgment, and therefore the sentence, despite the Government's attempt to downgrade it as a "first indorsement" or "attachment":

ENTRY OF JUDGMENT IN THE CASE OF *United States v. Airman First Class Bradley D. Lampkins*

1st Ind., Entry of Judgment, A1C Bradley D. Lampkins, dated 17 November 2020.

FROM: 5 BW/JA 17 November 2020

MEMORANDUM FOR: ALL REVIEWING AUTHORITIES

The following criminal indexing is required, following Entry of Judgment, according to the references listed:

DNA Processing Required Under 10 U.S.C. § 1565 and DoDI 5505.14: Yes
Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes
Domestic Violence Conviction Under 18 U.S.C. § 922(g)(9): No
Sex Offender Notification in accordance with DoDI 1325.07: No
Fingerprint Card and Final Disposition in accordance with DoDI 5505.11: Yes

(Emphasis added).

Separate from the *MCM* and service regulations making the firearm prohibition part of the sentence, this Court's treatment of promulgating orders is in tension with the Air Force Court's approach in *Lepore*. This Court has identified errors and ordered corrections in promulgating orders. Six months after the Air Force Court decided *Lepore*, this Court decided *United States v. Lemire*. In that decision, this Court granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n.*

(C.A.A.F. 2022) (unpub. op.).[10] This Court's direction that the Army CCA fix—or order the Government to fix—the promulgating order, is at odds with *Lepore*.

This Court's decision in *Lemire* reveals three things. First, this Court has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, this Court believes that CCAs have the power to address collateral consequences under Article 66, UCMJ, since it "directed" the Army CCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if this Court and the CCAs have the power to fix administrative errors under Article 66, UCMJ, as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors. There is no distinction under Article 66, UCMJ, that would allow administrative errors to be fixed, but not constitutional errors.

This Court should grant review to resolve the tension between *Lepore* and *Lemire*, especially since this Court indicated in *Lemire* that collateral consequences can be fixed. If this Court does not grant review, it should remand the case and order the Government to specify which subsection of 18 U.S.C. § 922 applies.

[10] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *MCM*, App. 15 at A15-22.

### 3. A1C Lampkins Faces Unjustified Prejudice for a Nonviolent Offense

A1C Lampkins faces a lifetime firearms ban—despite a constitutional right to keep and bear arms—for financial crimes. The Government cannot demonstrate that such a ban, even if it were limited temporally, is "consistent with the nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130.

The test for applying the Second Amendment is as follows:

> 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."

*Bruen*, 142 S. Ct. at 2129–30 (citation omitted).

Section 922 (g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." This section presumably applies to A1C Lampkins, but the Government did not specify that in the Entry of Judgment.

Under *Bruen*, subsection (g)(1) cannot constitutionally apply to A1C Lampkins, who stands convicted of a non-violent offense. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud,

rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition.

> [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, 704 (quotations omitted). 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 (quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that § 922 (g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years confinement. *Range*, 69 F.4th at 98.[11] Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In addition to the distinction on violence, a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony. Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal felon disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms

[11] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent David Bryan Range, No. 23-374 (U.S. Oct. 18, 2023.)

were unknown before World War I." *Id.* at 708.

This is not the only provision of § 922 to have come under fire in light of *Bruen*. The Fifth Circuit recently held that § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *Rahimi*, 61 F.4th at 461 (citation omitted). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448–49.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 450 (citing *Bruen*, 142 S. Ct. at 2129–30). Therefore, the Government bears the burden of justifying its regulation. *Id.*

Second, it recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451. Based on historical precedent, there are certain groups "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452. Here, the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted of an offense where no firearm was used. *Id.*

Third, *Rahimi* found the Government failed to show "§ 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at 460. If the Government in *Rahimi* failed to prove that our Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed upon domestic violence restraining order violation, then it similarly cannot prove that barring A1C Lampkins from *ever* possessing firearms for an offense where no firearm was used is constitutional.

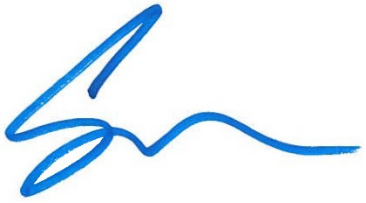
In addition to *Rahimi*, the Fifth Circuit has found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional. *Daniels*, 77 F.4th 337. In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at 340. He was later charged and convicted of a violation of § 922(g)(3). *Id*. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

*Id.*

In light of *Bruen* and the application of our Nation's history and tradition in relation to the Second Amendment, § 922 is unconstitutional as applied to A1C Lampkins through the Entry of Judgment.

**WHEREFORE**, A1C Lampkins respectfully requests that this Honorable Court grant his petition for review, or, in the alternative, remand the case and order the Government to specify which subsection of § 922 applies.



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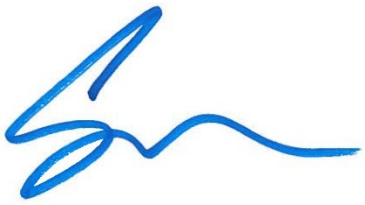
**CERTIFICATE OF FILING AND SERVICE**

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on January 18, 2024 and that a copy was also electronically served on the Government Trial and Appellate Operations Division on the same date.



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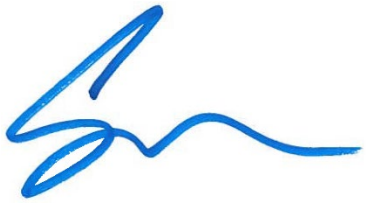
**CERTIFICATE OF COMPLIANCE WITH RULES 21(b), 24(b) & 37**

This supplement complies with the type-volume limitation of Rules 21(b) and 24(b) of no more than 9,000 words because it contains 8,990 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.



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## APPENDIX TABLE OF CONTENTS

# APPENDIX A

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40135** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Bradley D. LAMPKINS** | ) | |
| **Airman First Class (E-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 12 August 2020, a military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of one charge and one specification of attempt to steal $9,999.00 (Charge I) in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880; one charge and two specifications of larceny (Charge II) in violation of Article 121, UCMJ, 10 U.S.C. § 921; and one charge and 43 specifications of making, drawing, or uttering check, draft, or order without sufficient funds (Charge III) in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. The military judge sentenced Appellant to a dishonorable discharge, confinement for 540 days, reduction to the grade of E-1, and a reprimand.*

On 24 June 2022, Appellant filed his brief with this court setting forth assignments of error. In his brief, Appellant's second assignment of error asks whether the record of trial (ROT) is incomplete because it is missing the military judge's ruling on one of two legal issues trial defense counsel specifically preserved for appellate review. Specifically, the ROT is missing Appellate Exhibit (A.E.) XXVIII, the military judge's ruling on the Defense Motion to Dismiss for Speedy Trial. A review of the ROT confirms the military judge's ruling regarding speedy trial is missing.

The Government acknowledges the ROT does not include the military judge's ruling denying the defense's motion to dismiss for speedy trial. The Government argues that Appellant's requested remedy for correction pursuant

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* Because Appellant was convicted of conduct spanning between on or about 28 October 2018 and on or about 7 August 2019, references in this order to the punitive articles of the UCMJ are to both the *Manual for Courts-Martial, United States* (2016 ed.) and the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). As charges were referred to trial after 1 January 2019, references to the Rules for Courts-Martial and all other UCMJ references are to the 2019 *MCM*.

to Rule for Courts Martial (R.C.M.) 1112(d)(2) is unwarranted, as the Government has provided the missing exhibit through a motion to attach with an accompanying declaration from appellate government counsel attesting to the exhibit's authenticity. We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT.

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id*. "Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

Having reviewed the record, we find the omission of A.E. XXVIII, the military judge's ruling on the issue of speedy trial, is substantial.

R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication. R.C.M. 1112(d)(2)–(3) describes the procedure for return of the record of trial to the military judge for correction. The court notes that R.C.M. 1112(d)(2) requires notice and opportunity for the parties to examine and respond to the proposed correction.

Accordingly, it is by the court on this 25th day of October, 2022,

**ORDERED:**

The record of trial is returned to the Chief Trial Judge, Air Force Trial Judiciary, to correct the record under R.C.M. 1112(d) to resolve a substantial issue with the post-trial processing, insofar as the military judge's ruling on speedy trial is missing from the ROT.

Thereafter, the record of trial will be returned to the court not later than **14 November 2022** for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

If the record cannot be returned to the court by that date, the Government will inform the court in writing not later than **10 November 2022** of the status of the Government's compliance with this order.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# APPENDIX B

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40135 (f rev)**

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**UNITED STATES**
*Appellee*

**v.**

**Bradley D. LAMPKINS**
Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

*Upon Further Review*

Decided 2 November 2023

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*Military Judge*: Thomas J. Alford; Andrew R. Norton (post-trial processing); Dayle P. Percle (remand).

*Sentence*: Sentence adjudged on 12 August 2020 by GCM convened at Minot Air Force Base, North Dakota. Sentence entered by military judge on 17 November 2020: Dishonorable discharge, confinement for 46 months, reduction to E-1, and a reprimand.

*For Appellant*: Lieutenant Colonel Todd J. Fanniff, USAF; Major Spencer R. Nelson, USAF.

*For Appellee*: Major Morgan R. Christie, USAF; Major John P. Patera, USAF; Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, GRUEN, and KEARLEY, *Appellate Military Judges*.

Judge GRUEN delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge KEARLEY joined.

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GRUEN, Judge:

This case is before us for a second time. A military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of one specification of attempt to steal $9,999.00 (Charge I); two specifications of larceny (Charge II); and 43 specifications of making, drawing, or uttering check, draft, or order without sufficient funds (Charge III), in violation of Articles 80, 121, and 123a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 921, 923a.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 46 months, reduction to the grade of E-1, and a reprimand.[2] Upon recommendation from the military judge, the convening authority suspended all confinement in excess of 24 months for a period of two years and one month from the date of findings, 12 August 2020, at which time the suspended confinement would be remitted without further action unless the suspension was sooner vacated.

Appellant initially raised four issues which we have reworded: (1) whether Appellant is entitled to relief due to a 353-day post-trial processing delay; (2) whether the record of trial was incomplete; (3) whether the military judge abused his discretion in denying Appellant's motion for appropriate relief for illegal pretrial punishment; and (4) whether trial counsel committed prosecutorial misconduct during sentencing argument.

We agreed with Appellant with respect to issue (2). On 25 October 2022, we remanded this case to the Chief Trial Judge, Air Force Trial Judiciary, to correct the record under Rule for Courts-Martial (R.C.M.) 1112(d) to resolve a substantial issue with the post-trial processing, insofar as the military judge's ruling on speedy trial was missing from the record of trial. *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500, at *2–3 (A.F. Ct. Crim. App. 25 Oct. 2022) (order).[3] Appellant's record was re-docketed with this court on 9 November 2022 and included the missing ruling. Thus, we find the military judge's correction of the record remedies the error identified in our earlier order.

Subsequent to re-docketing, Appellant submitted three additional issues, which we have reworded and re-numbered: (5) whether the Government's

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[1] Because Appellant was convicted of conduct spanning between on or about 28 October 2018 and on or about 7 August 2019, references in this opinion to the punitive articles of the UCMJ are to both the *Manual for Courts-Martial, United States* (2016 ed.) and the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). As charges were referred to trial after 1 January 2019, references to the Rules for Courts-Martial and all other UCMJ references are to the 2019 *MCM*.

[2] Appellant was awarded 363 days of pretrial confinement credit against his sentence.

[3] We note an error in the LEXIS cite in that our order was issued on 25 October 2022, but the LEXIS cite incorrectly reflects 2020.

submission of an incomplete record of trial tolls the time period for presumptively unreasonable post-trial delay under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); (6) whether Appellant is entitled to special relief because the Government engaged in both speedy trial violations and unreasonable post-trial delay; and (7) whether the military judge's analysis of the factors in *Barker v. Wingo*, 407 U.S. 514 (1972), addressing a speedy trial motion fully aligned with that of *United States v. Harrington*, 81 M.J. 184 (C.A.A.F. 2021), *recon. denied,* 81 M.J. 322 (C.A.A.F. 2021)—a case decided after the military judge's ruling at trial.[4]

As to issue (5), we decline Appellant's request to find that over 800 days had elapsed between announcement of the sentence and docketing his case with this court. Here, the record establishes that Appellant's case was docketed at 353 days. We consider the 353-day delay in our discussion of issue (1) below.

We have carefully considered issue (7) and find no discussion or relief is warranted. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987)).

With regard to issue (1), for the reasons stated below, we find remedy is appropriate to address the excessive post-trial delay. In our decretal paragraph, we affirm the findings of guilty and only so much of the sentence that should be approved.

## I. BACKGROUND

The charges in this case stem from a number of fraudulent money transactions made by Appellant. Appellant pleaded guilty to all three charges including a total of 46 specifications. In the fall of 2018, Appellant was 19 years old and received a monthly pay of $1,931.10. He arrived at his first duty station on 24 September 2018 and opened a bank account on 27 September 2018 with an initial deposit of $70.00. On 28 October 2018, Appellant wrote the first of many fraudulent checks, this one to the Army and Air Force Exchange Service in the amount of $1,301.75 for the purchase of a computer and card scanner. On 23 February 2019, Appellant stole a Ford F-350 from a Minot, North Dakota, resident, the truck having a value of $23,000.00. In June 2019 he stole $26,800.00 worth of items and services from a local vehicle-related company. Finally, in August 2019, Appellant wrote a check to his wife in the amount of $9,999.00 knowing he did not have the funds in his checking account to cover said check.

[4] Appellant personally raises issues (3), (4), and (7) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

## II. DISCUSSION

### A. Post-Trial Processing

#### 1. Additional Background

On 10 August 2020, the military judge sentenced Appellant, and on 19 October 2020, the court reporter certified the record of trial "as accurate and complete" in accordance with R.C.M. 1112(b) and R.C.M. 1112(c)(1). Appellant's case was docketed with this court on 30 July 2021—353 days from the date he was sentenced.

On 9 July 2021, trial counsel provided an affidavit and case chronology explaining why it took the Government 353 days to docket Appellant's case with this court.[5] We have corrected the number of days from sentencing to docketing and added information from the record of trial detailing the post-trial processing timeline in this case as set forth below.

| Date | Event | Days after Sentence Announcement |
|---|---|---|
| 9 December 2020 | The base legal office deposited the original and four copies of the record of trial with the Traffic Management Office (TMO) for mail delivery via FedEx. The base legal office then updated the Automated Military Justice Analysis and Management System (AMJAMS) reflecting such action, which caused the case to no longer appear in the open case reports. | 120 |
| 9–11 December 2020 | The TMO lost one copy of the record of trial intended for the Air Force Appellate Records Branch (JAJM), and erroneously mailed the original to Appellant's confinement facility. The TMO mailed Appellant's copy, the remaining copy intended for JAJM, and the remaining copy to the servicing legal office for the general court-martial convening authority at the Numbered Air Force (NAF). | 120–122 |
| 11–18 February 2021 | The NAF received the records of trial and identified missing documents and extensive errors. | 184–191 |

[5] Appellant calculated a delay of 352 days—we have calculated a delay of 353 days.

| | | |
|---|---|---|
| 6 April 2021 | The NAF returned all the records of trial to the base legal office for correction. | 238 |
| 9 April 2021 | The noncommissioned officer in charge (NCOIC) maintained the NAF's copy of the record of trial. The other records of trial were in a sealed box placed inside a cubicle of the case paralegal who already had permanently changed duty stations. | 241 |
| 21 June 2021 | A newly assigned paralegal who began working in the above-mentioned cubicle discovered the box of records of trial in Appellant's case, and gave them to the NCOIC of the military justice section. The NCOIC indicated that processing those copies of the record of trial was no longer time sensitive because *Moreno* had tolled. | 315 |
| 5–6 July 2021 | The NCOIC inspected the records of trial and realized the original record was among them. The NCOIC began correcting the identified errors. | 328–329 |
| 7 July 2021 | The base legal office determined all missing documents had been obtained for inclusion in the record of trial. | 330 |
| 8–9 July 2021 | Another copy of the record of trial was created to replace the one lost in December 2020. The original and three copies were all corrected and provided to TMO for distribution. | 331–332 |
| 30 July 2021 | JAJM received the original record of trial. | 353 |

**2. Law**

As a matter of law, this court reviews whether claims of excessive post-trial delay resulted in a due process[6] violation. *United States v. Anderson*, 82 M.J. 82, 86 (C.A.A.F. 2022). Even if we do not find a due process violation, we may nonetheless grant Appellant relief for excessive post-trial delay under our broad authority to determine sentence appropriateness pursuant Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

[6] *See* U.S. CONST. amend. V.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *Moreno*, 63 M.J. at 135 (citations omitted). The United States Court of Appeals for the Armed Forces (CAAF) in *Moreno* held that a presumptive due process violation occurs under any of the following circumstances: (1) the convening authority takes action more than 120 days after completion of trial; (2) the record of trial is docketed by the service Court of Criminal Appeals (CCA) more than 30 days after the convening authority's action; or (3) a CCA completes appellate review and renders its decision more than 18 months after the case is docketed with the court. *Id.* at 150. As Appellant's case was processed under new procedural rules, we apply the 150-day aggregate standard threshold announced in *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). When docketing occurs more than 150 days after sentencing, the delay is presumptively unreasonable. "This 150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*." *Id.*

A case that does not meet the 150-day threshold triggers an analysis of the four non-exclusive factors set forth in *Barker* to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(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." *Moreno*, 63 M.J. at 135 (first citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); and then citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)). Analyzing these factors requires determining which factors favor the Government or an appellant and then balancing these factors. *Moreno*, 63 M.J. at 136. No single factor is dispositive, and the absence of a given factor does not prevent this court from finding a due process violation. *Id.* When examining reasons for the delay this court determines "how much of the delay was under the Government's control" and "assess[es] any legitimate reasons for the delay." *United States v. Anderson*, 82 M.J. 82, 88 (C.A.A.F. 2022).

*Moreno* identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. 63 M.J at 138–39 (citations omitted). "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay," and the CAAF requires "an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006)).

Furthermore, Article 66(d), UCMJ, authorizes this court to grant relief for excessive post-trial delay even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. In *Tardif*, the CAAF recognized "a Court of Criminal Appeals has

authority under Article 66[, UCMJ,] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)[, UCMJ]." *Id.* at 224 (citation omitted). The essential inquiry under *Tardif* is whether, given the post-trial delay, the sentence "remains appropriate[ ] in light of all circumstances." *Toohey*, 63 M.J. at 362 (citing *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) (per curiam)).

We provided a further analytical framework for that analysis in *United States v. Gay*, where we set forth a six-factor test to apply before granting "sentence appropriateness" relief under *Tardif* and *Toohey*, even in the absence of a due process violation:

> 1. How long did the delay exceed the standards set forth in *United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006)?
>
> 2. What reasons, if any, has the [G]overnment set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?
>
> 3. Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?
>
> 4. Has the delay 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. Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
>
> 6. Given the passage of time, can this court provide meaningful relief in this particular situation?

74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd* 75 M.J. 264 (C.A.A.F. 2016).

**3. Analysis**

Appellant contends that he is entitled to relief due to a 353-day post-trial processing delay between the day he was sentenced and the day his record of trial was docketed with this court. Appellant claims that he has suffered particularized anxiety and concern and is therefore prejudiced because of this delay. He further argues that a due process violation has occurred because "the delay adversely affects the public perception of the fairness and integrity of the military justice system." We agree the delay from sentencing to docketing with this court was presumptively unreasonable. While we do not find that the delay prejudiced Appellant, we nevertheless find that relief is appropriate to address the delay.

The Government delay in docketing Appellant's case with this court was 353 days—more than double the 150-day threshold set in *Livak*. Therefore, there is a facially unreasonable delay in post-trial processing. We must now address whether a due process violation has occurred, which requires analysis of the *Barker* factors. The first factor of the *Barker* analysis—the length of the delay—weighs heavily in favor of Appellant. Here, the delay was over 200 days past the 150-day threshold set forth by this court in *Livak*.

The second factor—the reasons for the delay—also weighs in Appellant's favor. The record shows the Government failed on multiple levels during the post-trial processing of the record. Not only did the base legal office responsible for moving the case post-sentencing fail to send the correct copies of the record to the NAF, the NAF took nearly two additional months to identify errors and send the record back to the base legal office for correction. We note a troubling period during post-trial processing wherein for 77 days the record sat untouched, in a cubicle at the base legal office. We find no good reasons were provided to justify delay, and accordingly find that this factor weighs in favor of Appellant.

With respect to the third factor—Appellant's assertion of the right to timely review and appeal—Appellant asserted his right to timely appellate review for the first time in his brief to this court. He asserted this right a second time upon re-docketing. No one factor is dispositive in the *Barker* analysis and the primary responsibility for speedy processing rests with the Government. *Moreno*, 63 M.J. at 136–37. Thus, we find with respect to Appellant's assertion of the right to timely review and appeal, this factor neither weighs in favor nor against Appellant's interests.

The final *Barker* factor addresses prejudice. Appellant asserts he has suffered constitutionally cognizable anxiety from the delay affecting him "physically, mentally, socially, and hindered [his] ability to move on with [his] life." He claims his concern and anxiety is distinguishable from the normal anxiety of an appeal because a medical doctor has diagnosed him with depression and post-traumatic stress disorder. Appellant further claims that the stress and anxiety have increased since he was released from confinement because of the post-trial processing delay. He states the stress and anxiety prevent him from sleeping without medication and he has nightmares given he has not yet had closure with his appeal. Additionally, he claims the lack of finality of his appeal has prevented him from applying for a service characterization upgrade or medical benefits and caused him difficulty in applying for employment. We do not agree with Appellant that his concern and anxiety are distinguishable from the normal concern and anxiety of an appeal and thus, we do not find prejudice. *See Toohey*, 63 M.J. at 361; *see also Anderson,* 82 M.J. at 87 (holding no prejudice for post-trial delay delaying appellant's clemency and parole consideration because prospects of receiving clemency or parole are inherently speculative); *United States v. Bush*, 68 M.J.

96, 101 (C.A.A.F. 2009) (holding no prejudice because appellant's assertion that post-trial delay led to a lost job opportunity were speculative and uncorroborated). We find this factor weighs in favor of the Government.

Where there is no qualifying prejudice from the delay, there is no due process violation unless, "when balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. Here, we find the delays were egregious, not justified, and would adversely affect the public's perception of the fairness and integrity of the military justice system. Again, we note that the overall delay in docketing this case with our court was 353 days, more than double the 150-day standard established in *Livak*. Additionally, we note that we have not been presented with any justification for the delay. Most troubling, though, is the fact that even after this case was over the 150-day standard Appellant's record was left untouched, in a cubicle at the base legal office. Therefore, we find the delay in this case amounted to a due process violation, and that Appellant is entitled to relief. We provide such relief in our decretal paragraph.

Finally, we note that even if we had not found a due process violation, after considering the factors outlined in *Gay,* we would find that Appellant is entitled to *Tardif* relief in the same amount for the excessive post-trial delay. Here, we again are persuaded by the fact that the delay exceeded the standards set forth in *Livak* by over 200 days*;* the general lack of attention by the Government to the overall post-trial processing of this case; the lack of sufficient reasons for the delay; the harm to confidence in the military justice process due to extensive delay; the confidence this court can provide meaningful relief in this particular situation; and the fact that to grant relief is consistent with the dual goals of justice and good order and discipline.

**B. Illegal Pretrial Punishment**

**1. Additional Background**

Appellant contends that the military judge abused his discretion when he denied Appellant's motion for appropriate relief for illegal pretrial confinement based on erroneous findings of fact and overlooking important facts. Appellant specifically argues that he is entitled to relief for two reasons: (1) because he was not permitted to go outdoors while in pretrial confinement; and (2) because his restriction to base was tantamount to confinement based on the fact that for 154 days Appellant could not sleep in his own home, put his children to bed, or spend quality time with his wife. We do not find the military judge abused his discretion and find no relief is warranted.

**2. Law**

"The question of whether [an a]ppellant is entitled to credit for an Article 13[, UCMJ,] violation is reviewed de novo." *United States v. Fischer*, 61 M.J. 415, 418

(C.A.A.F. 2005) (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)). "It is a mixed question of law and fact, and the military judge's findings of fact will not be overturned unless they are clearly erroneous." *Id.* "Appellant bears the burden of proof to establish a violation of Article 13[, UCMJ]." *Id.*

Article 13, UCMJ, provides, "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him." Article 13, UCMJ, prohibits two types of actions: (1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) "pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement." *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003) (citing *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000) (additional citation omitted)).

The determination of whether pretrial restriction is tantamount to confinement is based on the totality of the conditions imposed by the restriction. *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) (citation omitted). The CAAF has set forth criteria to consider when determining if pretrial restriction is tantamount to confinement:

> The nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

*Id.* (alteration in original) (quoting *United States v. Smith*, 20 M.J. 528, 531–32 (A.C.M.R. 1985), *cited with approval in United States v. Guerrero*, 28 M.J. 223, 225 (C.M.A. 1989)).

**3. Analysis**

Appellant's first claim is based on the military judge's finding that there was a valid, weather-related reason as to why he was denied access outside during

certain periods of his pretrial confinement. Specifically, Appellant claims "the [m]ilitary [j]udge erred in basing his ruling on erroneous facts and a reasoning that a policy of general applicability to all persons in confinement can justify what amounted to punishment." Appellant claims that the military judge made a clearly erroneous finding of fact that the temperatures at Minot Air Force Base, North Dakota, were "well below zero" at times during Appellant's stay in confinement. The military judge was presented with evidence that when the temperature dropped to 32 degrees Fahrenheit, inmates were not allowed outside. The fact that temperatures during the winter in Minot at times were "well below zero" is a finding of fact "through reasonable inferences that the military judge could reach from testimony and other evidence that was presented on the motion." *United States v. Harris*, Misc. Dkt. No. 2020-07, 2021 CCA LEXIS 176, at *12 (A.F. Ct. Crim. App. 16 Apr. 2021) (unpub. op.).

The military judge stated on the record, "I know it can get cold up here," and received evidence about Appellant's crimes purchasing a snowblower, spread, and ice melt. Using his common knowledge of the local area, combined with logical inferences from the testimony, the military judge could aptly conclude that the temperatures fell "well below zero" at times during Appellant's stay in confinement. This finding is "fairly supported by the record." *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985) (quoting *United States v. Lonberger*, 459 U.S. 422, 432 (1983)). Ultimately, the military judge concluded that there was no evidence that Appellant's confinement conditions "were done for the purposes of punishment, nor is there evidence that those conditions were more rigorous than necessary to ensure [Appellant's] presence at trial." Appellant failed to meet his burden to establish entitlement to credit on this point and we concur with the military judge's finding that there was no intent to punish Appellant when he was denied outside access due to inclement weather.

Appellant's second claim is that the military judge abused his discretion when he found Appellant's 154-day restriction to base was not tantamount to confinement. Appellant's argument is that during this time he could not sleep in his own home, put his children to bed, or spend quality time with his wife.

According to the criteria set forth by the CAAF to consider when determining if pretrial restriction is tantamount to confinement, the only fact Appellant raises that potentially is a consideration is the location of his sleeping accommodations. In this case, while Appellant was not sleeping in his own home during pretrial restriction, there is no indication that his sleeping accommodations alone were somehow tantamount to confinement. The military judge recognized in his ruling denying Appellant's motion that Appellant could not sleep in his own home during this time but noted that Appellant's wife and children were free to visit him. The military judge did not find the conditions Appellant complained of amounted to

pretrial confinement. We agree and find Appellant has not met his burden to establish a violation of Article 13, UCMJ, and is not entitled to relief on this point.

**C. Prosecutorial Misconduct**

**1. Additional Background**

Appellant claims that trial counsel invoked the community when calling him a "complete stain" during pre-sentencing proceedings and that this was improper argument under *United States v. Voorhees*, 79 M.J. 5 (C.A.A.F. 2019). As the CAAF reiterated in *Voorhees*, "Disparaging comments are also improper when they are directed to the defendant himself," and "[t]rial counsel's word choice served as 'more of a personal attack on the defendant than a commentary on the evidence.'" *Id*. at 12 (first quoting *United States v. Fletcher*, 62 M.J. 175, 182 (C.A.A.F. 2005); and then quoting *Fletcher*, 62 M.J. at 183). Appellant further claims that trial counsel's comment that he was a "complete stain" is analogous to calling him a "pig" as the trial counsel did in *Voorhees*, which the CAAF said amounted to clear error, *id*. at 7–8, and that this improper argument has negatively affected him. We find any error did not result in material prejudice to a substantial right of Appellant.

**2. Law**

The issue of "[i]mproper argument is a question of law that we review de novo." *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citation omitted). However, if trial defense counsel does not object to a sentencing argument by trial counsel, we review the issue for plain error. *Id.* (citing *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007)). To establish plain error, an appellant "must prove the existence of error, that the error was plain or obvious, and that the error resulted in material prejudice to a substantial right." *Id.* at 106 (citing *Erickson*, 65 M.J. at 223). Because "all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

"The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). Three factors "guide our determination of the prejudicial effect of improper argument: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction[s].'" *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (alteration in original) (quoting *Fletcher*, 62 M.J. at 184). "In applying the *Fletcher* factors in the context of an allegedly improper sentencing argument, we consider whether trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence

alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (alteration, internal quotation marks, and citation omitted).

"Trial counsel is entitled to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Frey*, 73 M.J. at 248 (internal quotation marks and citation omitted). "During sentencing argument, the trial counsel is at liberty to strike hard, but not foul, blows." *Halpin*, 71 M.J. at 479 (internal quotation marks and citation omitted). "[T]he argument by a trial counsel must be viewed within the context of the entire court-martial." *Baer*, 53 M.J. at 238. "The focus of our inquiry should not be on words in isolation, but on the argument as viewed in context." *Id.* (internal quotation marks and citations omitted).

When analyzing allegations of improper sentencing argument in a judge-alone forum, we presume a "military judge is able to distinguish between proper and improper sentencing arguments." *Erickson*, 65 M.J. at 225.

**3. Analysis**

As there was no objection during trial counsel's sentencing argument, we analyze this issue under a plain error standard of review. We need not determine whether trial counsel's sentencing argument constituted plain and obvious improper argument in this case as we ultimately find that Appellant has failed to demonstrate any material prejudice.

In testing for material prejudice, the first *Fletcher* factor considers the severity of the misconduct. 62 M.J. at 184. On this matter, we note that the "lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment." *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (internal quotation marks and citation omitted). Here, we find that the comment was minor and relatively insignificant. The comment was not the cornerstone of trial counsel's argument and we note the comment was made one time and did not appear anywhere on counsel's 16 slides used during argument. Ultimately, we find the comment had minimal impact, if any, on Appellant's sentence.

Regarding the second *Fletcher* factor—curative measures taken—no curative instruction was necessary because of the judge-alone forum. We note that military judges are presumed to know and follow the law, absent clear evidence to the contrary. *See United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (per curiam) (citation omitted); *see also Erickson*, 65 M.J. at 225 (noting the presumption that a military judge is able to distinguish between proper and improper sentencing arguments). Appellant has presented no evidence that the military judge in this case was unable to distinguish between proper and improper sentencing argument.

As to the third *Fletcher* factor—the weight of the evidence supporting the sentence—we find this factor weighs heavily in the Government's favor. The evidence

in this case was strong and uncontested, as it came from Appellant's own admissions to the military judge during his guilty plea inquiry. Appellant admitted to attempting to steal $9,999.00, larceny, and 43 specifications of making, drawing, or uttering checks without sufficient funds. The military judge sentenced Appellant to a dishonorable discharge, confinement for 46 months, reduction to the grade of E-1, and a reprimand. The 46 months' confinement is significantly less than Appellant's maximum exposure. As noted *supra*, we further reduce Appellant's sentence for unreasonable delay in this case.

In conclusion, we find that Appellant has failed to meet his burden to demonstrate that any error resulted in material prejudice to a substantial right. After considering trial counsel's comments as a whole, we are confident that Appellant was sentenced based on the evidence alone. *See Halpin*, 71 M.J. at 480.

**D. Appellate Review**

This review is specific to the processing time starting when Appellant's case was first docketed with this court, as we have already addressed sentencing to docketing with this court *supra*. Subsequent to re-docketing, Appellant requested this court find he is entitled to special relief when there is both a speedy trial violation and unreasonable post-trial delay during the appellate process to address the effect of those two errors in combination. Appellant concedes "this is a question of first impression" and cites no law to support special relief in such circumstances, nor does he define special relief under these circumstances. We decline to make a finding on the effect of the combined delays and address the delay in appellate processing below.

**1. Additional Background**

Appellant's record of trial was originally docketed with this court on 30 July 2021. Appellant requested and was granted eight enlargements of time to file his assignments of error, over the Government's opposition, extending the deadline to file his brief until 25 June 2022.

On 24 June 2022, Appellant filed his brief setting forth issues with this court. In his brief, issue (2) asks whether the record of trial is incomplete because it is missing the military judge's ruling on one of the two legal issues the defense counsel specifically preserved for appellate review. Specifically, the record was missing the military judge's ruling on the Defense Motion for Speedy Trial. While the Government argued Appellant's requested remedy for correction was unwarranted, they acknowledged the record did not include the subject ruling. On 25 October 2022, this court remanded the record for correction, directing that the record be returned to the court not later than 14 November 2022 for completion of appellate review. *Lampkins*, order at *500 (*see* n.3 *supra*).

The corrected record was re-docketed with this court on 9 November 2022. Thereafter, on 9 January 2023, Appellant filed an additional brief with three

additional issues. On 8 February 2023, the Government filed their answer to Appellant's brief. On 31 January 2023, Appellant filed a Motion for Leave to File Demand for Speedy Appellate Review arguing that 30 January 2023 was the 18-month deadline for this court to issue a decision, thus triggering *Moreno's* presumption of facially unreasonable delay. The Government did not oppose. On 9 February 2023 we granted Appellant's motion by treating such motion as a "demand for speedy appellate review." On 15 February 2023, Appellant filed a Motion for Leave to File a Supplemental Assignment of Error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which we denied on 24 February 2023.

**2. Law**

We review de novo an appellant's entitlement to relief for post-trial delay. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135 (citations omitted). In *Moreno*, the CAAF established a presumption of facially 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." *Id.* at 142.

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker,* 407 U.S. at 530: "(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 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." *Toohey*, 63 M.J. at 362.

**3. Analysis**

Over 18 months have elapsed since Appellant's record of trial was originally docketed with this court. Assuming for purposes of our analysis that the October 2022 remand and November 2022 re-docketing of the record did not "reset" the *Moreno* timeline, there is a facially unreasonable delay in the appellate proceedings. In light of this assumption, we have considered the *Barker* factors and find no violation of Appellant's due process rights. Although Appellant asserted in a declaration attached to the record that the delay in his appeal negatively affected

him physically, mentally, socially, and hindered his ability to move on with his life, we have found his arguments uncompelling. We have found no material prejudice to Appellant's substantial rights stemming from the appellate process. We find his confinement has not been "oppressive" for purposes of our *Moreno* analysis. Furthermore, we find appellate review processing has not been so egregious as to adversely affect the perception of the military justice system.

The timeline in appellate processing is largely attributable to Appellant's requests for enlargements of time and additional filings. After this court re-docketed his case, Appellant was afforded the opportunity to submit additional issues, which he did on 9 January 2023. Before the Government had an opportunity to respond to Appellant's brief, on 31 January 2023, Appellant filed a Motion for Leave to File Demand for Speedy Appellate Review. On 8 February 2023, the Government filed their response to Appellant's brief. On 15 February 2023, Appellant motioned to supplement his two earlier briefs requesting this court accept an additional issue pursuant to *Grostefon*. This court denied that motion. Accordingly, we find no violation of Appellant's due process rights.

Furthermore, recognizing our authority under Article 66(d), 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 Tardif*, 57 M.J. at 225. After considering the factors enumerated in *Gay*, 74 M.J. at 742, we conclude that with respect to appellate review, no such relief is warranted.

## III. CONCLUSION

We affirm only so much of the sentence that includes 46 months' confinement, a bad-conduct discharge, reduction to the grade of E-1, and a reprimand. The findings as entered, and the sentence as modified, are correct in law and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings as entered and the sentence, as modified, are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# APPENDIX C

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES**<br>*Appellee,*<br><br>v.<br><br>Airman First Class (E-3)<br>**BRADLEY D. LAMPKINS,**<br>United States Air Force<br>*Appellant* | ) | **MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR UNDER *GROSTEFON***<br><br>Before Panel No. 1<br><br>No. ACM 40135 (f rev)<br><br>15 February 2023 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rules 18(b) and 23(d) of this Honorable Court's Rules of Practice and Procedure, Appellant, Airman First Class (A1C) Bradley D. Lampkins, personally moves for leave to file a Supplemental Assignment of Error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Pursuant to Rule 23(d), A1C Lampkins' motion for leave to file is combined with the underlying Supplemental Assignment of Error, which is attached as Appendix A. As good cause for this motion, A1C Lampkins relies on his ability to benefit from changes to the law during the pendency of his appeal and the recent legal developments at the Supreme Court and the United States Court of Appeals for the Fifth Circuit.

A1C Lampkins filed his initial Brief on 24 June 2022. The day before filing, the Supreme Court issued its decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, which held that the Second and Fourteenth Amendments protected an individual's right to carry a handgun for self-defense outside the home. 142 S. Ct. 2111, 2117 (2022). After this Court remanded A1C Lampkins' case for the Government re-docketed the case, A1C Lampkins filed his additional Brief on . The Government provided its Answer on 8 February 2023.



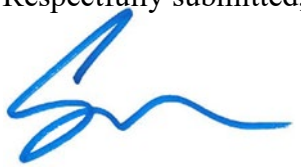
DENIED
24 FEB 2023

Notably, on 2 February 2023, the Fifth Circuit decided *United States v. Rahimi*, holding that 18 U.S.C.S. § 922(g)(8) was unconstitutional because the Government failed to demonstrate that § 922(g)(8)'s domestic violence restriction of the Second Amendment fit within the Nation's historical tradition of firearm regulation. 2023 U.S. App. LEXIS 2693, at *28 (5th Cir. Feb. 2, 2023). This decision is the good cause that A1C Lampkins is relying on to file this Supplemental Assignment of Error. Although *Bruen* was decided before his second brief was filed, the ramification of *Bruen* and how it could affect A1C Lampkins' rights was not fully known to him until the Fifth Circuit issued *Rahimi* on 2 February 2023.

A1C Lampkins has met the requirement of good cause given the fact that he is entitled to the benefit of changes in the law during the pendency of his direct appeal, coupled with the constitutional magnitude of the decisions discussed above. While Fifth Circuit precedent is not binding upon this Court, A1C Lampkins anticipates *Bruen* and *Rahimi* will spur additional changes in the law that may affect his rights. A1C Lampkins recognizes the delays in appellate review he has suffered to this point. If the Court grants this motion, he understands the additional delay may be held against him for speedy appellate review purposes.

**WHEREFORE**, A1C Lampkins respectfully requests this Honorable Court grant his motion and consider his Supplemental Assignment of Error.

Respectfully submitted,



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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 15 February 2023.

Respectfully submitted,

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## APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), A1C Bradley Lampkins, Appellant, through Appellate Defense Counsel, personally requests that this Court consider the following matter:

## IV.

**WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN A1C LAMPKINS WAS CONVICTED OF NON-VIOLENT OFFENSES AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?**

### Law and Analysis

The test for applying the Second Amendment is as follows:

> 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*, 142 S. Ct. 2111, 2129-30 (2022) (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, No. 21-11001, 2023 U.S. App. LEXIS 2693, at *28 (5th Cir. Feb. 2, 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pled guilty to "possessing a firearm while under a domestic violence restraining order." *Rahimi,* at *3.

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

The Fifth Circuit made two broad points. First, the Government's contention that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* limited their applicability to only "law-abiding, responsible citizens," is incorrect. *Rahimi* at *7. The Fifth Circuit's bottom line was:

> [T]he Government's argument fails because (1) it is inconsistent with *Heller*, *Bruen*, and the text of the Second Amendment, (2) it inexplicably treats Second Amendment rights differently than other individually held rights, and (3) it has no limiting principles.

*Rahimi*, at *8.

Second, and despite the violent nature of his offenses, the Fifth Circuit held that "The Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at *27-28. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include violent offenders, then it certainly cannot prove that its firearm prohibition on A1C Lampkins' for non-violent offenses would be constitutional.

A further problem with the Statement of Trial results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that A1C Lampkins fell under the firearm prohibition. Thus, A1C Lampkins is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be the domestic violence or drugs section given the facts of his case. Regardless, given the non-violent nature of the facts of his case, and *Rahimi*'s holding, it appears that the Government would not be able to meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms.

In *United States v. Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial

is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021). Despite the court martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized that, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the Court of Appeals for the Armed Forces (CAAF), decided *United States v. Lemire*. In that decision, CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpub. op.). The CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is in contravention to this Court's holding in *Lepore*.

If logic follows, the CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to correct administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, the CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCA's have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the Court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from the case *sub judice*. In *Lepore*, this Court made clear that "All references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The new 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "Any additional information…required under regulations prescribed by the Secretary concerned." Rules for Courts-Martial (R.C.M.) 1101(a)(6); 1111(b)(3)(F). AFI 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required the Statement of Trial results to include "whether the following criteria are met…firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

**WHEREFORE**, A1C Lampkins requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

22 February 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>*Appellee*<br><br>v.<br><br>Airman First Class (E-3)<br>BRADLEY D. LAMPKINS,<br>United States Air Force<br>*Appellant.* | ) **UNITED STATES' OPPOSITION TO**<br>) **APPELLANT'S MOTION FOR LEAVE**<br>) **TO FILE SUPPLEMENTAL**<br>) **ASSIGNMENT OF ERROR**<br>)<br>) Before Panel No. 1<br>)<br>) No. ACM 40135 (f rev)<br>)<br>) 22 February 2023 |

**TO THE HONORABLE, THE JUDGES OF**
**THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

Pursuant to Rules 18(d), 18.4, and 23(c) of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for leave to file a supplemental assignment of error, dated 14 February 2023. Appellant fails to establish good cause to grant this motion, and it should be denied to reinforce this Court's rules on timeliness and to discourage further instances of piecemeal appellate litigation.

Rule 18(d) requires that "[a]ny brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." Consistent with Rule 18.4, this Court may permit supplemental filings "submitted by motion for leave to file in accordance with Rule 23(d)."[1] In United States v. Albarda, this Court required the appellant "to show good cause to warrant acceptance" of a motion for leave to file a supplemental assignment of error. 2021 CCA LEXIS 75, at *29 n.7 (A.F. Ct. Crim. App. 22 February 2021) (unpub. op.).

[1] Rule 23(d) states that "[a]ny pleading not authorized or required by these or Service Court rules shall be accompanied by a motion for leave to file such pleading."

Appellant seeks to supplement his initial assignments of errors by raising one additional assignment of error[2] arguing that the federal statute prohibiting his possession of a firearm is unconstitutional. (Motion for Leave to File, dated 15 February 2023.) Appellant moves this Court to consider the additional assignment of error 235 days after his initial filing and 22 days after submitting his additional brief when this Court re-docketed his case. For good cause, Appellant cites the Fifth Circuit's recent decision in United States v. Rahimi, 2023 U.S. App. LEXIS 2693, __ F.4th __ (5th Cir. 2 February 2023). (Id.) Appellant further argues that this opinion "will spur additional changes in the law that may affect his rights." (Id.)

Rahimi is not relevant to Appellant's assignment of error. In Rahimi, a Fifth Circuit panel struck down 18 USC § 922(g)(8) as unconstitutional under the Second Amendment. Id. at *1. The statute at issue in Rahimi, 18 USC § 922(g)(8), prohibits the possession of firearms by someone subject to a domestic violence restraining order. Id. 18 USC § 922(g)(8). Here, Appellant was never subject to a domestic violence restraining order. Therefore, § 922(g)(8) is inapplicable. Instead, Appellant's firearm restriction stems from the felon restriction in § 922(g)(1) which makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."

Courts that have addressed Rahimi since it was decided have consistently made clear the Fifth Circuit's holding is limited to the domestic violence restraining order part of the statute and does not extend to other portions of statute, like the felon restriction:

> Defendant filed Rahimi as supplemental authority in this case, arguing it supports her position. The Court disagrees. Rahimi struck down § 922(g)(8), which is quite dissimilar from § 922(g)(3). § 922(g)(8) prohibits firearm possession by individuals subject to domestic violence restraining orders based on their threat to a

[2] Appellant raises this supplemental assignment of error personally, pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

> specific individual, and not a defined class of persons based on their danger to society writ large (such as the felon restriction). As noted above, Rahimi actually endorses the latter type of restrictions as consistent with the historical record. As § 922(g)(3) resembles the latter type of restrictions, the findings in Rahimi support the constitutionality of the statute at issue in this case.

United States v. Posey, No. 2:22-CR-83 JD, 2023 U.S. Dist. LEXIS 22005, at *24 n.7 (N.D. Ind. 9 February 2023).

> [T]he Court in Rahimi, in the same paragraph, seemingly acknowledged that the 'law-abiding citizen' language used in Heller and then Bruen *did* mean to exclude 'groups that have historically been stripped of their Second Amendment rights' by 'longstanding prohibitions on the possession of firearms by felons and the mentally ill.

United States v. Price, No. 21 CR 164, 2023 U.S. Dist. LEXIS 23794, at *9 (N.D. Ill. 13 February, 2023).

In sum, Rahimi recognized that the right to keep and bear arms is subject to reasonable restriction, including the felon restriction. Id. This is consistent with Supreme Court precedent that has rejected Second Amendment challenges to "longstanding prohibitions on the possession of firearms by felons." District of Columbia v. Heller, 554 U.S. 570, 573 (2008). Therefore, Rahimi does not apply to Appellant's case and his justification for the late filing fails.

Moreover, Rahimi is not binding authority and was only decided by a panel of the Fifth Circuit, as opposed to *en banc*.[3] Therefore, this Court should not accept Appellant's untimely filing that relies exclusively on a singular case of limited persuasion that addresses an inapplicable portion of the firearm statute.

[3] "And the likelihood that the Fifth Circuit will rehear Rahimi *en banc* cannot be ignored." United States v. Gleaves, No. 3:22-cr-00014, 2023 U.S. Dist. LEXIS 20328, at *9 n.3 (M.D. Tenn. Feb. 6, 2023).

The Court should discourage this type of piecemeal litigation, which unduly delays appellate review. This is especially true in Appellant's case where he has already demanded speedy appellate review. The Army Court of Criminal Appeals, when determining "whether to provide relief for a new claim not raised during an earlier appeal from the same appellant" recently held that in second and successive appeals relief will only be provided if the appellant can show both good cause for failing to raise the claim in the prior appeal and actual prejudice resulting from the newly raised assignment of error. United States v. Steele, 82 M.J. 695 (A. Ct. Crim. App. 2022) *pet. granted*, No. 22-0254/AR, 2022 CAAF LEXIS 780 (C.A.A.F. 2 November 2022).

This Court applies that rationale for cases on remand but should apply the same analysis for supplemental assignments of error. United States v. Shavrnoch, 47 M.J. 564, 569 (A.F. Ct. Crim. App. 1997). While the rules do permit this Court to consider supplemental pleadings; allowing Appellant to submit a supplemental assignment of error, while simultaneously demanding speedy trial, creates an exception that swallows the rule and encourages untimely filings.

For this reason, the United States respectfully requests this Honorable Court deny Appellant's motion for leave to file his supplemental assignment of error.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, and to the Air Force Appellate Defense Division on 22 February 2023 via electronic filing.

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# APPENDIX D

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES,**<br>*Appellee* | ) | **MOTION TO PUBLISH DECISION** |
| | ) | Before Panel No. 1 |
| | ) | No. ACM 40135 (f rev) |
| Airman First Class (E-3),<br>**BRADLEY D. LAMPKINS,**<br>United States Air Force,<br>*Appellant* | ) | 9 November 2023 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 30.4(b) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to publish the decision of this Court in the above captioned case. *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465 (A.F. Ct. Crim. App. 2 Nov. 2023) (unpub. op.). This motion has been filed within the 14 days required by Rule 30.4(b). There are two bases for this request related to the portion of the opinion analyzing proper post-trial processing. First, this Court's decision "call[s] attention to a rule of law or procedure that appears to be overlooked." A.F. CT. CRIM. APP. R. 34(a). Second, it makes a "significant contribution to military justice jurisprudence." *Id.*

*Overlooked Rule of Law*

After the trial portion of a court-martial is completed, post-trial processing often becomes [illegible]ught that takes a backseat to priorities that are more urgent or more important for the [illegible]t. This is evident not only in the case *sub judice*, but in the cases where this Court has been required to act because the Government did not complete records of trial properly.[1] While

DENIED
29 NOV 2023

[1] *See e.g. United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM

this Court specifically granted relief because of the Government's lack of timeliness on post-trial processing, the record's completeness contributed to the problem: "Not only did the base legal office responsible for moving the case post-sentencing fail to send the correct copies of the record to the NAF, the NAF took nearly two additional months to identify errors and send the record back to the base legal office for correction." *Lampkins*, slip op. at 8.

Some military practitioners also overlook the fact that proper post-trial processing is not just the responsibility of the base legal office. Rather, it is a responsibility that starts with the court reporter and extends to higher headquarters. This Court noted that fact when it observed, "The record shows the Government failed on multiple levels during the post-trial processing of the

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S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. 12 May 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. 7 Dec. 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. 17 Nov. 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. 8 Nov. 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. 25 Oct. 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. 22 Sep. 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpub. op.); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. 20 Jan. 2022) (unpub. op.) (requiring second remand for noncompliance with initial remand order), *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 Aug. 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. 5 Jan. 2022) (unpub. op.).

record." *Id.* By publishing this opinion, this Court will emphasize the importance that every level in the JAG Corps has in post-trial processing.

Finally, this Court stated *why* proper post-trial processing is important in its holding. This Court found that "the delay in this case amounted to a due process violation, and that Appellant is entitled to relief." *Id.* at 9. While post-trial processing and due process may already be linked in existing case law, this case is notable because this Court granted significant sentence relief for the due process violation. This holding sends a powerful reminder to every practitioner in the field that what they do is important, even if it is on a seemingly mundane task, such as post-trial paperwork. Failure to timely and properly complete post-trial processing affects a servicemember's right to due process under the Constitution of the United States. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citating *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

*Significant Contribution to Military Justice Jurisprudence*

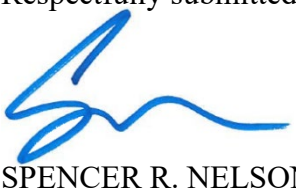
This case also makes a "significant contribution to military justice jurisprudence" for two reasons. A.F. CT. CRIM. APP. R. 34(A). First, this case was processed under the "new procedural rules" which require the application of "the 150-day aggregate standard threshold announced in [*Livak*]." *Lampkins*, slip op. at 6. As such, under the new rules, this is the first case where this Court has not approved a dishonorable discharge for the Government's failure to timely docket a record of trial. This is a "significant contribution" to this Court's jurisprudence that military practitioners should be aware of.

Second, this Court also highlighted that post-trial processing is not just an internal process that affects the limited number of people involved in the processing of courts-martial and the individual servicemember who was convicted. Rather, this Court stated, "Here, we find the delays

were egregious, not justified, and would adversely affect the public's perception of the fairness and integrity of the military justice system." *Id.* at 9. Thus, post-trial processing affects how the public perceives the military justice system and—when not done properly—it can discredit the service as a whole.

**WHEREFORE**, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,



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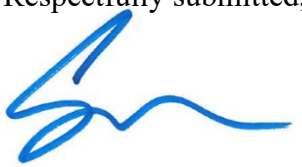
(240) 612-4773

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 9 November 2023.

Respectfully submitted,



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# APPENDIX E

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM S32731 (f rev)**

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**UNITED STATES**
*Appellee*

**v.**

**Tyrone GAMMAGE**
Airman (E-2), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

*Upon Further Review*

Decided 15 December 2023

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*Military Judge*: Colin P. Eichenberger; Christopher D. James (remand).

*Sentence*: Sentence adjudged on 17 May 2022 by SpCM convened at Francis E. Warren Air Force Base, Wyoming. Sentence entered by military judge on 8 June 2022: Bad-conduct discharge, confinement for 6 months, forfeiture of $1,190.00 pay per month for 6 months, and reduction to E-1.

*For Appellant*: Major Samanth P. Golseth, USAF; Jacob P. Frankson, Legal Extern.[1]

*For Appellee*: Colonel Matthew P. Talcott, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Major Brittany M. Speirs, USAF; Captain Olivia B. Hoff, USAF; Captain Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire; Abigail E. Thomas, Legal Extern.[2]

Before ANNEXSTAD, GRUEN and KEARLEY, *Appellate Military Judges*.

Senior Judge ANNEXSTAD delivered the opinion of the court, in which Judge GRUEN and Judge KEARLEY joined.

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[1] Mr. Frankson was supervised by attorneys admitted to practice before this court.

[2] Ms. Thomas was supervised by attorneys admitted to practice before this court.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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ANNEXSTAD, Senior Judge:

On 17 May 2022, Appellant was tried by a special court-martial at Francis E. Warren Air Force Base, Wyoming. In accordance with his pleas and pursuant to a plea agreement, a military judge found Appellant guilty of one specification of failure to obey a lawful order, one specification of destruction of non-military property, two specifications of domestic violence, and one specification of disorderly conduct, in violation of Articles 92, 109, 128b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 909, 928b, 934.[3] The military judge sentenced Appellant to a bad-conduct discharge, confinement for six months, forfeiture of $1,190.00 pay per month for six months, and reduction to the grade of E-1. The convening authority took no action on the findings or sentence.

On 5 May 2023, Appellant submitted his assignment of error brief in which he raised one issue: the record of trial was incomplete in that it was missing all eight attachments to the stipulation of fact, which was admitted as a prosecution exhibit during his court-martial. On 5 June 2023, we remanded this case to the Chief Trial Judge, Air Force Trial Judiciary, to address the missing attachments to Appellant's stipulation of fact. *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240, at *2 (A.F. Ct. Crim. App. 5 Jun. 2023) (order).

On 23 June 2023, Appellant's case was re-docketed with this court. On 18 August 2023, Appellant submitted another assignment of error brief and again alleged that the record of trial was incomplete, in that it still was missing four of ten photographs that were part of Attachment 6 to the stipulation of fact. Appellant also raised one additional issue: whether the Government's submission of an incomplete record of trial to this court subjected Appellant to unreasonable post-trial delay. On 29 September 2023, we remanded this case a second time to the Chief Trial Judge, Air Force Trial Judiciary, specifically to address the missing photographs that were part of Attachment 6 to Appellant's stipulation of fact. *United States v. Gammage*, No. ACM S32731 (f rev), 2023 CCA LEXIS 421, at *2 (A.F. Ct. Crim. App. 29 Sep. 2023) (order).

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[3] All references in this order to the UCMJ are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

On 13 October 2023, Appellant's case was again re-docketed with this court. Appellant submitted another assignment of error brief and agreed that the record of trial was complete. Appellant did not raise any new issues. As both parties agree that the record of trial is complete, we find that issue is resolved, and no further discussion is warranted.

We discuss the remaining issue regarding unreasonable post-trial delay below. Finding no error that materially prejudiced a substantial right of Appellant, we affirm the findings and sentence.

## I. BACKGROUND

Appellant's court-martial concluded on 17 May 2022, and the entry of judgment was signed by the military judge on 8 June 2022. Appellant's case was originally docketed with this court on 11 July 2022. Subsequently, and as discussed above, Appellant's case was remanded twice, with the final docketing date occurring on 13 October 2023.

## II. DISCUSSION

Appellant contends that the Government's submission of an incomplete record of trial with this court subjected him to unreasonable post-trial delay because a complete record of trial was not docketed with this court in compliance with *United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020). We disagree, and find no relief is warranted.

We review the question of whether an appellant's due process rights are violated because of post-trial delay de novo. *Livak*, 80 M.J. at 632. In *Moreno,* the United States Court of Appeals for the Armed Forces identified thresholds for facially unreasonable delay during three particular segments of the post-trial and appellate process. 63 M.J. at 141–43. Specifically, our superior court established a presumption of facially unreasonable delay where: (1) the convening authority did not take action within 120 days of the completion of trial, (2) the record was not docketed with the Court of Criminal Appeals (CCA) within 30 days of the convening authority's action, or (3) the CCA did not render a decision within 18 months of docketing. *Id*. at 142.

In *Livak,* this court recognized that "the specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules." 80 M.J. at 633. In acknowledgment of this fact, this court established an aggregated sentence-to-docketing 150-day threshold for facially unreasonable delay in cases, like Appellant's, that were referred to trial on or after 1 January 2019.

"In the absence of a due process violation, this court considers whether relief for excessive post-trial delay is warranted consistent with this court's authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d)." *Id*. at 632; *see also United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *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).

Appellant's primary argument on appeal is that a complete record of trial in his case was not docketed with this court until 13 October 2023—over 500 days after Appellant was sentenced—and well past the 150-day threshold established by this court in *Livak*. However, we do not find a facially unreasonable delay under *Livak* or *Moreno*. We are not aware of any authority where our superior court has articulated that only a complete record of trial will forestall a presumption of post-trial delay. In Appellant's case, the record of trial was docketed with this court on 11 July 2022, some 55 days after Appellant was sentenced. As this was well below the 150-day standard, we find that the Government categorically complied with this court's decision in *Livak,* and that no facially unreasonable post-trial delay occurred. Furthermore, since this court's decision is being rendered within 18 months of original docketing (11 July 2022), we find no facially unreasonable delay of appellate review has occurred. Additionally, we conclude that Appellant's due process rights have not been violated.

While we recognize that records of trial are remanded on occasion due to omissions or other defects, we decline to create a new requirement for cases that are docketed, remanded, and later re-docketed with this court. We find the original standards announced in *Moreno,* and its progeny, adequately protect "an appellant's due process right to timely post-trial and appellate review." *Livak*, 80 M.J. at 633.

Finally, recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. After considering the factors enumerated in *Gay*, 74 M.J. at 744, we conclude it is not.

## III. CONCLUSION

The findings and sentence as entered are correct in law and fact and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40372**

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**UNITED STATES**
*Appellee*

**v.**

**Carson C. CONWAY**
Captain (O-3), U.S. Air Force, *Appellant*

---

Appeal from the United States Air Force Trial Judiciary

Decided 5 December 2023

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*Military Judge*: Julie L. Pitvorec.

*Sentence*: Sentence adjudged 22 February 2022 by GCM convened at Laughlin Air Force Base, Texas. Sentence entered by military judge on 18 October 2022: Dismissal, confinement for 5 months, and a reprimand.

*For Appellant*: Major Matthew L. Blyth, USAF; Major David L. Bosner USAF.

*For Appellee*: Lieutenant Colonel James Peter Ferrell, USAF; Captain Olivia B. Hoff, USAF; Captain Tyler L. Washburn, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, RAMÍREZ, and KEARLEY, *Appellate Military Judges*.

Judge RAMÍREZ delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge KEARLEY joined.

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RAMÍREZ, Judge:

In accordance with Appellant's pleas, and pursuant to a plea agreement, a general court-martial comprised of a military judge sitting alone convicted Appellant of one specification of distribution of intimate visual images, and one specification of knowingly making a false written statement in connection with the acquisition of a firearm, in violation of Articles 117a and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 917a, 934.[1] Three specifications alleging conduct unbecoming an officer and gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933, were dismissed with prejudice consistent with Appellant's plea agreement. The military judge sentenced Appellant to a dismissal, confinement for five months, and a reprimand. The convening authority took no action on the findings or sentence.

Appellant raises five issues on appeal, which we reword: (1) whether omissions from the record of trial require sentencing relief or remand for correction; (2) whether a plea agreement requiring dismissal renders the sentencing procedure an "empty ritual" and violates public policy; (3) whether trial counsel committed prosecutorial misconduct during the sentencing argument; (4) whether Appellant's sentence is inappropriately severe; and (5) whether 18 U.S.C. § 922 is unconstitutional as applied to Appellant.

We remand this case as we find the first issue has merit and must be addressed before we consider the remaining issues.

## I. BACKGROUND

As to Issue (1), Appellant explains in his brief that the following are omissions or deficiencies in the record:

> 1. Two Article 32, UCMJ, 10 U.S.C. § 832, preliminary hearings were conducted in the above-captioned case. The audio recordings for both preliminary hearings are missing.
>
> 2. After Appellant's second Article 32, UCMJ, preliminary hearing, both parties provided the preliminary hearing officer (PHO) with supplemental information. This information was listed by the PHO in a chart as part of the PHO report but is missing from the record.
>
> 3. PHO Exhibits 4–8, contained on a DVD, are inoperable.

[1] All references in this opinion to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

> 4. Attachments 3, 4, and 7 to Prosecution Exhibit 1, the stipulation of fact, are missing.
>
> 5. Appellate Exhibit XI, Appellant's post-trial appellate rights advisement form, is missing.

The Government acknowledges the items listed by Appellant are missing from the record of trial and has confirmed these items still exist in the possession of the legal office, located at Laughlin Air Force Base (AFB), Texas.

The court further notes that Prosecution Exhibit 5 (a letter of reprimand which Appellant received and was accepted as a sentencing exhibit) lists three attachments, but the attachments are missing.

## II. DISCUSSION

Whether a record is complete is a question of law that this court reviews de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted).

"[A] complete record of proceedings and testimony shall be prepared in any case of a sentence of . . . dismissal . . . ." Article 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2). This includes any evidence or exhibits considered by the court-martial, pursuant to Rule for Courts-Martial (R.C.M.) 1112(b), and if not used as an exhibit, the preliminary hearing report pursuant to R.C.M. 1112(f).

Here, the Government concedes that the record of trial (ROT) is incomplete and should be remanded. We agree. According to the Government, the Laughlin AFB legal office "possesses the omitted items and has the ability to make the ROT whole." Therefore, we remand the ROT to the Chief Trial Judge, Air Force Trial Judiciary, to comply with the requirements of Article 54, UCMJ, and R.C.M. 1112(b).

## III. CONCLUSION

Pursuant to R.C.M. 1112(d)(2), this case is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to correct the record with respect to the six items identified in this opinion above and any other item that is missing from the record of trial and is required under R.C.M. 1112. Additionally, the military judge shall give notice of any proposed corrections to all parties and permit them to examine and respond to the proposed corrections. R.C.M. 1112(d)(2).

Thereafter, the record of trial will be returned to the court not later than **9**

**January 2024** for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40303** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Jason M. BLACKBURN** | ) | |
| **Airman Basic (E-1)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 1 March and 28–30 March 2022, Appellant was tried by a general court-martial at Little Rock Air Force Base, Arkansas. Contrary to his pleas, a military judge found Appellant guilty of one charge and two specifications of aggravated sexual contact of a child in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, *Manual for Courts-Martial, United States (*2008 ed.), one charge and two specifications of rape of a child, and four specifications of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b, *Manual for Courts-Martial, United States* (2012 ed.),* and adjudged a sentence of 14 years' confinement, forfeiture of all pay and allowances, dishonorable discharge, and a reprimand. The convening authority suspended a portion of the adjudged forfeitures, provided language for the reprimand, and approved the remainder of the sentence.

On 28 June 2023, Appellant submitted a brief in which he argues, *inter alia,* that the record of trial is incomplete in that it is missing all three attachments to Appellate Exhibit VIII, *Defense Motion for Appropriate Relief for the Unreasonable Multiplication of Charges*. Appellant requested this court remand the record of trial for correction pursuant to R.C.M. 1112(d)(2).

On 7 August 2023, the Government submitted an answer to Appellant's brief, and concurred that the record of trial was missing all three attachments to Appellate Exhibit VIII. On the same day, the Government filed a Motion to Attach the three missing attachments to Appellate Exhibit VIII, as well as a declaration, dated 3 August 2023, from Captain JP, assistant trial counsel to

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* All other references in this order to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

Appellant's court-martial. This court granted the Motion to Attach on 15 August 2023. The Government argues that remand is not required because the missing attachments are now attached to the record, and that this court should be satisfied that there are "no impediments" to this court performing its Article 66, UCMJ, 10 U.S.C. § 866, review.

On 21 August 2023, Appellant filed a reply brief, and contends, *inter alia,* that Appellant's record of trial is still incomplete. Appellant again argues that attachments to the record do not complete the record. Appellant again requests that we remand the record of trial for correction under R.C.M. 1112(d)(2). We agree.

Accordingly, it is by the court on this 11th day of September, 2023,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for the three missing attachments to Appellate Exhibit VIII, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3); R.C.M. 1112(d)(2), (3).

The record of trial will be returned to the court not later than **28 September 2023** unless a military judge or this court grants an enlargement of time for good cause shown. The Government will inform the court in writing not later than **21 September 2023** of the status of the Government's compliance with this order, unless the record of trial will be returned by the above date.

Thereafter, the court will complete its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40375**

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**UNITED STATES**
*Appellee*

**v.**

**Oscar F. GONZALEZ, Jr.**
Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 8 September 2023

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*Military Judge*: Pilar G. Wennrich.

*Sentence*: Sentence adjudged 21 July 2022 by GCM convened at Joint Base Charleston, South Carolina. Sentence entered by military judge on 20 September 2022: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances for 6 months, and reduction to E-1.

*For Appellant*: Major Jenna M. Arroyo, USAF; Major Jarett Merk, USAF.

*For Appellee*: Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, CADOTTE, and MASON, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Chief Judge JOHNSON and Senior Judge CADOTTE joined.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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MASON, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one charge with one specification of battery upon a spouse and one specification of assault

consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances for six months, and reduction to the grade of E-1. The convening authority took no action on the findings or sentence.

Appellant raises one assignment of error, whether the record of trial is incomplete. We remand the case for resolution of the issue of the missing attachments to Prosecution Exhibit 1, the stipulation of fact. We defer completing our Article 66(d), UCMJ, 10 U.S.C. § 866(d), review until the record is returned to this court.

## I. BACKGROUND

In November 2020, Appellant arrived at Joint Base Charleston, South Carolina. At that time, Appellant's wife—BG—was already in Charleston but the two were having marital problems and were not living together. On 11 November 2020, BG went to Appellant's hotel room so they could go to a unit barbeque together. In the hotel room, an argument arose. BG stated that as she was going to leave, Appellant got up and stood in her way, and prevented her from leaving the room. He then tried to kiss her. BG told him twice to stop. Appellant then grabbed BG's neck with both hands and applied pressure for eight to ten seconds. BG kicked Appellant to get him to stop and Appellant did. At some point later, BG walked out of the room and down the hallway. Still not wanting her to leave, Appellant ran out of his room, grabbed her wrist, and prevented BG from leaving. Appellant told BG that she was not leaving, and they were going to work things out. They both returned to the room. A subsequent investigation ensued which led to Appellant's court-martial.

At trial, Appellant pleaded guilty to one specification of battery upon his spouse BG, and one specification of assault consummated by a battery for touching and squeezing BG's neck and grabbing her wrist. During the guilty plea inquiry, trial counsel offered a three-page stipulation of fact, Prosecution Exhibit 1, which purportedly contained two attachments: (1) "Photographs taken by [BG] of her neck and wrist, 6 pages," and (2) "Photographs taken by AFOSI of [BG's] neck and wrist, 26 pages." The military judge admitted this exhibit totaling 35 pages.

[1] Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

## II. DISCUSSION

### A. Law

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004).

Rule for Courts-Martial (R.C.M.) 1112(b) sets forth the contents required to be contained in a record of trial. Amongst those contents are exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits. R.C.M. 1112(b)(6).

> If a record is incomplete or defective a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule.

R.C.M. 1112(d)(2).

"In assessing either whether a record is complete or whether a transcript is verbatim, the threshold question is 'whether the omitted material was 'substantial,' either qualitatively or quantitatively." *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (citations omitted).

### B. Analysis

Review of the record of trial confirms that Prosecution Exhibit 1 contains only the first three pages, but not the attachments. The remaining 32 pages of photographs—Attachments (1) and (2)—referenced in the exhibit and on the record are not contained in the record of trial. Appellant argues that the absence of these documents should result in this court setting aside the findings and sentence. The Government concedes that the omission is substantial, but requests that we remand the case for correction of the record. We agree with the Government. As the record is incomplete in the absence of the missing attachments, we return this record of trial.

## III. CONCLUSION

The record of trial is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to correct the record under R.C.M. 1112(d) to account for the missing attachments to Prosecution Exhibit 1, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3); R.C.M. 1112(d)(2), (3). Thereafter, the record of trial will be returned to this court **not later than**

**30 September 2023** for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40305** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Michael A. PORTILLOS** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 28 September 2021 and 14 March 2022, Appellant was tried by a general court-martial at Aviano Air Force Base, Italy. In accordance with his pleas, and pursuant to a plea agreement, a military judge found Appellant guilty of one charge and four specifications of assault consummated by a battery upon his spouse, in violation of Article 128, Uniform Code of Military Justice (UCMJ).[*] A military judge sentenced Appellant to a bad-conduct discharge, confinement for 12 months, reduction to the grade of E-1, and a reprimand.

On 14 April 2023, Appellant submitted a brief in which he argues that he is entitled to new post-trial processing because the convening authority (1) decided on action nine days after the announcement of sentence and before the Defense submitted matters in clemency pursuant to Rule for Courts-Martial (R.C.M.) 1106, and (2) decided on action and deferment requests before Appellant's time to rebut the victim submission of matters had expired.

On 15 May 2023, the Government submitted their answer to Appellant's brief, and stated that Appellant was not prejudiced when the convening authority issued his decision on action before Appellant's time to submit clemency or rebuttal had run.

Within ten days of an announced sentence in a general court-martial, the accused may submit matters to the convening authority for consideration under R.C.M. 1109 or 1110. *See* R.C.M. 1106(a), R.C.M. 1106(d)(1). Crime victims may also submit matters within ten days. R.C.M. 1106A(a). If a crime victim submits matters under R.C.M. 1106A, the accused shall have five days from receipt of those matters to submit any matters in rebuttal. R.C.M. 1106(d)(3).

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[*] All references in this order to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

"The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable." R.C.M. 1106A(c)(3). "Before taking or declining to take any action on the sentence [in clemency], the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A). In making a clemency decision, a convening authority "may not consider matters adverse to the accused without providing the accused an opportunity to respond." R.C.M. 1106A(c)(2)(B), Discussion.

On 14 March 2022, the victim and the Appellant were provided notice of their opportunities to submit matters for the convening authority's consideration before he decided what, if any, action to take on Appellant's case. Matters were due to the convening authority not later than 24 March 2022. Appellant was notified that, in addition to submitting matters in clemency, he could also "submit an application . . . to defer any forfeitures of pay or allowances, reduction in grade, or service of a sentence to confinement" and request waiver of "any forfeitures of pay and allowances under Article 58b, UCMJ," for the benefit of his dependents. The victim provided matters the same day.

On 16 March 2022, Appellant requested deferment of his rank reduction and automatic forfeitures, and waiver of automatic forfeitures. On 21 March 2022, Appellant's trial defense counsel were provided a copy of the victim submission of matters. On 23 March 2022, the convening authority granted deferment of the rank reduction and waived the automatic forfeitures. He denied Appellant's request for deferment of the automatic forfeitures as moot and took no action on the findings or sentence.

Here, the court-martial sentenced Appellant on 14 March 2022, and the convening authority decided on action nine days later on 23 March 2022. This early decision on action denied Appellant his opportunity to timely submit matters in clemency. The convening authority also erred by deciding on action three days before Appellant's five-day window to rebut the victim matters had tolled.

Additionally, while Appellant has not raised the issue, we find the record of trial is substantially incomplete because it does not include one of three discs capturing victim's interview with the Air Force Office of Special Investigations, an attachment to Appellate Exhibit IX. This interview is labeled, 1027202017544. "The record of trial contains the court-martial proceedings, and includes any evidence or exhibits considered by the court-martial in determining the findings or sentence." R.C.M. 1112(b). The record shall include *inter alia* "any appellate exhibits." R.C.M. 1112(b)(6).

> If a record is incomplete or defective a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule.

R.C.M. 1112(d)(2).

Consequently, we return the record to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d), to address the missing disc, Attachment 3 to Appellate Exhibit IX, and to resolve a substantial issue with the post-trial processing.

Accordingly, it is by the court on this 1st day of August, 2023,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary. Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding. *See* JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge may:

> (1) Return the record of trial to the convening authority for new post-trial processing consistent with this order, specifically serving Appellant with victim matters submitted under R.C.M. 1106A and affording Appellant the opportunity to respond to such matters pursuant to R.C.M. 1106(d)(3) and affording Appellant a full ten days to submit matters in clemency before the convening authority makes a decision on any deferment or clemency requests by Appellant;
>
> (2) Conduct one or more Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3), proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839, sessions;
>
> (3) Correct or modify the entry of judgment; and
>
> (4) Correct the record of trial to account for the missing attachment to Appellate Exhibit IX, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3).

Thereafter, the record of trial will be returned to this court for completion

of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM S32734** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Hector D. MANZANO TARIN** | ) | |
| **Senior Airman (E-4)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 2** |

On 6 June 2022, Appellant was tried by a special court-martial at Hill Air Force Base, Utah. In accordance with his pleas, and pursuant to a plea agreement, a military judge found Appellant guilty of one specification of conspiracy, and one specification of larceny, in violation of Articles 81 and 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 921.

On 9 May 2023, Appellant filed his brief, raising three issues before this court: (1) that the "military judge erred by admitting evidence that Appellant possessed a mortgage as rebuttal to his unsworn statement that his motive was to assist his brother;" (2) that the record of trial (ROT) is incomplete in that the stipulation of fact in the record of trial is not what was admitted during the court-martial; and (3) that his sentence is inappropriately severe and therefore his bad-conduct discharge should be set aside.

This order addresses Appellant's second raised issue. Upon review, Prosecution Exhibit 1, the stipulation of fact in the record of trial, consists of a total of 48 pages, and includes four separate attachments: (1) AAFES return policy (two pages); (2) EMT AAFES statement, dated 15 December 2021 (12 pages); Appellant's brother's statement (13 pages), (3) Appellant's brother's answers to S21, dated 24 January 2022 (one page); and (4) AAFES receipts (27 pages). First, according to Appellant and supported by the record, the pages to the stipulation of fact were not numbered at trial, but are numbered in the ROT. Appellant highlights the acknowledgement from the Government that the case paralegal altered the admitted prosecution exhibit post-trial by including page numbers. Secondly, Appellant directs the court's attention to Attachments (2) and (4) to the stipulation of fact; specifically, that trial counsel informed the military judge during the guilty plea that Attachment (2) had 13 pages and that Attachment (4) had 25 pages. Appellant therefore argues that he cannot be sure that the attachments to the stipulation are the same

attachments admitted during Appellant's court-martial, and maintains that the record is incomplete.

On 8 June 2023, the Government submitted their answer to Appellant's brief, and argued that the record of trial was complete as the stipulation of fact and its four attachments in the record of trial is what was admitted during the court martial. In support of this, the Government submitted a motion to attach declarations by (1) Captain JG, trial counsel in Appellant's court-martial, dated 5 June 2023; and (2) SSgt BS, the noncommissioned officer of the Hill Air Force Base legal office, dated 2 June 2023. The Government argues that the attachment of these documents is both relevant and necessary for the court's review of the record in light of Appellant's assignment of error alleging the ROT is incomplete. On 20 June 2023, we granted the Government's motion to attach. We find that a discrepancy as to what attachments to the stipulation of fact were admitted during Appellant's court-martial as compared to the attachments contained in the ROT still exists despite the declarations submitted by the Government.

We have reviewed Appellant's second issue, the Government's answer and motion in response to this issue, applicable case law and Rules for Courts-Martial (R.C.M.), and determine that Appellant's case should be returned pursuant to R.C.M. 1112 to ensure the ROT contains the complete stipulation of fact admitted as Prosecution Exhibit 1.

Accordingly, it is by the court on this 27th day of June 2023,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, under R.C.M. 1112(d) to correct the record regarding the contents of Prosecution Exhibit 1 admitted at Appellant's court-martial. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

The record of trial will be returned to the court not later than **28 July 2023** unless a military judge or this court grants an enlargement of time for good cause shown. The Government will inform the court in writing not later than

**21 July 2023** of the status of the Government's compliance with this order, unless the record of trial has already been returned to the court by that date.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40339** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Mason A. HUBBARD** | ) | |
| **Airman (E-2)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 29 June 2022, Appellant was tried by a general court-martial at Dover Air Force Base, Delaware. In accordance with his pleas, and pursuant to a plea agreement, a military judge found Appellant guilty of one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.*

On 8 June 2023, Appellant submitted a Motion to Examine Sealed Material, in which defense counsel moved to examine the attachments to Prosecution Exhibit 1. Prosecution Exhibit 1 contains an Attachment A. As defined by the stipulation of fact, Attachment A is a disk containing a contraband image.

Upon review by this court, it was discovered that this disk is blank and does not contain the contraband image referred to by the stipulation of fact or any other image not referred to by the stipulation of fact. Consequently, the record of trial in Appellant's case is to be returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under Rule for Courts-Martial (R.C.M.) 1112(d). As the record is being returned, we find Appellant's Motion to Examine Sealed Material to be moot. However, Appellant may again file a motion to view sealed materials after the case has been redocketed with this court.

Accordingly, it is by the court on this 15th day of June, 2023,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for the missing attachment to the stipulation of fact, and any other portion of the

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* All references in this order to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

The record of trial will be returned to the court not later than **15 July 2023** unless a military judge or this court grants an enlargement of time for good cause shown. The Government will inform the court in writing not later than **30 June 2023** of the status of the Government's compliance with this order, unless the record of trial has already been returned to the court by that date.

**It is further ordered:**

Appellant's Motion to Examine Sealed Material is **MOOT**.

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40462** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Malik C. SIMMONS** | ) | |
| **Airman First Class (E-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 3 March 2023, Appellant was convicted by a general court-martial at Minot Air Force Base, North Dakota, of one specification of possessing child pornography in violation on Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.* The military judge sentenced Appellant to a dishonorable discharge, confinement for 11 months, reduction to the grade of E-1, and a reprimand. The record of trial was docketed with this court on 16 May 2023. Upon this court's review of the record, we discovered Preliminary Hearing Officer (PHO) Exhibits 12–34 missing.

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id*. "Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

On 16 May 2023, this court ordered the Government to show cause why the court should not remand this record for completion and correction of the record. On 1 June 2023, the Government responded to the court's order by requesting the court return the case to the Chief Trial Judge for correction. According to the Government, "A PHO report under Article 32, UCMJ, including its attachments, is not required content of a record of trial under R.C.M. 1112(b).

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* All references in this order to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

However, under R.C.M. 1112(f)(1)(A), the PHO report is among those items the United States is required to attach to the record of trial."

Accordingly, it is by the court on this 5th day of June, 2023,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for PHO Exhibits 12–34, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

The record of trial will be returned to the court not later than **30 June 2023** unless a military judge or this court grants an enlargement of time for good cause shown. The Government will inform the court in writing not later than **22 June 2023** of the status of the Government's compliance with this order, unless the record of trial has already been returned to the court by that date.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40304** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Jordan P. GOODWATER** | ) | |
| **Airman (E-2)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 2** |

On 13 April 2022, Appellant was convicted by a general court-martial at Nellis Air Force Base, Nevada, of one specification each of possessing and distributing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. The military judge sentenced Appellant to a bad-conduct discharge, confinement for 2 years and 8 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On 18 May 2023, Appellant's counsel submitted a "Motion for Leave to File Motion for Remand," advising this court that Prosecution Exhibit 2 and Prosecution Exhibit 18 were missing from the record of trial (ROT). Prosecution Exhibit 2 was admitted during findings proceedings and is a CD purported to contain an image derived from a National Center for Missing and Exploited Children CyberTipline Report. The military judge ordered Prosecution Exhibit 2 sealed. Prosecution Exhibit 18 was admitted during sentencing proceedings and is a CD containing images and videos purported to be child pornography. On 24 May 2023, the Government stated it did not oppose Appellant's motion, the above-mentioned exhibits were missing from the ROT, and that remand was appropriate.

Upon this court's review of the record, we see Prosecution Exhibits 2 and 18 are missing. Consequently, the record of trial in Appellant's case is to be returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under Rule for Court-Martial (R.C.M.) 1112(d).

Accordingly, it is by the court on this 31st day of May, 2023,

**ORDERED:**

Appellant's Motion for Leave to File Motion for Remand is **GRANTED**. The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for Prosecution Exhibits 2 and 18, and any other portion of the record that is

determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

The record of trial will be returned to the court not later than **15 June 2023**. If the record cannot be returned to the court by that date, the Government will inform the court in writing not later than **8 June 2023** of the status of the Government's compliance with this order.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40311** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Codi A. IRVIN** | ) | |
| **Airman First Class (E-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 27 April 2023, Appellant's counsel submitted a Motion to Examine Sealed Material, requesting permission for appellate counsel for the Appellant and the Government to examine Prosecution Exhibit 1 and its attachments, the stipulation of fact. Upon this court's initial review of the record, it discovered Prosecution Exhibit 1 and its attachments were ordered sealed by the military judge at trial but were not sealed in the record of trial filed with the court. On 1 May 2023, the court granted Appellant's Motion to Examine Sealed Material, sealed Prosecution Exhibit 1 in the record retained by the court, and ordered the Government to retrieve and destroy any unauthorized copies.

Upon further review of the record, it was discovered that Attachments 2 and 3 of Prosecution Exhibit 1 were not appended to the exhibit. Attachment 2 is identified as "Child Pornography – six video files (1 disc)," and Attachment 3 is identified as "Aggravation Evidence – four picture files (1 disc)." Both attachments are missing from the record.

Accordingly, it is by the court on this 12th day of May, 2023,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for Prosecution Exhibit 1, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

The record of trial will be returned to the court not later than **5 June 2023**. If the record cannot be returned to the court by that date, the Government will inform the court in writing not later than **23 May 2023** of the status of the Government's compliance with this order.

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40185**

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**UNITED STATES**
*Appellee*

**v.**

**Michael A. VALENTIN-ANDINO**
Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 30 January 2023

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*Military Judge:* Charles E. Wiedie (arraignment); Willie J. Babor.

*Sentence:* Sentence adjudged on 20 May 2021 by GCM convened at Royal Air Force Lakenheath, United Kingdom. Sentence entered by military judge on 10 June 2021: Dishonorable discharge, confinement for 90 days, and reduction to the grade of E-1.

*For Appellant:* Major Eshawn R. Rawlley, USAF.

*For Appelle*e: Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major John P. Patera, USAF; Major Jay S. Peer, USAF; Mary Ellen Payne, Esquire.

Before POSCH, RICHARDSON, and CADOTTE, *Appellate Military Judges*.

Judge CADOTTE delivered the opinion of the court, in which Senior Judge POSCH and Judge RICHARDSON joined.

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**PUBLISHED OPINION OF THE COURT**

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CADOTTE, Judge:

A general court-martial, consisting of officer and enlisted members, convicted Appellant, contrary to his pleas, of one specification of sexual assault, in

violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, *Manual for Courts-Martial*, *United States* (2019 ed.).[1] Members sentenced Appellant to a dishonorable discharge, confinement for 90 days, and reduction to the grade of E-1.

Appellant raises four assignments of error, which we have reworded: (1) whether Appellant's conviction is legally and factually sufficient; (2) whether the record of trial is substantially incomplete; (3) whether Appellant is entitled to appropriate relief because he was not timely served with the victim's submission of matters in accordance with Rule for Courts-Martial (R.C.M.) 1106A, prior to the convening authority signing the Decision on Action memorandum in his case; and (4) whether Appellant was deprived of his right to a unanimous verdict.

We find remand is necessary to address Appellant's second and third assignments of error. We agree with Appellant's second assignment of error that the record of trial is incomplete because it is missing substantially verbatim recordings of the court-martial proceedings. As a result, we return it for correction under R.C.M. 1112(d). Additionally, we agree with Appellant's third assignment of error and find he was not served a copy of the victim's submission of matters or provided with an opportunity to rebut the matters prior to the convening authority signing the Decision on Action memorandum on 3 June 2021. Consequently, we find that remand to the Chief Trial Judge, Air Force Trial Judiciary, is appropriate. We defer addressing Appellant's other assignments of error until the record is returned to this court for completion of our Article 66(d), UCMJ, 10 U.S.C. § 866(d), review.

## I. BACKGROUND

On 19 May 2021, officer and enlisted members found Appellant guilty of one specification of sexually assaulting KG, and the next day Appellant was sentenced to a dishonorable discharge, confinement for 90 days, and reduction to the grade of E-1. At the conclusion of the court-martial, both Appellant and KG were advised of their right to submit matters to the convening authority.

On 24 May 2021, KG submitted matters to the convening authority in accordance with R.C.M. 1106A. Four paragraphs of KG's matters are identical to her written sentencing victim impact statement. In the remaining two paragraphs of her matters, KG highlights Appellant's adjudged sentence and then states, "From what I understand this is well below the maximum allowable sentence for [Appellant's] crime: the crime he committed against me that will

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

affect me for the rest of my life." KG then requested the convening authority "not grant any clemency in the form of a lighter sentence or setting aside any conviction," and pleaded, "Please affirm the conviction and sentence imposed." KG concludes by thanking the convening authority for consideration of her letter and her "request not to grant clemency in this case."

On 30 May 2021, Appellant requested deferment of automatic forfeitures pursuant to R.C.M. 1103(b) and Article 57(b), UCMJ, until entry of judgment. Appellant's request was based on his own desire to obtain financial relief as he "prepare[d] for his transition from the Air Force." The request also addressed each factor contained in R.C.M. 1103(d)(2), which we address in more detail later in this opinion. Afterwards, on 1 June 2021, Appellant's counsel informed the Government that Appellant did not intend to submit additional matters to the convening authority.

On 3 June 2021, the convening authority signed a Decision on Action memorandum in which the convening authority took "no action" on the findings and sentence.[2] In this memorandum the convening authority also denied Appellant's deferment request, stating:

> [Appellant] requested that I defer forfeiture of pay for a period of six months. I hereby deny the requests [sic] for deferment. After considering the factors outlined in R.C.M. 1103(d) with regard to deferment, in particular the nature of the offenses [sic] and their effect on the victim, I find [Appellant] did not meet his burden of showing his interests in deferral outweigh the community's interests in imposition of the punishment on its effective date.

In the Decision on Action memorandum, the convening authority further states: "Prior to coming to this decision, I consulted with my Staff Judge Advocate. Before taking action, I considered matters timely submitted by the accused under [R.C.M.] 1106 and the victim under [R.C.M.] 1106[A]." The military judge entered judgment on 10 June 2021.[3] Not until 16 July 2021 did Appellant's counsel acknowledge receipt of KG's submission of matters; there is no record of receipt by Appellant.

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[2] The record does not contain documentation that Appellant was served a copy of the Decision on Action memorandum. The record does include an acknowledgment of receipt of the Decision on Action memorandum by a defense paralegal dated 28 June 2021, 18 days after entry of judgment.

[3] The record does not contain documentation that Appellant was served a copy of the entry of judgment. The record does include an acknowledgment of receipt of the entry of judgment by a defense paralegal dated 28 June 2021.

Appellant's case was docketed with this court on 6 October 2021. On 27 October 2022, Appellant executed a post-trial declaration in which he states, "I have no recollection of being served with the named victim's post-trial matters."[4] Appellant explains that if he had received the victim's post-trial matters, he would have responded to them. Appellant states:

> The victim urged the convening authority not to grant me any kind of relief from my sentence, and I believe this negatively affected my chances of getting deferment. I would have wanted the convening authority to know that upon finishing my confinement term for a sexual offense, I was going to have to travel from the UK [United Kingdom] back to my home in Puerto Rico, where the minimum wage at the time was $7.25 [per hour]. Additionally, though the victim believes she will be affected for the rest of her life, the effects of this conviction—including the mandatory dishonorable discharge and sex offender registration—will also stay with me for the rest of mine. Any financial help, even slight monetary assistance, would have made a significant meaningful difference for me. I would have wanted the convening authority to know all of these facts before he acted on my deferment request. After returning to Puerto Rico, I was unemployed for many months before finally finding a job. Despite this good news, I am still struggling to make ends meet.

On 16 June 2021, the court reporter certified the "record of trial as accurate and complete in accordance with [R.C.M.] 1112(b) and (c)(1)." The contents of the record of trial include a disc labeled "GCM US v. Valentin.Andino RAF Lakenheath UK, 14 January 2021 . . . Open Sessions Only, Disc 1 of __." While the disc purports to consist of all open sessions of Appellant's court-martial, the disc contains only a single audio file: a recording of Appellant's arraignment. The record of trial does not include an audio recording of any other open proceedings of Appellant's court-martial.

[4] We have assessed whether we may consider this declaration from outside the "entire record" of trial in light of our superior court's decision in *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020). We conclude that we may, in line with precedents permitting consideration of affidavits "necessary for resolving issues raised by materials in the record." *Id.* at 444.

## II. DISCUSSION

### A. Incomplete Record of Trial

The contents of a record of trial shall include a "substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting." R.C.M. 1112(b)(1). "Court-martial proceedings may be recorded by videotape, audiotape, or other technology from which sound images may be reproduced to accurately depict the court-martial." R.C.M. 1112(a).

> If a record is incomplete or defective a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule.

R.C.M. 1112(d)(2).

Appellant argues the record is incomplete and requests that his sentence be reduced, or "alternatively, that we remand the record of trial to the Chief Trial Judge, Air Force Trial Judiciary for correction under R.C.M. 1112(d)." The Government concedes the record of trial is incomplete and consequently that it should be returned to the military judge for correction. We agree with the parties that the record of trial is incomplete because it does not include a substantially verbatim recording of the court-martial proceedings. Consequently, in our decretal paragraph, we return the record to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d), to address the missing substantially verbatim recordings of the court-martial proceedings.

### B. Failure to Serve Victim Matters

#### 1. Law

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). Because they are matters of law, we review interpretations of statutes and Rules for Courts-Martial de novo. *See United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted); *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005) (citation omitted).

"In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110." R.C.M. 1106A(a). "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable." R.C.M. 1106A(c)(3).

If a crime victim submits matters under R.C.M. 1106A, "the accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). "Before taking or declining to take any action on the sentence [in clemency], the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A). In making a clemency decision, a convening authority "may not consider matters adverse to the accused without providing the accused an opportunity to respond." R.C.M. 1106A(c)(2)(B), Discussion. The convening authority may also consider "additional matters," to include evidence introduced at the court-martial, appellate exhibits, the recording or transcription of the proceedings,[5] the personnel records of the accused, and any other such matters the convening authority deems appropriate. R.C.M. 1109(d)(3)(B).

"Post-trial conduct must consist of fair play, specifically giving the appellant 'notice and an opportunity to respond.'" *United States v. Hunter*, No. 201700036, 2017 CCA LEXIS 527, at *4 (N.M. Ct. Crim. App. 8 Aug. 2017) (unpub. op.) (quoting *United States* v. *Leal,* 44 M.J. 235, 237 (C.A.A.F. 1996)). "Serving victim clemency correspondence on the accused for comment before convening authority action protects an accused's due process rights under the Rules for Courts-Martial and preserves the actual and perceived fairness of the military justice system." *United States v. Bartlett*, 64 M.J. 641, 649 (A. Ct. Crim. App. 2007).

Article 57(b)(1), UCMJ, 10 U.S.C. § 857(b)(1), authorizes a convening authority, upon application by an accused, to defer a forfeiture of pay or allowances and a reduction in grade until entry of judgment. R.C.M. 1103(d)(2) provides that an accused seeking to have a punishment deferred "shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date." The rule outlines several factors which the convening authority may consider in determining whether to grant the request, which are:

> the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

[5] Subject to the provisions of R.C.M. 1113 and 1109(d)(3)(C).

R.C.M. 1103(d)(2).

"When a convening authority acts on an accused's request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the accused) and must include the reasons upon which the action is based." *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018); *see also* R.C.M. 1103(d)(2) ("The action of the decision of the authority acting on the deferment request shall be in writing."). A convening authority's exercise of discretion in clemency is distinct from a decision on a deferment request. *United States v. Edwards*, 77 M.J. 668, 670 (A.F. Ct. Crim. App. 2018). R.C.M. 1103 is silent on whether a convening authority must consider matters submitted by a crime victim under R.C.M. 1106A when acting on a deferment request. *See* R.C.M. 1103. We review a convening authority's denial of a deferment request for an abuse of discretion. R.C.M. 1103(d)(2).

We provide relief for an abuse of discretion that materially prejudiced an appellant's substantial rights. *See United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018) (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a)). However, before determining prejudice, we first look at the requirements of notice to an appellant and the opportunity to respond. In *United States v. Spears*, we stated that after the recommendation of the staff judge advocate (SJAR) is served on an appellant, "[a]ny legal review of a case for the convening authority, including those of forfeiture waiver requests . . . should be treated as an addendum to the original SJAR and served on appellant for comment." 48 M.J. 768, 776 (A.F. Ct. Crim. App. 1998), *overruled on other grounds by United States v. Owen*, 50 M.J. 629 (A.F. Ct. Crim. App. 1998) (en banc). We noted that failure to serve the legal review on the accused, and failure to provide the accused an opportunity to comment, violated "the concepts of basic fairness and procedural due process." *Id.* at 775; *see also United States v. Brown*, 54 M.J. 289, 292 (C.A.A.F. 2000) (finding an appellant did "not meet the applicable standards for finding prejudicial error" and as a result not deciding "whether the requirements of notice and an opportunity to comment apply to requests for deferment of adjudged forfeitures or waiver of automatic forfeitures").

An appellant claiming to have been denied a right to comment on post-trial matters "has the burden of making a colorable showing of possible prejudice" to be entitled to relief. *Brown*, 54 M.J. at 292 (citation omitted). Specifically concerning rebuttal matters, the United States Court of Appeals for the Armed Forces (CAAF) requires an appellant "to demonstrate prejudice by stating what, if anything, would have been submitted to deny, counter, or explain the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997) (internal quotation marks and citation omitted). The CAAF further explained that "if an appellant makes some colorable showing of possible prejudice, we

will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might have done' if defense counsel had been given an opportunity to comment." *Id.* at 323–24 (quoting *United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996)).

**2. Analysis**

Appellant contends that the convening authority erred by not ensuring that he was provided victim matters submitted by KG. Appellant similarly contends that the convening authority erred by signing the Decision on Action memorandum, which included the convening authority's decision on Appellant's deferment request, without providing him the opportunity to rebut the victim's matters. Appellant requests we not approve Appellant's reduction to the grade of E-1,[6] or alternatively remand the case for new post-trial processing. The Government concedes, and the record supports, that Appellant was not provided KG's R.C.M. 1106A matters prior to the convening authority's decision on action. The Government argues Appellant is not entitled to relief because he did not suffer prejudice, however if the court finds prejudice, we should return the record for new post-trial processing.

The convening authority made two distinct decisions at issue in his Decision on Action memorandum: (1) whether to grant Appellant sentencing relief in the form of clemency; and (2) whether to grant Appellant's request for deferment of automatic forfeitures. As to the first decision, and without any clemency matters submitted by Appellant, the convening authority decided to take no action on both the findings and sentence. As to the second decision, the convening authority decided to deny Appellant's request for deferment after considering new victim matters but before Appellant had the opportunity to review or comment on them. We conclude our court's finding in *Spears*, that "the concepts of basic fairness and procedural due process" require service and opportunity to comment in the context of a waiver request, also apply here. 48 M.J. at 775. If a convening authority considers matters submitted by a crime victim before acting on a deferment request, then the convening authority first must provide to an appellant notice of those matters and an opportunity to respond. As Appellant did not have that opportunity here, we find the convening authority abused his discretion in denying Appellant's deferment request.

We now turn our attention to prejudice. The Government's answer to this assignment of error cites *Chatman* for the proposition that "some colorable

[6] Appellant raises reduction in grade only as a remedy to the Government's failure to submit victim's matters to him. He did not request reduction in grade as part of any clemency request to the convening authority; he never submitted a clemency request.

showing of possible prejudice" is the standard for post-trial rebuttal matters. 46 M.J. at 323–24. In this case, we agree.

The Decision on Action memorandum annotates the convening authority "considered matters timely submitted by the accused under [R.C.M] 1106 and the victim under [R.C.M.] 1106[A]." This statement does not distinguish between considering KG's R.C.M. 1106A matters for clemency, on the one hand, or the deferment decision, on the other. We have separately considered whether Appellant has met his burden as to prejudice regarding the convening authority's decisions on (1) clemency and (2) deferment. We reach different conclusions as to each decision.

***a. Clemency Decision***

Appellant has not shown a colorable showing of possible prejudice regarding the convening authority's clemency decision. Pursuant to Article 60a, UCMJ, 10 U.S.C. § 860a, the convening authority was authorized to take action on Appellant's sentence by reducing his term of confinement and reduction in grade. However, Appellant did not request clemency during the post-trial processing of his case; he only requested deferment. Moreover, Appellant's declaration on appeal does not include rebuttal matters he would have submitted to the convening authority regarding clemency in response to KG's submission of matters for consideration on the decision on action under Article 60a, UCMJ. *See Chatman*, 46 M.J. at 323. His singular focus was the convening authority's deferment decision, and not his sentence to confinement or reduction in grade. Under these circumstances, Appellant fails establish a colorable showing of possible prejudice. We now turn to examine the deferment decision.

***b. Deferment Decision***

We find that Appellant has met his burden showing prejudice regarding the convening authority's deferment decision.[7] It was within the convening authority's power to grant Appellant's request to defer automatic forfeitures. Appellant describes in his post-trial declaration the rebuttal matters he would have submitted to the convening authority in response to KG's submission of

[7] Although not raised by the parties, we acknowledge the possibility of concluding Appellant failed to establish a colorable showing of possible prejudice because of the *de minimis* nature of the deferment at issue. However, we find that under the facts of this case, it is speculative as to what the length of deferment might have been had the Government properly served matters on Appellant. The Appellant was not served with the convening authority's Decision on Action memorandum prior to the entry of judgment. Consequently, Appellant was denied an opportunity to file a post-trial motion prior to entry of judgment. Had Appellant filed a post-trial motion, the issuance of an entry of judgment would have been later and thereby increased the period of deferment.

matters. Specifically, Appellant states that "the victim urged the convening authority not to grant [him] any kind of relief from [his] sentence, and [he] believed this negatively affected [his] chances of getting deferment." To counter KG's submission of matters, Appellant states he would have explained to the convening authority how difficult his circumstances were as a result of being a convicted sex offender, the dire economic circumstances then existing in his home of Puerto Rico, and how deferment of forfeitures would have provided him relief. We "will not speculate on what the convening authority might have done" had Appellant been given the opportunity to comment on KG's submission of matters. *See Chatman*, 46 M.J. at 323 *(*quoting *Jones*, 44 M.J. at 244).

We reject the Government's argument that KG's post-trial matters were substantially the same as her victim impact statement, and, consequently, Appellant did not suffer prejudice resulting from the failure to serve him with the statement. In support of the argument that KG's post-trial matters were substantially the same as her victim impact statement admitted a trial, the Government directs our attention to the first four paragraphs of KG's six-paragraph statement which are identical to the matters she submitted at trial. However, KG's matters submitted under R.C.M. 1106A contain new information which was not included in her sentencing victim impact statement.

We find the convening authority abused his discretion, and we find Appellant's alternate relief—new post-trial processing—is warranted with regards to his deferment request only. Therefore, we conclude that the relief warranted in this case is to provide Appellant that to which he is entitled: the right to be served with KG's submission of matters, and the opportunity to submit rebuttal matters for the convening authority's consideration, before the convening authority decides whether to grant Appellant's deferment request.

## III. CONCLUSION

The record of trial is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, to (1) resolve a substantial issue with the post-trial processing; and (2) correct the record of trial, which is deficient in that a substantially verbatim audio recording of the court-martial proceedings is omitted.

Our remand returns jurisdiction over the case to a detailed military judge and dismisses this appellate proceeding. *See* JT. CT. CRIM. APP. R. 29(b)(2). A detailed military judge shall return the record of trial to the convening authority for new post-trial processing consistent with this opinion, specifically serving Appellant with victim matters submitted under R.C.M. 1106A and affording Appellant the opportunity to respond to such matters pursuant to R.C.M. 1106(d)(3) before the convening authority makes a decision on Appellant's deferment request. Further, a detailed military judge may:

(1) Conduct one or more Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3), proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839, sessions;

(2) Modify the entry of judgment; and

(3) Correct the record under R.C.M. 1112(d) to account for the missing substantially verbatim audio recordings of the court-martial proceedings, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3).

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40168** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Yasmeen M. LAKE** | ) | |
| **Senior Airman (E-4)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 2 December 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Thirteenth) requesting an additional 30 days to submit Appellant's assignments of error. Counsel for Appellant notes that he cannot view certain evidence in Appellant's case—specifically, Prosecution Exhibits 1, 12, 27, 37, 41, 45, 51, 62, 87, 88, 89, 90, and 91—because of proprietary software needed to view the evidence. The Government does not oppose the motion but suggests a status conference may be appropriate to address the software issue.

On or about 1 November 2022, the court received a copy of the proprietary software from appellate government counsel. Since that date, the court has attempted to view the exhibits at issue but has been unsuccessful. The court has also solicited the assistance of personnel from the local communications squadron, but to date, has not been able to successfully install the software or view the exhibits.

Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial* (21 Apr. 2021), provides guidance to Department of the Air Force personnel on preparation of records of trial. It notes, in relevant part:

> All digital audio and video media must be in a format playable on the factory installed version of Windows Media® player (e.g., WMV, WMA, MPEG, MP3, AVI). **(T-1).** Ensure the original and copies of the audio and video are clear prior to forwarding the ROT to JAJM. **(T-1).** Counsel offering the exhibit will verify that the media is not damaged and plays as intended. **(T-1).**

DAFMAN 51-203, ¶ 2.2.4.2.

The court notes that the prosecution exhibits at issue were not prepared in accordance with DAFMAN 51-203 or its predecessor guidance and therefore treats the record as incomplete. "A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge

for correction under this rule." R.C.M. 1112(d)(2). The court returns the record of trial for the court reporter to make viewable Prosecution Exhibits 1, 12, 27, 37, 41, 45, 51, 62, 87, 88, 89, 90, and 91, in compliance with DAFMAN 51-203, ¶ 2.2.4.2. No status conference is required at this time.

Accordingly, it is by the court on this 7th day of December, 2022,

**ORDERED:**

The record of trial is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, for return to the military judge for correction of the record pursuant to R.C.M. 1112(d)(2). Thereafter, the record of trial will be returned to this court for completion of appellate review under Article 66, UCMJ, 10 U.S.C. § 866. Appellate counsel for the Government shall inform the court not later than **19 December 2022**, in writing, of the status of compliance with the court's order unless the record of trial has been returned to the court prior to that date.

**It is further ordered:**

Appellant's Motion for Enlargement of Time (Thirteenth) is therefore **MOOT**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40290** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Keen A. FERNANDEZ** | ) | |
| **Airman First Class (E-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 2** |

On 19 October 2021 and 26–28 January 2022, Appellant was tried by a general court-martial at Joint Base Andrews-Naval Air Facility Washington, Maryland. He was convicted of one charge of wrongfully distributing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.*

On 4 November 2022, Appellant's counsel submitted a Motion to Examine Sealed Material, requesting to examine Appellate Exhibits IX and XIX; and Prosecution Exhibits 5, 10, and 11.

Upon this court's review of the record, we discovered Prosecution Exhibit 5, which is a computer disc, to be cracked. As a result, the disc is inoperable and the court is unable to view the contents of Prosecution Exhibit 5. Consequently, the record of trial in Appellant's case is to be returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d). As the record is being returned, we find Appellant's Motion to Examine Sealed Material to be moot. However, Appellant may again file a motion to view sealed materials after the case has been redocketed with this court.

Accordingly, it is by the court on this 17th day of November, 2022,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for the correct version of sealed Prosecution Exhibit 5, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for

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* All references in this order to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

The record of trial will be returned to the court not later than **16 December 2022**. If the record cannot be returned to the court by that date, the Government will inform the court in writing not later than **14 December 2022** of the status of the Government's compliance with this order.

**It is further ordered:**

Appellant's Motion to Examine Sealed Material is **MOOT.**

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40131** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **John F. STAFFORD III** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Special Panel** |

Appellant submitted his assignments of error to this court on 23 June 2022. Among other alleged errors, Appellant asserted that four appellate exhibits were missing from the record of trial. In addition, Appellant asserted that a two-page supplement to the Preliminary Hearing Officer (PHO) report was missing. Appellant asserts these omissions are both qualitatively and quantitatively substantial, and that this court should remand the record to the Chief Trial Judge of the Air Force Trial Judiciary in order for corrective action to be taken under Rule for Courts-Martial (R.C.M.) 1112(d).

The Government submitted its answer brief on 25 August 2022. With respect to the omissions asserted by Appellant, the Government conceded that the four appellate exhibits are missing, and that "this case should be returned to the military judge to correct the record in accordance with R.C.M. 1112(d)." The Government did not comment on Appellant's assertion that a two-page supplement to the PHO report was also missing.

We have reviewed the record of trial and concur with the parties that four appellate exhibits are missing from the record of trial. Specifically:

(1) Appellate Exhibit LXXI is described in the record as an email from the circuit trial counsel dated 20 July 2020, attached to the record as additional evidence in support of a defense motion to dismiss due to prosecutorial misconduct. The document erroneously labeled as Appellate Exhibit LXXI in the record is a copy of Appellate Exhibit LXVIII, which is a different email from the circuit trial counsel dated 27 July 2020.

(2) Appellate Exhibit CXXVI is described in the record as the military judge's ruling on a defense motion to compel and supplemental motion to compel dated 3 March 2021. The document erroneously labeled as Appellate Exhibit CXXVI in the record is a copy of Appellate Exhibit CXV, a defense motion for a continuance dated 3 March 2021.

(3) Appellate Exhibit CLXII is described in the record as the military judge's ruling on the Defense's second motion to reconsider the military judge's ruling on the Defense's motion for abatement, dated 9 March 2021. The document erroneously marked as Appellate Exhibit CLXII in the record is a copy of the Defense's second motion to reconsider the military judge's ruling on the Defense's motion for abatement, dated 7 March 2021.

(4) Appellate Exhibit CLXIII is described in the record as the Defense's second motion to reconsider the military judge's ruling on the Defense's motion for abatement, dated 7 March 2021. The document erroneously marked as Appellate Exhibit CLXIII in the record is a copy of Appellate Exhibit CLV, a defense supplemental motion to compel production and discovery, dated 7 March 2021.

With respect to Appellant's assertion that a two-page supplement to the PHO report is also missing, we note that, as Appellant states, such a supplement is listed as an attachment to the Special Court-Martial Convening Authority's transmittal of charges memorandum dated 18 March 2021. In addition, the record includes a receipt signed by Appellant on 24 February 2020 whereby Appellant acknowledges receipt of two "Supplemental Continuation Pages for PHO Report." However, the two-page supplement itself does not appear to be included in the record of trial.

A complete record of the proceedings 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). The record of trial in every general court-martial shall include, *inter alia*, the exhibits, including appellate exhibits. R.C.M. 1112(b)(6). Unless it is used as an exhibit, the PHO report prepared pursuant to Article 32, UCMJ, 10 U.S.C. § 832, shall be attached to the record for appellate review. R.C.M. 1112(f)(1)(A).

"[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). "In assessing [ ] whether a record is complete . . . the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)). "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)).

"A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority

may return a record of trial to the military judge for correction under this rule." R.C.M. 1112(d)(2).

Accordingly, it is by the court on this 8th day of November, 2022,

**ORDERED:**

The record of trial is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, for return to the military judge for correction of the record pursuant to R.C.M. 1112(d)(2). Thereafter, the record of trial will be returned to this court for completion of appellate review under Article 66, UCMJ, 10 U.S.C. § 866. Appellate counsel for the Government shall inform the court not later than **13 January 2023**, in writing, of the status of compliance with the court's order unless the record of trial has been returned to the court prior to that date.

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Acting Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40119** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Ervin D. MCCOY** | ) | |
| **Airman (E-2)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

Appellant's general court-martial took place on 29 March–1 April 2021. The original record of trial was docketed with this court on 6 July 2022. The record of trial includes one disc that purports to contain audio recordings of the open session proceedings of the court-martial, and one disc that contains audio recordings of closed-session proceedings that occurred on 29 March 2021. However, the disc that should contain the recordings of the open session proceedings—that is, audio from the trial—contains only recordings of the preliminary hearing held pursuant to Article 32, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832.* The audio of the open sessions of Appellant's court-martial is not included. A certified verbatim written transcript of the proceedings is attached to the record.

Rule for Courts-Martial (R.C.M.) 1112(b) provides that "[t]he record of trial in every general and special court-martial shall include: (1) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting . . . ."

On 26 July 2022, Appellant filed an assignments of error brief that raised eight issues. One of those issues, raised by Appellant personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), requested that this court consider whether "the record of trial's omission of the trial audio is a substantial omission that limits this court's ability to approve a punitive discharge or confinement in excess of six months." On 27 September 2022, the Government submitted its answer to Appellant's assignments of error brief. The Government acknowledged the audio from the trial is missing stating that its copy of the record of trial, similar to the court's original record of trial, contains recordings from the preliminary hearing but does not contain recordings from the

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* All references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

open sessions of Appellant's court-martial. While the Government acknowledged that the required audio is missing, it argued that this error amounted to an insubstantial omission and claimed the "[c]ourt is not impaired in its ability to perform its Article 66[, UCMJ,] review as it has a verbatim transcript, along with the required certifications, of the entire proceeding."

The court does not agree, and finds remand appropriate in order to correct this substantial deficiency in the record of Appellant's court-martial.

R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication. R.C.M. 1112(d)(2)–(3) describes the procedure for return of the record of trial to the military judge for correction. The court notes that R.C.M. 1112(d)(2) requires notice and opportunity for the parties to examine and respond to the proposed correction.

Accordingly, it is by the court on this 31st day of October, 2022,

**ORDERED:**

Pursuant to R.C.M. 1112(d), the record of trial in Appellant's case is returned to the military judge for correction of the deficiency identified above—the omission of the substantially verbatim recording of the open sessions of Appellant's court-martial proceedings—and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ, 10 U.S.C. § 866.

The record of trial will be returned to the court not later than **30 November 2022**. If the record cannot be returned to the court by that date, the Government will inform the court in writing not later than 28 November 2022 of the status of the Government's compliance with this order.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40199** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Kevin R. ROMERO-ALEGRIA** | ) | |
| **Senior Airman (E-4)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 23 June 2021, Appellant was tried by a general court-martial at Tinker Air Force Base, Oklahoma. He was convicted, consistent with his pleas and pursuant to a plea agreement, of two specifications of sexually abusing a child, and one specification of wrongfully possessing child pornography in violation of Article 120b and Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920b, 934, respectively.*

Upon this court's initial review of Appellant's record of trial, it was discovered the record did not contain Attachment 8 of Appellate Exhibit VI, and that it appeared the description of Attachment 8 of Appellate Exhibit VI was the same as the description of Attachment 6 of Appellate Exhibit V. The court separately noted that the description of Attachment 4 of Prosecution Exhibit 1 was inconsistent with the contents of Attachment 4 of Prosecution Exhibit 1. Therefore, on 1 September 2022, this court ordered the Government to show good cause as to "why this court should not remand this record for completion and correction" to determine if the omission from the record of trial of Attachment 8 of Appellate Exhibit VI and the inconsistency with the description of Attachment 4 of Prosecution 1 and its contents, are substantial.

On 16 September 2022, the Government responded to the court's order recommending that the court "remand the record for correction."

Accordingly, it is by the court on this 22d day of September, 2022,

**ORDERED:**

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* All references in this order to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under Rule for Courts-Martial (R.C.M.) 1112(d) to correct the record with respect to Attachment 8 of Appellate Exhibit VI, Attachment 4 of Prosecution Exhibit 1, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3).

Thereafter, the record of trial will be returned to this court not later than **14 October 2022** for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d). If the record cannot be returned to the court by that date, the Government will inform the court in writing not later than **12 October 2022** of the status of the Government's compliance with this order.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 39939 (f rev)** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Paul J. GOLDMAN** | ) | |
| **Airman First Class (E-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Special Panel** |

On 20 January 2022, this court issued an opinion remanding the record of trial in Appellant's case to the Chief Trial Judge, Air Force Trial Judiciary, for correction of errors in the entry of judgment (EoJ) as noted in the opinion. *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43, at *17 (A.F. Ct. Crim. App. 20 Jan. 2022) (unpub. op.). In addition, this court authorized the detailed military judge to correct the record under Rule for Courts-Martial 1112(d) in order to resolve multiple apparent omissions from the record of trial, and to return the record of trial to the convening authority in order to permit her to take action on the sentence. *Id.* at *17–18.

On remand, the convening authority signed a new decision on action which, *inter alia*, approved the adjudged sentence, and the military judge issued a certificate of correction to resolve the apparent omissions from the record. In addition, the military judge signed a new EoJ dated 29 March 2022 which stated that three specifications had been withdrawn and dismissed with prejudice after arraignment, where the "with prejudice" language had been omitted from the original EoJ. However, the new EoJ did not correct several other errors identified in this court's opinion, specifically:

> • The EoJ incorrectly states the convening authority deferred "all of the adjudged" forfeitures. First, the military judge adjudged no forfeitures. Second, the convening authority's decision on action memorandum correctly omitted any reference to adjudged forfeitures when addressing the question of deferral.
>
> • The convening authority deferred Appellant's reduction to the grade of E-1 from 14 days after announcement of sentence until the date of the EoJ. The EoJ omits the convening authority's decision on deferral of reduction in grade. Instead, the EoJ repeats a statement, which is partially incorrect, regarding deferral of forfeitures.

> • The convening authority waived the automatic forfeitures of all pay and allowances for a period of six months or release "of" confinement, whichever is sooner, and directed the forfeitures be paid to MP for the benefit of Appellant's dependent child. However, the EoJ only states that the "pay" was directed to be paid to MP, rather than the "total pay and allowances."
>
> • The reprimand in the EoJ misspells United States Air Force. It is correctly spelled in the convening authority's decision on action memorandum.

*Id*. at *13–14.

The record of trial was re-docketed with this court on 4 April 2022. On 19 July 2022, Appellant submitted the case to this court "on its merits with no specific assignments of error."

On 12 August 2022, this court issued an order to the Government to show good cause as to why we should not again remand the record of trial to the Air Force Trial Judiciary for correction of the EoJ in accordance with this court's prior decree. On 26 August 2022, the Government provided a timely answer to the show cause order. The Government acknowledged the new EoJ "did not correct four errors identified by this [c]ourt in its 20 January 2022 opinion," but opined this court should itself "make the corrections for the purpose of judicial economy."

Accordingly, it is by the court on this 30th day of August, 2022,

**ORDERED:**

The record of trial is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the EoJ in accordance with this court's prior opinion, as explained above. Article 66(g), UCMJ, 10 U.S.C. § 866(g); Rule for Courts-Martial 1111(c)(3); *see Goldman*, unpub. op. at *13–14, 17. Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66, UCMJ, 10 U.S.C. § 866. Appellate counsel for the Government shall inform the court not later than 30 September 2022, in writing, of the status of compliance with the court's order unless the record of trial has been returned to the court prior to that date.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40132** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Christian D. PAYAN** | ) | |
| **Airman First Class (E-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 2** |

On 18 May 2021, a general court-martial consisting of a military judge sitting alone convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[1] Appellant was sentenced to a dishonorable discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant's case was docketed with the court on 28 July 2021. Upon review of the record of trial, in response to Appellant's motion to view sealed materials dated 19 April 2022, the court discovered an omission in the record. Transcript pages 28–38 show the military judge conducted a closed session of the court, pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), and Military Rule of Evidence 412. However, the record of trial filed with the court does not contain the audio recording of the closed session. This transcribed session was ordered sealed by the military judge, but we further discovered that these transcribed pages were not sealed. On 27 April 2022, the court issued an order to correct the record of trial by adding the missing audio of the closed session of the court. We are rescinding this order due to the discovery of other deficiencies in the record.

After this court's 27 April 2022 order, it was brought to the attention of the court that Appellate Exhibits V and VI contained the same document, *Defense Motion to Compel Production of Expert Consultant*. Appellate Exhibit VI should be the Government's response to Defense's motion to compel, but is missing from the record.

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[1] All references in this order to the Uniform Code of Military Justice, Rules for Courts-Martial, and Military Rules of Evidence, are to the *Manual for Courts-Martial, United States* (2019 ed.).

The record of trial must contain "[a] substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting." Rule for Courts-Martial (R.C.M.) 1112(b)(1). Further, R.C.M 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication. R.C.M. 1112(d)(2)–(3) describes the procedure for the military judge to take corrective action for an incomplete record. Once a superior court returns a record to the military judge for correction, the military judge must give notice of the proposed correction to the parties and permit the parties to examine and respond to the proposed change.

Accordingly it is by the court on this 28th day of April, 2022,

**ORDERED:**

The Government shall take all steps necessary to ensure that transcript pages 28–38 in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[2]

However, if appellate defense counsel, and appellate government counsel, possess transcript pages 28–38, counsel are authorized to retain copies of these transcript pages until completion of our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate defense counsel and appellate government counsel shall destroy any retained copies of transcript pages 28–38 in their possession.

The Clerk of Court will ensure transcript pages 28–38 are properly sealed in the record retained by the court.

**It is further ordered:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for the missing audio of the closed session of court, missing Appellate Exhibit VI, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). After the military judge makes the necessary corrective measures, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

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[2] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

The record of trial will be returned to the court not later than **31 May 2022**. If the record cannot be returned to the court by that date, the Government will inform the court in writing not later than 26 May 2022 of the status of the Government's compliance with this order.

The court's 27 April 2022 order is hereby RESCINDED.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40092** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Calvin M. COOPER** | ) | |
| **Airman First Class (E-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 3 February 2021, Appellant was convicted by a general court-martial at Kirtland Air Force Base (AFB), New Mexico, contrary to his pleas, of one specification of operating a vehicle in a wanton manner, in violation of Article 113, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 913; one specification of involuntary manslaughter by culpable negligence, in violation of Article 119, UCMJ, 10 U.S.C. § 919; and one specification of negligent homicide, in violation of Article 134, UCMJ, 10 U.S.C. § 934.*

During Appellant's court-martial, Prosecution Exhibit 9 was admitted into evidence. Trial counsel described the exhibit as follows: "Prosecution Exhibit 9 for identification is a 16-page document, undated. These are scene photos. The first page is titled as 'Explicit.'" Trial defense counsel did not oppose admission.

Appellate Exhibit CXI, dated 17 February 2021, is an order by the military judge sealing certain documents in Appellant's court-martial, including Prosecution Exhibit 9.

Upon this court's review of the record, we noted a conflict between the description provided by the trial counsel and Prosecution Exhibit 9 in the record filed with the court. Prosecution Exhibit 9 appears to be a four-page document, with footers on each page stating, "Page 1 of 4" through "Page 4 of 4." Additionally, contrary to the representations by trial counsel, there is no marking of "Explicit" on the first page. Thus, it appeared that the record of trial did not contain a proper version of Prosecution Exhibit 9. *See* Rule for Courts-Martial (R.C.M.) 1112(b)(6).

On 14 April 2022, this Court ordered the Government to show good cause as to "why this court should not remand this record for correction." On 26 April

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* All references in this order to the Uniform Code of Military Justice and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

2022, the Government responded stating the Air Force Appellate Operation Division (JAJG) "cannot confirm the accurate contents of Prosecution Exhibit 9 from its own copy of the record and cannot access the original copy of the record maintained at Kirtland AFB due to geographic distance." The Government acknowledged that "[g]iven the sensitivities of dealing with sealed materials, correcting the record would prove very difficult without a remand and military judge involvement. Thus, this case should be sent back to the military judge to correct the record of trial, in accordance with R.C.M. 1112(d)."

Additionally, on 27 April 2022, in a "Consent Motion for Leave to File Motion to Remand for Correction Under R.C.M. 1112(d)," the Government advised this court that "pages from Appellate Exhibit LIX—a defense motion to compel the production of an expert consultant—are also missing from the Record of Trial. Specifically, the four listed attachments to this defense motion are missing." The Government requests any remand order from this court require correction of Appellate Exhibit LIX; Appellant consents to this motion.

R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication. R.C.M. 1112(d)(2)–(3) describes the procedure for the military judge to take corrective action for an incomplete record. The court notes that R.C.M. 1112(d)(2) requires notice and opportunity for the parties to examine and respond to the proposed correction.

Accordingly, it is by the court on this 28th day of April, 2022,

**ORDERED:**

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for the complete and correct version of Prosecution Exhibit 9, complete version of Appellate Exhibit LIX, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

The record of trial will be returned to the court not later than **31 May 2022**. If the record cannot be returned to the court by that date, the Government will

inform the court in writing not later than 26 May 2022 of the status of the Government's compliance with this order.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 39936**

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**UNITED STATES**
*Appellee*

**v.**

**Evan L. WESTCOTT**
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 17 March 2022

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*Military Judge:* Bryon T. Gleisner.

*Sentence:* Sentence adjudged on 16 January 2020 by GCM convened at Pope Army Airfield, North Carolina. Sentence entered by military judge on 29 May 2020: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

*For Appellant:* Captain David L. Bosner, USAF.

*For Appellee:* Lieutenant Colonel Matthew J. Neil, USAF; Major Alex B. Coberly, USAF; Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, KEY, and MEGINLEY, *Appellate Military Judges*.

Senior Judge KEY delivered the opinion of the court. Chief Judge JOHNSON filed a separate opinion concurring in part and in the result. Judge MEGINLEY filed a separate opinion dissenting in part and in the result.

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KEY, Senior Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification each of aggravated sexual contact and abusive sexual contact of Ms. SW, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[1,2] The members sentenced Appellant to a dishonorable discharge, confinement for three years, and reduction to the grade of E-1. The convening authority deferred Appellant's reduction in grade until the date the entry of judgment was signed by the military judge and directed Appellant's automatic forfeitures be waived for a period of six months for the benefit of Appellant's dependents.

Appellant has raised 12 issues on appeal: (1) whether his convictions are factually and legally sufficient; (2) whether the military judge erred when he admitted the victim's interview with law enforcement into evidence as a prior consistent statement; (3) whether the military judge's failure to fully instruct the members on the definition of consent warrants relief;[3] (4) whether his trial defense counsel were ineffective; (5) whether trial counsel improperly commented on Appellant's right to remain silent; (6) whether the military judge erred in permitting trial counsel to ask a witness if he was aware Appellant's ex-wife had alleged Appellant sexually assaulted her; (7) whether he was subjected to illegal pretrial punishment; (8) whether his sentence is inappropriately severe; (9) whether the convening authority erred in failing to take action on Appellant's sentence; (10) whether the findings and sentence should be set aside under the cumulative error doctrine; (11) whether his conviction is invalid because he was not afforded the right to an unanimous verdict; and (12) whether the United States Supreme Court's ruling in *Solorio v. United States*, 483 U.S. 435 (1987), which held that personal jurisdiction over servicemembers does not depend on a service connection to the charged offense, should be "revisited and rejected."[4] We also consider the issue of timely post-trial processing

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[1] All references in this opinion to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.). All other references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant was acquitted of one specification of sexual assault on divers occasions, in violation of Article 120, UCMJ, and one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, both involving Ms. SW.

[3] We also consider the related matter of the completeness of the record of trial with respect to this issue.

[4] Appellant personally asserts issues (11) and (12) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

and appellate review. We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

## I. BACKGROUND

In April or May 2015, Appellant met Ms. SW on a dating website. At the time, Appellant was stationed in Alaska and Ms. SW lived in North Carolina, but Appellant anticipated receiving orders to Pope Army Airfield (AAF), North Carolina. In June 2015, Appellant went to North Carolina to visit his family who lived near the base. While he was there, he went on a few dates with Ms. SW. Shortly thereafter, Appellant received his military orders to Pope AAF, and he moved there in mid-August 2015. He and Ms. SW continued their relationship, and, about a month later, Ms. SW became pregnant with their son. She moved into Appellant's home in October 2015, and they married two years later in September 2017. In late May 2018, Ms. SW separated from Appellant and alleged he had sexually assaulted her on multiple occasions, including during her last evening in the house she shared with Appellant. The members convicted Appellant of two offenses arising out of his conduct during that last evening, but acquitted him of two specifications alleging prior assaults. At his court-martial, Appellant was represented by two civilian counsel in addition to his detailed military counsel.

## II. DISCUSSION

### A. Issues Summarily Resolved

#### 1. Alleged Pretrial Punishment: Issue (7)

The weekend prior to the start of Appellant's court-martial, Appellant's first sergeant directed Appellant to go to the Pope AAF emergency room in order to complete a confinement physical exam. Once he arrived at the emergency room, medical personnel there informed him such an exam would be premature at that point because Appellant had not been convicted of anything, let alone sentenced to confinement. On appeal, Appellant contends that the military judge abused his discretion in denying his motion for three days of credit based upon these events, which he argues amounted to illegal pretrial punishment under Article 13, UCMJ, 10 U.S.C. § 813. We have carefully considered this issue and find it does not warrant further discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

#### 2. Convening Authority Not Taking Action: Issue (9)

In his Decision on Action memorandum, the convening authority indicated he took action on the sentence by deferring Appellant's grade reduction and waiving his automatic forfeitures. The convening authority did not, however,

specifically state what action he was taking with respect to Appellant's adjudged confinement or punitive discharge. After Appellant filed his assignments of error, the United States Court of Appeals for the Armed Forces (CAAF) decided *United States v. Brubaker-Escobar*, 81 M.J. 471, 472 (C.A.A.F. 2021) (per curiam). Consistent with that decision, we conclude the convening authority made a procedural error when he failed to take action on the entire sentence, considering that Appellant's offenses all occurred prior to 1 January 2019, and the charges were referred after that date. In spite of this error, we note the convening authority granted Appellant's requested deferment of the adjudged reduction in grade, and he lacked the ability to grant clemency with respect to the remainder of the adjudged sentence. In testing this error for material prejudice to a substantial right of Appellant, we conclude he is not entitled to relief. *See United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005).

**3. Cumulative Error: Issue (10)**

Appellant asserts the cumulative effect of errors pertaining to his court-martial deprived him of a fair trial and warrant setting aside the findings and sentence. As we discuss in this opinion, we find no error materially prejudicial to his substantial rights. Consequently, the cumulative error doctrine is inapplicable here.

**4. Unanimous Verdict: Issue (11)**

Appellant personally raises his claim that the Constitution guarantees the right to a unanimous verdict, a right not reflected in the current court-martial framework. Appellant raises this claim under *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390 (2020), along with both the Fifth and Sixth Amendments. U.S. CONST. amend. V, VI. However, our superior court has held "there is no Sixth Amendment right to trial by jury in courts-martial." *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citations omitted); *see also United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986) (noting that "courts-martial have never been considered subject to the jury-trial demands of the Constitution"). The United States Supreme Court similarly concluded neither the Fifth Amendment nor the Sixth Amendment creates a right to a jury in a military trial in *Ex parte Quirin*, 317 U.S. 1, 45 (1942). *See also Ex parte Milligan*, 71 U.S. 2, 123 (1866); *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials

by courts-martial or military commissions. . . . The constitution of courts-martial . . . is a matter appropriate for congressional action.").[5] Moreover, Appellant cannot demonstrate he was convicted upon less than a unanimous vote by the members.[6] This issue warrants neither further discussion nor relief. *See Matias*, 25 M.J. at 361.

**5. Absence of Service Connection to His Offenses: Issue (12)**

Having considered Appellant's invitation, we decline to reject the binding precedent established by the United States Supreme Court more than three decades ago regarding the military's jurisdiction over servicemembers. We do not discuss this issue further. *See id.*

**B. Legal and Factual Sufficiency**

Appellant contends his convictions are legally and factually insufficient, arguing that Ms. SW's testimony was uncorroborated and that she had both poor credibility and a motive to falsely accuse him of assaulting her. We are not persuaded.

**1. Additional Background**

At Appellant's court-martial in January 2020, Ms. SW testified that she "started losing interest" in sex with Appellant after their son was born, but Appellant meanwhile "started becoming more forceful [in] wanting to have sex." Ms. SW further testified that from September 2017 to May 2018, Appellant "would force [her] clothes off of [her] and force [her] into having sex with him against [her] will even though [she] had repeatedly told him no." She said this occurred multiple times a month until she decided to leave Appellant in May 2018. Ms. SW also said Appellant grabbed her neck with his hand without her consent once. For this conduct, Appellant was charged with sexually assaulting Ms. SW on divers occasions and committing a single act of assault consummated by a battery; he was, however, ultimately acquitted of these offenses.

Appellant's convictions for committing aggravated sexual contact and abusive sexual contact arose from events occurring in the evening of 23 May

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[5] Although not argued by Appellant, our dissenting colleague suggests there may be a constitutional infirmity in the application of collateral post-trial consequences—such as sex-offender registration requirements—to people convicted by less-than-unanimous court-martial panels. Whether or not this is the case, our court has no authority to direct or constrain non-military entities' enforcement of generally applicable laws.

[6] During Appellant's court-martial, the Defense asked the military judge for "a polling of the panel," a request the military judge denied. Trial defense counsel did not explain what issues the proposed polling would have encompassed.

2018—the last evening Ms. SW intended to spend in the home. Ms. SW testified that while she was packing her belongings in their bedroom, Appellant was taking a shower in the adjoining bathroom, getting ready to report for his military night-shift duties. Appellant called her over and told her, "I would have treated you better if you had [ ] given it up to me every day." Without responding, Ms. SW walked away from the bathroom and resumed collecting her things.

As Ms. SW explained, Appellant then emerged from the bathroom with a towel around his waist. He dropped the towel and walked over to her, grabbed her left hand, and put her hand on his penis at which point she "jerked [her] hand away." Appellant then pushed her onto the bed and held her arms above her head. Ms. SW testified that she told Appellant "no" and tried to push him away, but he was "pinning [her] down to the bed" by laying on her right side, using his right hand to "push [her] left leg to the side," and "inch[ing] his body in between [her] legs."

Ms. SW said Appellant then started trying to pull down her shorts. The direct examination proceeded:

> Q: So before we get into that, so what were you wearing at the time?
>
> A: I remember I was wearing a T-shirt and I was wearing maternity shorts they were—had a stretchy band on top so he was able to pull them easily.
>
> Q: And so going back to what you are describing, he was trying to put his hand on your shorts?
>
> A: Yes. He hooked his fingers underneath my shorts and started moving his hands down towards my vagina.
>
> Q: Was he able to do that?
>
> A: He—yes. He got down pretty far. And before he, before he pulled down my shorts he was stroking my vagina outside of my shorts with his right hand.
>
> Q: And so just so we get the timeline clear, the touching that outside the shorts when did that occur?
>
> A: That happened after he was able to push my left leg to the side and he started touching me through the shorts.
>
> Q: What were you doing as he was touching you through the shorts?
>
> A: I was trying to get my arms free to push him away and then I tell him no.

Ms. SW testified Appellant was "using his fingers and rubbing up and down the outside of [her] shorts where [her] vagina is." Appellant was not able to penetrate Ms. SW's vagina, but she said that while "he got close to the outside of [her] vagina," he was unable "to go any further." Ms. SW said she "moved [her] knee up" to try and get Appellant's hand away as she "kept trying to get [her] arms free and trying to get him off of [her]" and that she thought she "even went so far as to trying to smack him [i]n between the legs." She also told Appellant he would be late for work if he did not stop, and Appellant eventually got up off her and went back to getting ready to go to work.

Appellant left a few minutes later, and Ms. SW finished packing. The next morning, Ms. SW left the house and moved in with her sister, Ms. JR. A couple of days later, Ms. SW told Ms. JR what had occurred, and Ms. JR suggested Ms. SW notify the police. Ms. SW agreed and filed a report with the Hoke County, North Carolina, Sheriff's Office on 26 May 2018. Ms. SW recounted the events of 23 May 2018 in an interview with a sheriff's deputy and one of the office's sergeants which was recorded on the deputy's body camera. Ms. JR was also present. In the interview, which was admitted into evidence in its entirety, Ms. SW told the deputy that as Appellant was getting ready for work, Appellant said that he and Ms. SW "should have sex again" before she left him. The following colloquy also took place in the interview:

> DEP [Deputy]: So as he was leaving for work the other day he—will—anyway or tell me before he left, he wants to have sex. You said he started pulling your shorts down?
>
> VIC [Ms. SW]: Yeah he pushed me down on the bed wouldn't let me up.
>
> DEP: Right.
>
> VIC: He tried pulling off my shorts and he tried to stick his hand on my shorts.
>
> DEP: Mm-hm.
>
> VIC: And I kept trying to push him away from—
>
> WIT [Ms. JR]: Didn't he make you touch him too?
>
> VIC: Yes. Yeah he grabbed my hand he made me touch him too. And he was naked at that time too.
>
> . . . .
>
> DEP: Did at any point during this incident, did he penetrate you?
>
> VIC: No.

> DEP: Okay so he never—fingers, private part, anything like that, penis never went in?
>
> VIC: I—fingers got close, but I think I was able to push him away before he could.
>
> . . . .
>
> SGT [Sergeant]: Did you—did he get your pants off?
>
> VIC: No. I was able to keep him from doing that.
>
> DEP: Never penetrated.
>
> SGT: But did he touch you in your vaginal area?
>
> VIC: Over my shorts.
>
> SGT: Over your shorts.
>
> VIC: Yeah.
>
> SGT: And when his hand went in, he didn't touch anything?
>
> VIC: He like was around the area but he didn't penetrate. I was able to like push his hands away before he was able to.
>
> SGT: Okay. And then after you told him you pushed him away, did he stop?
>
> VIC: No. I kept having to push him away. I even had to like—because he was naked at the time, I even had to like slap him like in between the legs to try and get him to go away. And he did not he was still being extremely aggressive towards me and the only thing that probably saved him or saved me from going further is that he was going to be late for work.

Two days later, Ms. JR noticed bruises on Ms. SW's legs and arms, and she pointed them out to Ms. SW. Ms. SW explained at Appellant's court-martial that she has a genetic disease rendering her legally blind, and she was unable to see the bruises herself—as a result, she was unaware of the bruises until Ms. JR told her about them. Ms. JR said at trial that the bruises appeared "as if someone grabbed like this and there were points," grabbing her left arm as she testified. Once Ms. SW learned she was bruised, she went back to the Hoke County Sheriff's Office, where a detective took pictures of her injuries, one of which was a bruise on the inside of Ms. SW's left knee. The photographs were admitted into evidence as a prosecution exhibit.

During Ms. SW's cross-examination, trial defense counsel did not specifically ask Ms. SW about the 23 May 2018 incident. Instead, the Defense sought to establish that, contrary to Ms. SW's testimony, Appellant and Ms. SW had

engaged in consensual sexual conduct throughout their relationship, and on some occasions Ms. SW would initially rebuff Appellant's advances but then later consent to sexual activity. The Defense also attempted to show that Ms. SW was frustrated with Appellant not helping around the house and that she stood to gain financially should Appellant be convicted. Ms. SW conceded that while she was living with Appellant, she had never told anyone he was sexually assaulting her, but she explained Appellant would "always tell [her] that it's not rape when you're married."

Through their cross-examination of law enforcement witnesses, the Defense sought to establish that Ms. SW had made inconsistent or unbelievable claims about how often Appellant sexually assaulted her during their relationship. In the Defense's closing argument, trial defense counsel specifically pointed to the fact Ms. SW discussed only the 23 May 2018 incident when she was interviewed by the Hoke County investigators and that her other allegations did not surface until some later point in the investigation.

**2. Law**

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (internal quotation marks and citation omitted). The "[G]overnment is free to meet its burden of proof with circumstantial evidence." *Id.* (citations omitted).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In

conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399).

In order for Appellant to be found guilty of aggravated sexual contact, as charged here, the Government was required to prove beyond a reasonable doubt: (1) that Appellant committed sexual contact upon Ms. SW by touching her groin with his hand; (2) that he did so by using unlawful force; and (3) that he did so with the intent to gratify his sexual desire. *See Manual for Courts-Martial*, *United States* (2016 ed.) (2016 *MCM*), pt. IV, ¶ 45.b.(5)(a). "Sexual contact" includes, *inter alia*, "any touching . . . either directly or through the clothing, [of] any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." *Id.* ¶ 45.a.(g)(2)(B). "Unlawful force" means "an act of force done without legal justification or excuse." *Id.* ¶ 45.a.(g)(6). "Force" includes "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person." *Id.* ¶ 45.a.(g)(5)(B).

In order for Appellant to be found guilty of abusive sexual contact, the Government was required to prove beyond a reasonable doubt: (1) that Appellant committed sexual contact upon Ms. SW by using his hand to place her hand on his penis; (2) that he did so by causing bodily harm to Ms. SW, to wit: placing her hand on his penis; (3) that he did so with the intent to gratify his sexual desire; and (4) that he did so without Ms. SW's consent. *Id.* ¶ 45.b.(7)(b).[7] "Bodily harm" includes "any nonconsensual sexual act or nonconsensual sexual contact." *Id.* ¶ 45.a.(g)(3). "Consent" means "a freely given agreement to the conduct at issue by a competent person." *Id.* ¶ 45.a.(g)(8)(A).

The affirmative defense of mistake of fact as to consent is available to an accused who can demonstrate that he or she—through ignorance or mistake—incorrectly believed another consented to the sexual contact in question. *See* Rule for Courts-Martial (R.C.M.) 916(j)(1). In order to rely on this defense, the accused's belief must be both honest and reasonable. *See id.*; *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)); *United States v. Gans*, No. ACM 39321, 2019 CCA LEXIS 162, at *14 (A.F. Ct. Crim. App. 11 Apr. 2019) (unpub. op.). Once raised, the Government bears the burden of proving beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1); *see United States v. McDonald*, 78

[7] Although the *Manual for Courts-Martial* does not include the element of "without consent," the military judge instructed the members that they were required to find this element had been met.

M.J. 376, 379 (C.A.A.F. 2019). "The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." *McDonald*, 78 M.J. at 381.

**3. Analysis**

On appeal, Appellant attempts to undermine the evidence supporting his convictions, largely relying on his claim that Ms. SW was not a credible witness. He argues that she had a financial motive to fabricate her claims and that her testimony was inadequately corroborated. After reviewing the record, however, we conclude Appellant's post-trial attack has missed its mark.

While trial defense counsel raised some questions about Ms. SW's testimony during the court-martial, the Defense was unable to decisively impair her credibility. The primary shortcoming of Ms. SW's testimony was its lack of detailed specifics about the various assaults she alleged she suffered over the course of her relationship with Appellant. Ms. SW, however, did provide specific details about the events of 23 May 2018. Moreover, she reported those events almost immediately after they occurred and gave recorded interviews to law enforcement the same week. The Government also obtained photographic evidence of Ms. SW's bruises taken around the same time. True, there were some minor inconsistencies between Ms. SW's testimony and her interviews which took place two years earlier, but the Defense spent little time trying to highlight those inconsistencies. Instead, trial defense counsel mounted a broader attack by portraying Ms. SW as typically refusing Appellant's sexual entreaties at first but later consenting to sexual activity. Considering Appellant was acquitted of the more serious sexual assault specification along with the assault consummated by a battery charge, the Defense's approach was not altogether unsuccessful.

That being said, the Defense's claim that Ms. SW—as a matter of course—would first rebuff Appellant's advances only to later acquiesce was thinly sourced. In fact, the claim seems to have been derived from a single question posed by trial defense counsel: "[I]sn't it true that there were some—there were many times when [Appellant] asked you to have sex and you may have not been in the mood, but you gave in, you gave [in] and you consented?" Ms. SW answered, "There were sometimes, yes." After that exchange, trial defense counsel moved on to other matters. Whatever may be gleaned from this response by Ms. SW, a rational factfinder could wholly reject the notion that on 23 May 2018—while Appellant was pinning her down and holding her arms above her head, while she was telling him "no" and struggling to get away from him after Appellant had said he would have been nicer to her if she had "given it up" every day, all against the backdrop of her packing to leave the house and their marriage—Ms. SW was, in fact, consenting despite all her outward manifestations to the contrary. Similarly, a rational factfinder could conclude the

Government had proven beyond a reasonable doubt that Ms. SW did not consent to Appellant's actions that evening and that Appellant was operating under neither an honest nor a reasonable belief that she did.

The Defense sought to portray Ms. SW as having a financial incentive to allege Appellant had abused her, namely so that she could receive transitional compensation. The force of this accusation was largely blunted when Ms. SW disavowed any knowledge of the program. While trial defense argued "[i]t's not credible that she didn't know" because she was assigned a special victims' counsel whose "job is to make sure that the person knows what's going on with the process, with the court-martial, with everything they can get that might happen to them after this court-martial," no evidence was ever adduced as to how much compensation Ms. SW might receive, when she would first receive it, how long it would last, or if she was even entitled to it at all. Moreover, there is nothing in the record indicating when Ms. SW retained her special victims' counsel's services, much less evidence that she had spoken to a special victims' counsel prior to 26 May 2018, when she first reported Appellant's conduct to the Hoke County Sheriff's Office. Thus, a rational factfinder could place little or no significance on the fact that a transitional compensation program exists or that Ms. SW could conceptually benefit from it in some indeterminate fashion. In the face of Ms. SW's stated lack of knowledge of the program, a rational factfinder could reject the theory outright.

The aggravated sexual contact specification alleges Appellant committed the offense by "touching [Ms. SW's] groin with his hand, with an intent to gratify his sexual desire, by using unlawful force." The dissent takes issue with the factual sufficiency of that specification insofar as Ms. SW did not specifically state Appellant touched her "groin," as he was charged with doing. Although not raised either at trial or by Appellant on appeal, the dissent seeks to limit the anatomical boundaries of Ms. SW's groin to the point that it lies outside the reach of the evidence in this case.

At no point did Ms. SW use the word "groin" in her testimony. Instead, Ms. SW testified that Appellant "hooked his fingers underneath [her] shorts and started moving his hands down towards [her] vagina," and in doing so, "[h]e got down pretty far" and "close to the outside of [her] vagina." She said in her interview with the sheriff's deputy that when Appellant's hand was in her shorts, he did not penetrate her vagina, but "[h]e like was around the area." In addition, he touched her vaginal area through her shorts with his fingers, "rubbing up and down the outside of [her] shorts where [her] vagina is."

Two of our sister service courts have relatively recently sought to distinguish a person's genitals from their groin, giving some traction to the dissent's argument. In *United States v. McDonald*, the United States Navy-Marine

Corps Court of Criminal Appeals determined two specifications were not facially duplicative where one involved the appellant touching the victim with his penis while the second alleged the appellant had rubbed his groin on the victim's buttocks. 78 M.J. 669, 680 (N.M. Ct. Crim. App. 2018). The court reasoned that "groin" and "penis" are not synonymous, because a medical dictionary reviewed by the court defined "groin" as "[t]he groove, and the part of the body around it, formed by the junction of the thigh with the abdomen, on either side,"[8] and because "groin" and "genitalia" are listed separately in the definition of "sexual contact" in Article 120, UCMJ.[9] *Id*. The court further highlighted that the two specifications covered different acts committed on different days and concluded the appellant's argument lacked merit. *Id*.

In *United States v. Perez*, the United States Army Court of Criminal Appeals concluded that the trial judge had failed to elicit a sufficient factual basis to support the appellant's guilty plea, where the appellant was charged with touching the victim's genitals but explained in his providence inquiry that he had touched the victim on her pubic mound, just above her genitals. ARMY 20140117, 2016 CCA LEXIS 131, at *6 (A. Ct. Crim. App. 29 Feb. 2016) (unpub. op.). The court concluded that substituting "groin" for the charged "genitals" during appellate review would amount to a material and possibly fatal variance under the theory that "'genitals' is not the same as 'groin' or 'groin area.'" *Id*. at *5–6.

However, other than contemplating the difference between a person's groin and their genitals, these two cases bear little similarity to Appellant's. *McDonald* involved a multiplicity challenge in which the court concluded the Government's charging scheme adequately put the appellant on notice of what he was required to defend against and differentiated between the charged events so that appellant was not being convicted of the same conduct twice. *Perez*, on the other hand, covered the familiar prohibition of modifying a charge such that the appellant was denied the ability to prepare for trial and defend against the charge. *See United States v. Treat*, 73 M.J. 331, 336 (C.A.A.F. 2014).

In the instant case, Appellant was charged with touching Ms. SW's groin. At trial, Ms. SW testified that Appellant reached "pretty far" down her shorts and his hand was near, but not touching, her vagina. This, in conjunction with

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[8] The court cited J.E. SCHMIDT, M.D., ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER (Release No. 52 Sep. 2018).

[9] *See* Article 120(g)(2)(A), UCMJ, 10 U.S.C. § 920(g)(2)(A), defining sexual contact as "touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person . . . ."

her testimony about Appellant using his fingers to rub "up and down the outside of [her] shorts where [her] vagina is," leaves little doubt Appellant touched Ms. SW's groin, even using the definition of "groin" employed in *McDonald*. That is, Appellant touched Ms. SW either where her thighs joined her abdomen, or *the part of the body around* that junction.[10] Thus, even adopting a rigid distinction between Ms. SW's groin and Ms. SW's genitals, the evidence still supports the conclusion that Appellant touched her groin.

We conclude that a rational factfinder could have found beyond a reasonable doubt all the essential elements of Appellant's convicted offenses, to include that he touched Ms. SW's groin. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's convictions both legally and factually sufficient.

**C. Admission of the Recording of Ms. SW's Interview**

As discussed above, the recording of Ms. SW's interview at the Hoke County Sheriff's Office was admitted into evidence at Appellant's trial. Appellant argues that this was improper under the theory that the recording did not qualify

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[10] We also note that "groin" is often used to generally describe the area between a person's legs, to include their genitals. *See, e.g.*, *United States v. Gould*, ARMY 20120727, 2017 CCA LEXIS 338, at *11 (A. Ct. Crim. App. 17 May 2017) (unpub. op.) (equating "genital area" to "groin"); *United States v. Washington*, 61 M.J. 574, 577 (N.M. Ct. Crim. App. 2005) (describing "private part" as "the groin area of the male and female anatomy"); *United States v. Hanson*, 30 M.J. 1198, 1200 (A.F.C.M.R. 1990) (stating appellant made a comment about his genitals and then grabbed himself "in the groin area"). Similarly, appellate opinions make repeated references to people being kicked in the groin, which seem far more likely to refer to a person being kicked in the genitals as opposed to the precise area where their abdomen meets their thigh. *See, e.g.*, *United States v. Powell*, 49 M.J. 220, 223 (C.A.A.F. 1998); *United States v. Hughes*, 48 M.J. 700, 708 (A.F. Ct. Crim. App. 1998); *United States v. Viola*, 26 M.J. 822, 825 (A.C.M.R. 1988). References to groin as the area above a person's genitals are also not uncommon. *See, e.g.*, *United States v. Rodriguez*, 31 M.J. 150, 152 (C.M.A. 1990) (stating appellant put his hands in the victim's pants "into her groin area, on her pubic hair"); *Stratton v. State*, 132 So. 3d 1074, 1077 (Miss. Ct. App. 2014) (describing a scar "directly above the pubic area of [the defendant's] groin"); *People v. Flock*, 2008 Mich. App. LEXIS 2388, at *15–16 (Mich. Ct. App. 25 Nov. 2008) (unpub. op.) (concluding area covered by pubic hair is part of the groin); *People v. Sykes*, 793 N.E.2d 816, 826 (Ill. App. Ct. 2003) (alternatively describing defendant having shaved his "pubic area" and his "groin"). Moreover, in *Perez*, the military judge and the parties referred to the appellant touching the victim's groin area while describing that area as a spot above her genitals, where her pubic hair would be. 2016 CCA LEXIS 131, at *3.

as a prior consistent statement under the Military Rules of Evidence. We find, however, that Appellant has waived this issue.

**1. Additional Background**

The parties gave their opening statements the morning of 14 January 2020, and the Government next called Ms. SW to testify. At the conclusion of her testimony, the court-martial recessed for lunch, and Ms. JR testified for the Government once the court reconvened. After Ms. JR was excused, trial counsel asked the military judge, "Your Honor, based on discussions over the lunch break, maybe [sic] have a 10 minute recess to prepare documentary piece of evidence to present?" The military judge granted the request, and the court reconvened at the end of the recess. Prior to calling the members into the courtroom, the military judged asked if there was "anything we need to take up regarding this document." The following colloquy occurred:

> CTC [circuit trial counsel]: "No, Your Honor[. F]or the [c]ourt's awareness we were going to put in snippets of her Hoke County—the [victim's] Hoke County interview as prior consistent statements however discussing with the [D]efense, under rule of completeness they would like the entire interview to come in. And so we agreed to that so we're going to put the entire interview in through [the sheriff's deputy].
>
> MJ [military judge]: Okay, all right. Is that your understanding [D]efense?
>
> CivDC2 [second civilian defense counsel]: It is sir, it is sir.
>
> MJ: Okay. I'll take that proffer. All right. Call the members.

Once the members returned to the courtroom, the sheriff's deputy was called to the stand, and trial counsel sought to admit the recording of Ms. SW's interview as Prosecution Exhibit 1 early in his testimony. Trial defense counsel objected and asked to "question the witness on the foundation." The military judge responded, "All right let's—you're saying there's lack—so you are objecting for lack of foundation?" One of Appellant's trial defense counsel responded, "I'm also, yes. . . . I'm also worried about that's a complete body cam from the entire day." The military judge then said he would permit the Government to "follow up" on the matter, which led to trial counsel eliciting testimony from the sheriff's deputy to the effect that the proffered recording was the entirety of Ms. SW's interview.

The military judge asked the Defense again whether they had any objection, and trial defense counsel argued "there should be more body cam footage. I want to make sure there's not additional footage and what happened." Trial defense counsel said he reviewed the video and then posited, "I know that a 20

minute, a 20 minute video that starts with 08, and then the next one starts at 31, and they come together, there's three minutes missing. I'm trying to figure out where those three minutes are."[11] Without any further discussion, the military judge overruled the defense objection and admitted the recording as Prosecution Exhibit 1.

During the Defense's closing argument, trial defense counsel invoked the recording to demonstrate that Ms. SW only told the sheriff's deputy about the events of 23 May 2018 and made no allegations during the interview of having suffered prior and repeated sexual assaults during her relationship with Appellant. Trial defense counsel argued Ms. SW's version of events had morphed over time, telling the members, "This is a story that started as, 'Well, my husband was mean to me on 23 May,' and evolved into a whole different story."

**2. Law**

A declarant-witness's prior, out-of-court statement which is consistent with his or her trial testimony is admissible under two circumstances: (1) when the statement is offered to rebut a charge that the declarant recently fabricated the trial testimony or gave the testimony due to a recent improper influence or motive, or (2) when the statement is offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Mil. R. Evid. 801(d)(1)(B). Prior consistent statements under this rule need not be identical to trial testimony, but must only be "'for the most part consistent' and in particular, be 'consistent with respect to . . . fact[s] of central importance to the trial.'" *United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020) (alterations in original) (quoting *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988)). When offered to rehabilitate the declarant's credibility, such statements must "be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Id.* at 396. Statements admitted under this rule are not hearsay and therefore amount to substantive evidence. *Id.* at 395.

When an appellant does not preserve error with respect to the admission of evidence by lodging a timely objection, that error is forfeited unless it amounts to plain error. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citing *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)) (additional citations omitted). Waiver, however, occurs when an appellant has intentionally relinquished or abandoned a known right. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). When an appellant affirmatively states he has no objection to

[11] The sheriff's deputy testified the interview recording consisted of three video files. We are unable to precisely discern from the record what trial defense counsel's references to "08" and "31" pertain to, but we presume he is referring to time markers on the videos.

the admission of evidence, the issue is ordinarily waived and his right to complain about its admission on appeal is extinguished. *United States v. Ahern*, 76 M.J. 194, 198 (C.A.A.F. 2017) (citing *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009)).

**3. Analysis**

Appellant argues on appeal that the military judge erred by admitting the recorded interview as a prior consistent statement for a variety of reasons, not the least of which is that the recording contains both statements by people other than Ms. SW and statements by Ms. SW which were not actually consistent with anything she testified to. Appellant further argues we should review the admission of the recording under a plain error standard. We disagree, as we conclude Appellant intentionally abandoned his right to object to the admissibility of the recording and therefore waived the issue on appeal.

Trial counsel explained to the military judge that the parties had actually negotiated what portions of the recording would be admitted into evidence—as opposed to whether the recording would be admitted at all. The Government only intended to offer portions of the recording, but trial defense counsel desired the *entire* recording to be admitted, and trial counsel agreed to do so. The military judge squarely asked trial defense counsel if the Government's explanation mirrored trial defense's counsel's understanding, and they said it did. When the Government sought to admit the recording during the sheriff's deputy's testimony, the Defense objected, but that objection pertained to their concern that the members were going to receive something less than the entire interview, not that the interview—or any portion of it—should *not* be admitted. Appellant's position at trial was that the entire recording should be admitted into evidence, and that position operates to waive the alleged error on appeal.[12]

Pursuant to Article 66(d), UCMJ, we have the unique statutory responsibility to affirm only such findings of guilty and so much of the sentence that is correct and "should be approved." 10 U.S.C. § 866(d). Thus, we retain the authority to address errors raised for the first time on appeal despite waiver of those errors at trial. *See, e.g.*, *United States v. Hardy*, 77 M.J. 438, 442–43 (C.A.A.F. 2018). We recognize that had the Defense objected to the recording at trial on the grounds Appellant now seeks to advance, a proper application of the rules of evidence would have almost assuredly resulted in something less

[12] Appellant argues his defense counsel were ineffective by permitting the introduction of the recording; we address that contention within our analysis of Appellant's other ineffective-assistance claims, *infra*. To the extent there was any question whether trial defense counsel actually sought admission of the entire interview, the declarations submitted in response to Appellant's ineffective assistance of counsel claims make clear the Defense made the strategic choice to seek to the interview's admission.

than the entire recording being admitted. Beyond simply not objecting to the recording, Appellant's counsel affirmatively agreed to its admission. Appellant has not identified any authority that prohibits parties from agreeing to admit evidence which may be otherwise subject to objection under the rules of evidence. Instead, Appellant seems to have come to the conclusion—post-trial—that such an agreement was not the best strategy. Considering the foregoing, we decline to pierce Appellant's waiver, and we will leave it intact.

**D. Military Judge's Failure to Instruct on the Definition of Consent**

The military judge's findings instructions—which both the Government and the Defense expressly agreed to at trial—did not define the term "consent." On appeal, Appellant submits that this error warrants setting aside the findings and sentence in his case. The Government, meanwhile, argues Appellant affirmatively waived the issue.[13]

**1. Additional Background**

Following the close of evidence, the military judge released the members for the day and conducted an R.C.M. 802 conference regarding the findings instructions, and afterwards, he sent the parties a draft of his instructions. The next morning, the military judge discussed the instructions with the parties on the record. At one point in this discussion, the military judge asked if the parties saw any defenses raised in the case. Trial counsel said, "No," but trial defense counsel said, "Other than the reasonable mistake of fact, which you've already included in your instructions, sir."

At the end of this discussion, the military judge asked if there were any objections to the instructions. Trial defense counsel answered, "There are not, sir." The military judge then asked, "[D]o both trial counsel and defense counsel specifically affirm that the instructions are a correct statement of law, to the best of your knowledge and understanding?" Both trial counsel and trial defense counsel responded affirmatively. The military judge then recessed the court-martial for nearly half an hour so that he could finalize the instructions.

When the court reconvened, the military judge again asked if the parties had any objections to the instructions or requests for additional instructions. One of Appellant's trial defense counsel first said the Defense had not been able to review the revised instructions due to lack of Internet access in the courtroom. A second trial defense counsel said he was aware of what was being changed in the instructions and that the Defense had no objection "to that change." That same trial defense counsel then noted the military judge had

[13] To the extent the issue was waived, Appellant argues such waiver constitutes ineffective assistance of counsel. We address that claim later in this opinion's ineffective-assistance section.

made a comment about "adding a separate part of one of the elements," leading the military judge to say: "Right. Right. We had add—that was missing from the part—the second element. No objections. Defense, do you want additional time? I'll certainly give it to you."[14] One trial defense counsel replied, "No, sir," and a second said, "No, we're fine, if those were the two changes. I understand."

After the military judge read the instructions to the members and the parties gave their closing arguments, the military judge again asked if the parties objected to the instructions or requested additional instructions. Both trial counsel and trial defense counsel answered in the negative.

Three weeks after Appellant was sentenced, the military judge notified the parties via email that his findings instructions had not included a definition of the word "consent," which was an element of the offense of abusive sexual contact alleged in Specification 2 of Charge I.[15] In his email, the military judge noted the Defense had not requested this definition be included and that the Defense had not argued a theory of consent to the members,[16] but he directed the parties to submit briefs addressing whether the lack of a definition constituted error and, if so, what relief was warranted.

The instructions the military judge had read to the members included the elements of all the charged offenses. For the aggravated sexual contact specification, those elements essentially amounted to: sexual contact; unlawful force; and specific intent. For abusive sexual contact, the elements included: sexual contact; bodily harm; specific intent; and lack of consent.

The military judge also instructed the members that the defense of mistake of fact applied to all the charged offenses in the case. In giving that instruction, he said, "There has been testimony tending to show that, at the time of the alleged offenses, the accused mistakenly believed that [Ms. SW] consulted [sic] to the sexual or physical conduct alleged concerning these offenses."[17] He told the members that the defense was available if they concluded Appellant "held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual or physical conduct." The military judge further ex-

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[14] This discussion had been about whether to include "without consent" in the second element of the abusive sexual contact specification in light of the fact "without consent" was already listed as a fourth element to that offense.

[15] Lack of consent was also an element of the sexual assault specification, of which Appellant was acquitted.

[16] The military judge was incorrect on this point—the Defense's primary argument at trial was that all sexual contact between Appellant and Ms. SW was consensual.

[17] The words "consulted [sic]" appear in the transcript.

plained that a mistake would only be reasonable if it was "based on information, or lack of it, that would indicate to a reasonable person that the other person consented to the sexual or physical conduct." Finally, he instructed the members that the Government had the burden to prove beyond a reasonable doubt that the defense did not exist. In addition to this defense, the military judge told the members they could consider Ms. SW's past sexual and physical contact with Appellant on the question of whether she consented to the charged acts.

The instruction on consent found in the *Military Judges' Benchbook*, which the military judge did *not* give, explains that, "[a]ll the evidence concerning consent to the sexual conduct is relevant and must be considered" in assessing whether the Government has met its burden. Dept. of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-45-15 (10 Sep. 2014) (*Benchbook*). The instruction also explains that evidence an alleged victim did consent may lead the members to have a reasonable doubt as to whether the Government has proven the offense. Following that instruction, the *Benchbook* proposes a definition of consent—also omitted by the military judge—as "a freely given agreement to the conduct at issue by a competent person," that "[a]n expression of lack of consent through words or conduct means there is no consent," that "[l]ack of consent may be inferred based on the circumstances," and that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent."

In a written response to the military judge's email, the Defense argued the military judge had made an error of constitutional dimension and a mistrial was warranted. Contrary to the statement in the military judge's email, trial defense counsel asserted one of the defenses they pressed at trial was that Ms. SW had consented to all the charged conduct. The Government, meanwhile, argued the Defense had waived the issue and that even if the issue had not been waived, Appellant was not prejudiced by the definition's omission.

The military judge convened a post-trial hearing regarding the instruction on 11 May 2020.[18] At the hearing, trial counsel reiterated their position that Appellant had waived the matter by virtue of announcing they had no objections to the instructions. Trial counsel also argued that even if the military judge had erred, Appellant was not prejudiced, because the *Benchbook* definition of consent would have favored the Government more than Appellant. The Defense argued that consent was a defense to the abusive sexual contact offense, so the definition of consent was a required instruction. The Defense also argued that even though consent is not a defense to aggravated sexual contact,

[18] The hearing had been scheduled earlier, but was delayed due to logistical challenges arising from the Coronavirus (COVID-19) pandemic.

consent could "negate" the element of force. Trial defense counsel conceded Appellant would not be entitled to relief for waived error, but argued that in order for Appellant to have waived the issue, "there would've had to have been a dialogue" in which the military judge explicitly asked if Appellant wished to waive particular instructions. Trial defense counsel said the omission of the definition amounted to plain error and Appellant was prejudiced in that the members were not told they must consider all the surrounding circumstances in determining whether Ms. SW had consented or not. Because a key aspect of the overall defense theory was that Ms. SW would typically resist Appellant's sexual advances but eventually consent to them, the Defense asserted the members needed the instruction in order to understand that the legal concept of consent "is broader than a merely yes or no." Trial defense counsel maintained they simply failed to notice the absence of the consent instruction at trial, as discussed in more detail in Section II(F)(2)(a), *infra*.

In late May 2020, the military judge issued a ruling on the matter of his instructions, but the ruling is missing from the record of trial docketed with this court, as discussed in greater detail in Section II(I), *infra*. In their pleadings before this court, the parties agree the military judge declined to grant Appellant's request for a mistrial or any other relief.

**2. Law**

Military judges are required to "determine and deliver appropriate instructions." *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). Required instructions include a "description of the elements of each offense charged," any applicable special defenses, and "[s]uch other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given." R.C.M. 920(e).

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f); *see also United States v. McClour*, 76 M.J. 23, 25 (C.A.A.F. 2017) (reviewing failure to object to instructions for plain error). The CAAF has concluded a valid waiver at trial "leaves no error to correct on appeal." *Ahern*, 76 M.J. at 197 (citing *Campos*, 67 M.J. at 332). Where an appellant "affirmatively decline[s] to object to the military judge's instructions and offer[s] no additional instructions," he may thereby affirmatively waive any right to raise the issue on appeal, even "in regards to the elements of the offense." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). Instructions that would be otherwise required may be waived, such as instructions on affirmative defenses. *See, e.g.*, *United States v. Rich*, 79 M.J. 472, 477 (C.A.A.F. 2020); *United States v. Gutierrez*, 64 M.J. 374, 377–78 (C.A.A.F. 2007). "Whether an appellant has waived an issue is a legal

question that this [c]ourt reviews de novo." *Davis*, 79 M.J. at 331 (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019)).

**3. Analysis**

By stating on the record that the Defense had no objection, Appellant affirmatively waived any objection to the military judge's instructions. Trial defense counsel said they had no objection to the instructions both before and after they were given to the members. The Defense had these instructions in writing and listened to the military judge read them in open court. Under *Davis*, the only conclusion available is that Appellant waived the issue of the definition of consent. 79 M.J. at 331.

However, the CAAF has made clear that the Courts of Criminal Appeals have discretion, in the exercise of their authority under Article 66, UCMJ, 10 U.S.C. § 866, to determine whether to apply waiver or to pierce that waiver in order to correct a legal error. *See Hardy*, 77 M.J. at 442–43; *United States v. Chin*, 75 M.J. 220, 222–23 (C.A.A.F. 2016) (discussing our ability to correct error despite waiver).

Although the omission of the consent instruction was apparently due to the military judge's oversight—and the absence of a defense objection was the product of a similar oversight on trial defense counsel's part—Appellant had ample opportunity to review and object to the instructions. Appellant's post-trial argument that the military judge did not strictly follow the proposed *Benchbook* language does not warrant our intervention, especially when we consider the fact that "the *Benchbook* is not binding as it is not a primary source of law." *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013). Even if we were to pierce Appellant's waiver, we conclude Appellant was not prejudiced by the instructions that were given, as discussed in Section II(F)(2)(a), *infra*. Therefore, we will leave Appellant's waiver intact.

**E. Testing the Basis of Character Testimony**

Appellant argues the military judge erred in permitting the Government to ask a defense character witness about allegations Appellant had sexually assaulted his previous wife. We disagree.

**1. Additional Background**

In pre-sentencing proceedings, the Defense called Mr. BB, a friend of Appellant's. During Mr. BB's brief testimony, he explained that he befriended Appellant when the two of them were sophomores in high school and that they had kept in touch over the years, including through Appellant's court-martial—a period of approximately 15 years. Trial defense counsel asked Mr. BB to describe Appellant, and Mr. BB spoke approvingly of Appellant as a father and a friend. In the midst of his narrative response, Mr. BB said,

> [Appellant] has been there for me when I had family emergencies and issues, and the same way around. [Appellant] would never turn your [sic] back on anybody, [Appellant] wouldn't hurt anybody. It's not in his DNA to hurt anybody. And I can tell you that from high school to everything else, [Appellant] would never do anything wrong to you. He would actually help you if he could and he would do whatever he can.

Mr. BB's direct examination concluded shortly thereafter and trial counsel requested an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing. In that hearing, trial counsel argued that by saying Appellant "wouldn't hurt anyone," Mr. BB had opened the door to allow the Government to ask him if he was aware Appellant's ex-wife had also accused Appellant of sexual assault.[19] The Defense objected to the question and argued the military judge should determine what Mr. BB's answer would be while outside the members' presence, because trial defense counsel believed Mr. BB had no knowledge of the allegation. The military judge said he would permit the question, specifically noting he concluded the question's probative value was not outweighed by the danger of unfair prejudice in light of the fact he was only permitting trial counsel to ask the one question. He explained the question was permissible to test Mr. BB's opinion, and he further ruled the question would be asked for the first time in front of the members. When the members returned to the courtroom and Mr. BB was asked if he was aware of the allegation, he said he was not.

After two more defense witnesses and Appellant's unsworn statement, the Defense rested and the members were excused. At some point, one of the panel members submitted this written question to the military judge: "Is it possible for the panel to learn more of the allegations [Appellant's] ex-wife made against him, specifically the nature of the claims in [sic] any findings related to them." This led trial defense counsel to move for a mistrial, arguing trial counsel did not have a good faith basis for asking the question in the first place and that they were simply trying to "poison the well" by putting the allegation in front of the members. The military judge denied the motion, reiterating his view that the question was, in fact, proper because "the [D]efense opened the door." The military judge read a proposed instruction to the parties, to which trial defense counsel said, "We don't want that instruction." The military judge responded, "You just asked for mistrial, I'm giving the instruction." When the members returned, the military judge instructed them:

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[19] Trial counsel had provided pretrial notice to the Defense of their intent to raise the alleged sexual assault in rebuttal. Trial counsel also explained to the military judge the factual basis for the allegation.

> During the testimony of [Mr. BB], he was asked whether he was aware that [Appellant] was alleged to have assaulted his ex-wife. This was a permissible question, however there is no evidence that [Appellant] assaulted his ex-wife. This question was permitted to test the basis of the witness's opinion, and to enable you to assess the weight you accord to his testimony. You may not consider the question for any other purpose.

The military judge asked the members if they could follow this instruction, and he noted he received an affirmative response from each of them.

**2. Law**

Cross-examination concerning prior misconduct, "if there is a good-faith belief for the question, is the means of testing a witness'[s] testimony concerning an accused's character." *United States v. Pruitt*, 46 M.J. 148, 151 (C.A.A.F. 1997) (footnote omitted); *see also* Mil. R. Evid. 405(a). One purpose of such an inquiry is "to raise questions about the witness'[s] standard of evaluating good character." *Pruitt*, 46 M.J. at 151. However, "the cross-examiner is not allowed to prove the existence of the acts about which he asks." *United States v. Martinez*, No. ACM S31909, 2012 CCA LEXIS 324, at *7 (A.F. Ct. Crim. App. 23 Aug. 2012) (unpub. op) (quoting Stephen A. Saltzburg, et al., Military Rules of Evidence Manual 496 (3d ed. 1991)). Thus, the suggestion of prior misconduct in so-called "have you heard" or "did you know" questions is not offered to prove the misconduct occurred, but rather to evaluate the witness's opinion. *United States v. Beno*, 324 F.2d 582, 588 (2d Cir. 1963), *cited with approval in United States v. Trimper*, 28 M.J. 460, 467 (C.M.A. 1989); *United States v. Anderson*, No. ACM 39141, 2018 CCA LEXIS 122, at *5 (A.F. Ct. Crim. App. 28 Feb. 2018) (unpub. op.) (explaining that counsel may, on a good-faith basis, ask such questions to test the basis for and attempt to undermine the witness's opinion).

Such "have you heard" questions must still pass muster under Mil. R. Evid. 403 before they are asked. *United States v. Pearce*, 27 M.J. 121, 125 (C.M.A. 1988). This imposes the "heavy responsibility" on the military judge to "protect the practice from any misuse." *Id.* (quoting *Michelson v. United States*, 335 U.S. 469, 480 (1948)). Military judges are afforded broad discretion in applying Mil. R. Evid. 403, but we give less deference to military judges "if they fail to articulate their balancing analysis on the record." *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009) (quoting *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

**3. Analysis**

We conclude the military judge did not abuse his discretion in permitting the Government to test the foundation of Mr. BB's opinions by asking him if

he was aware of the prior assault allegation. Mr. BB had testified to Appellant's positive character attributes and declared Appellant would not hurt anyone, based upon their decade-and-a-half-long friendship. This left the impression that Appellant was a kind and nonviolent person and had been so the entire time they had been friends. The fact Mr. BB was not aware of the allegation tends, in some slight fashion, to undermine the basis for his opinion about Appellant's character. This is so because it demonstrated Mr. BB's exposure to Appellant was arguably limited and therefore his opinion was entitled to less weight. *See, e.g.*, *Pearce*, 27 M.J. at 125 (finding no error in asking a witness if he was aware the appellant had been under investigation several years prior to his court-martial for a similar offense, in part because the witness's lack of knowledge of the investigation undercut the basis for the witness's opinion about the appellant's honesty).

The military judge's analysis of this issue is wanting, however. While he said he found the probative value of the question to not be substantially outweighed by unfair prejudice, he did not say how he came to the conclusion or what factors he considered, other than that he was going to limit trial counsel to asking just one question. As a result of his failure to articulate his analysis, we grant the military judge's ruling less deference than we otherwise would have given it.

Under Mil. R. Evid. 403, evidence may be excluded if its "probative value is substantially outweighed by a danger of . . . unfair prejudice." In the case of Appellant standing trial for sexually assaulting his wife, the deeply prejudicial value of suggesting to the members he also sexually assaulted his ex-wife would not seem up for debate. Indeed, trial counsel's singular question on the matter almost immediately led a member to ask for more information about the allegation.

In one sense, the probative value of the question was low, considering Mr. BB had no knowledge of the allegation—which meant the members were not permitted to consider the truth of the allegation.[20] Trial counsel did not seek to ask Mr. BB if such an allegation would change his opinion, nor did trial counsel comment on Mr. BB's testimony at all in the Government's sentencing argument. This definitely raises the specter that this question was put to Mr. BB not so much for the purpose of testing the basis of his opinion, but to instead

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[20] We also note that trial counsel asked if Mr. BB was aware Appellant had been *accused* of sexually assaulting his ex-wife as opposed to asking about Appellant's actual conduct. The CAAF has held this is "an error of form, not substance." *United States v. Pearce*, 27 M.J. 121, 124 (C.M.A. 1988).

communicate uncharged misconduct to the members.[21] On the other hand, it was the Defense that called Mr. BB, who testified about his long-standing friendship with Appellant and his belief that Appellant would not hurt anybody and "would never do anything wrong to you." These attributes squarely relate to Appellant's rehabilitative potential and the question of whether society needed to be protected from Appellant with a lengthy term of confinement. The fact Mr. BB was unaware of such a serious allegation demonstrates his relationship with Appellant was not as close as he portrayed it, which, in turn, undermined the basis of his opinion. After trying to portray himself as not being capable of harming anyone, Appellant can hardly claim surprise that the Government sought to test the basis for that characterization. *See, e.g.*, *Michelson*, 335 U.S. at 485 (noting that defendants "have no valid complaint at the latitude which existing law allows to the prosecution to meet by cross-examination an issue voluntarily tendered by the defense").

We do not find the military judge abused his discretion in allowing trial counsel to test Mr. BB's opinion by asking about the prior sexual assault allegation. Having conducted our own analysis under Mil. R. Evid. 403, we conclude the relevance of testing the basis for Mr. BB's opinion was not substantially outweighed by the danger of unfair prejudice. The Government was not required to let Mr. BB's testimony go unanswered or its basis untested, and therein lay the relevance of the Government's question. While the question was assuredly prejudicial, we do not characterize it as *unfairly* prejudicial in light of the fact it was the Defense which brought Mr. BB's testimony in the first place. We also note only a single question on the matter was asked, and Mr. BB disavowed any knowledge of the allegation. The question was devoid of specific details and only asked if Mr. BB knew Appellant had been *accused* of committing sexual assault. In *Pearce*, the CAAF noted that the fact a person has been merely investigated for an offense is "if anything, mitigating" because "[m]any an innocent person has been investigated, merely to be exonerated." 27 M.J. at 124. We see no difference here. Therefore, we conclude Mil. R. Evid. 403 would not operate to prohibit the question posed by the Government in Appellant's case.

However, even if the military judge erred in allowing this information to be presented, we ask whether "the error substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)). We conclude that it

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[21] Notably, if the Government had sufficient evidence of Appellant committing a prior sexual assault, the Government had the ready ability to offer such evidence under Mil. R. Evid. 413.

did not. The military judge's instruction told the members they could not consider the allegation as being true in light of Mr. BB's testimony that he was unaware of it. Absent evidence to the contrary, we may "presume that members follow[ed] [the] military judge's instructions."[22] *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted). In addition, trial counsel did not return to the allegation during sentencing argument or otherwise seek to capitalize on it. Thus, we see no indication the question operated to substantially influence Appellant's sentence.

**F. Allegations of Ineffective Assistance of Counsel**

At trial, Appellant was represented by his detailed military counsel, Major (Maj) TK, along with two civilian counsel, Mr. JO and Ms. MK. On appeal, Appellant asserts that his counsel committed numerous errors which cumulatively deprived him of the effective assistance of counsel. He specifically raises 12 different alleged deficiencies, 11 of which we discuss below—several of which we consolidate for our analysis.[23] Based on Appellant's allegations, we ordered and received declarations from his trial defense counsel which we consider in addressing his claims. *See United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020).

**1. Law**

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). We review allegations of ineffective assistance de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *Gilley*, 56 M.J. at 124 (citing *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000)). "[O]ur scrutiny of a trial defense counsel's performance is 'highly deferential,' and we make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the

[22] Although one panel member asked for more information about the allegation, this occurred before the military judge had instructed the members on how they could consider the question put to Mr. BB.

[23] Appellant's twelfth alleged deficiency is based on his counsel agreeing to a two-month continuance relating to the post-trial Article 39(a), UCMJ, hearing. We conclude this allegation warrants neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

time.'" *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (omission in original) (quoting *Strickland*, 466 U.S. at 689).

We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. *Mazza*, 67 M.J. at 475 (citation omitted). "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *Gooch*, 69 M.J. at 362–63). The burden is on the appellant to demonstrate both deficient performance and prejudice. *Id*. (citation omitted).

If an appellant's allegations are true, we consider the following factors to determine whether the presumption of competence has been overcome: (1) whether "there a reasonable explanation for counsel's actions;" (2) whether defense counsel's level of advocacy fell "measurably below the performance" ordinarily expected of "fallible lawyers;" and (3) if defense counsel were ineffective, whether there is "a reasonable probability" there would have been a different result absent the ineffective representation. *Gooch*, 69 M.J. at 362 (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)); *see also Akbar*, 74 M.J. at 386 (applying same standard for defense counsel's performance during sentencing proceedings). Considering the last question, "[i]t is not enough to show that the errors had some conceivable effect on the outcome," instead, it must be a "probability sufficient to undermine confidence in the outcome," including "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Datavs*, 71 M.J. at 424 (internal quotation marks and citations omitted).

It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005).

**2. Analysis**

Considering the entire record, the assertions Appellant makes in his assignments of error, along with trial defense counsel's declarations, we conclude that Appellant has not carried his burden to demonstrate he is entitled to relief. We examine each allegation in turn.

***a. Findings Instructions***

Appellant claims his counsel were deficient in failing to object to the military judge's findings instructions to the extent they omitted the definition of "consent," as discussed in Section II(D), *supra*.

During the 11 May 2020 post-trial hearing on the issue of the missing instruction, Ms. MK said she wanted to "take a moment to foot stomp some

things for the appellate record" regarding the Defense's possible waiver of the issue "to highlight for the appellate court that if the [D]efense—if we missed it, the defense actions were IAC and insufficient." We note the acronym "IAC" typically stands for "ineffective assistance of counsel." She went on to explain that the Defense assumed the military judge would give "the standard instructions" for the abusive and aggravated sexual contact specifications, but they "did not see the language that was missing from the standard instruction." This led the military judge to ask Ms. MK whether she had read the draft instructions when they were first sent to the parties. Mr. JO answered,

> I reviewed the instructions that night. When I review the instructions, I'm reviewing for special language, I'm looking—I, I'm usually able to find a typo or two. Usually I'm able to find can instead of a can't, and that's what I'm looking for. I, I did not notice that the standard consent instruction was not there. . . . I mean we do the comparison with the electronic bench book[,] make sure everything measured up, measured up side to side, and all instructions that was comfortable [sic] with the Court's reading. If, [ ] the court would've had a consent instruction it would've said consent means you must say no, then I would've noticed, but . . . I did not notice the negative. And yeah, I mean it matched, it matched the drop down menu in the Army bench book.

The military judge pointed out that he had asked the parties if they had any objections after he read the instructions to the members in open court. Mr. JO explained that when the instructions are being read to the members, he just listens to determine whether the military judge accurately reads the instructions as written, and is not assessing whether additional instructions should be given. He said the fact the consent instruction was "missing altogether" was "quite frankly, something [he] did not see." The Defense argued the military judge should declare a mistrial, but the military judge declined to grant relief. As noted above, the military judge's ruling is absent from the record of trial docketed with this court.

In their declarations, all three counsel admit they overlooked the fact the instructions did not define consent. Mr. JO and Ms. MK say the electronic version of the *Benchbook* they used contained an error in which the consent instruction was omitted, but they have provided no further evidence in support of this claim.

Based upon trial defense counsel's own assertions, there was no strategic or tactical decision behind not objecting to the instructions—they thought the instruction should be given, but it was not. This was purely the result of oversight. Counsel suggest the problem arose from some flaw in the *Benchbook*, but

the *Benchbook* itself indicates it is designed to "assist military judges . . . in the drafting of necessary instructions" with "the pattern instructions . . . intended only as guides." *Benchbook* at 3. As noted above, the *Benchbook* is advisory in nature. *See Riley*, 72 M.J. at 122.

While we recognize that defense counsel—like all trial participants—are fallible, trial defense counsel perceived that their error here was so significant that they argued a mistrial was the only appropriate remedy. We have no ready ability to determine whether the version of the *Benchbook* being used at the time in fact omitted the instruction at issue, but that is of no moment, because the *Benchbook* is an aid to—not a replacement for—independent and competent legal analysis. Trial defense counsel had the obligation to carefully review the draft instructions and propose their own instructions based upon the facts of Appellant's case and the state of the law. Considering the Defense's strategy was to argue Ms. SW had consented to the conduct in question based upon her alleged prior sexual conduct with Appellant, we find it all the more difficult to excuse trial defense counsel's failure to ensure the military judge instructed the members on that precise point.

We conclude Appellant's counsel's conduct fell measurably below of that expected of attorneys on this point, but Appellant is only entitled to relief if he establishes there is a reasonable probability of a different result in the absence of the errors. *Gooch*, 69 M.J. at 362. We find he has not done so. Under the Defense's theory, the members needed to be put on notice that the fact Ms. SW had, on past occasions, initially rebuffed Appellant's advances but later consented to sexual activity could be used to assess whether she consented during the charged events, or, alternatively, that Appellant might have been mistaken about her consent. However, the military judge did, in fact, instruct the members on both points. First, he told the members that evidence of Ms. SW's past acts of sexual and physical contact "should be considered . . . on the issue of whether [she] consented to the sexual and physical acts with which the accused is charged." Second, he explained that the defense of mistake of fact applied to each of the charged offenses and that it was the Government's burden to prove beyond a reasonable doubt the defense did not apply. Moreover, the military judge explained that lack of consent was an element of the abusive sexual contact offense, which the Government was required to prove.

We are not convinced the missing instruction would have provided enough force to lead to Appellant's acquittal or otherwise undermine our faith in the verdict. That instruction would have told the members that all evidence concerning consent is relevant and must be considered, and that evidence of consent may cause the members to have a reasonable doubt as to whether the Government proved Appellant committed the offenses beyond a reasonable doubt. The remainder of the instruction would have described consent as "a

freely given agreement to the conduct at issue," and would have then included a number of examples of non-consent, such as an "expression of lack of consent through words or conduct." To the extent the members believed Ms. SW's testimony, this last point squarely cuts against Appellant, as she testified she repeatedly told him to stop. To be sure, the military judge's instructions would have been superior had he employed the recommended *Benchbook* instructions or the statutory definitions enshrined in the UCMJ, but the Defense's theory was adequately covered by the instructions that were given, and Appellant is entitled to no relief.

***b. Ms. SW's Recorded Interview***

Appellant claims his counsel were deficient in allowing the Government to introduce the entirety of Prosecution Exhibit 1, Ms. SW's recorded interview with the Hoke County Sheriff's Office, discussed in Section II(C), *supra*.

At trial, the Defense agreed with the admission of the complete interview, even raising concerns that the members might receive something less than the entire recording. Appellant's argument is that this permitted the Government to present a "bolstering repetition of the allegation" without any strategic or tactical purpose. In his declaration, Mr. JO states he concluded the interview was "a mixed bag for both parties," and that "showing the entire video was more beneficial than showing only the portions which benefited the Government." Ms. MK echoes that sentiment, stating that "[w]hile the video contained statements by [Ms. SW] supporting the allegations . . . her demeanor during the report and discussion with law enforcement also contained information favorable to the Defense." Maj TK further explains that by showing the entire interview, the members were able to see Ms. JR interrupting the interview to "fill in the gaps or add her own perspective and details," as well as see Ms. JR's dislike of Appellant. This fed into a Defense theory that Ms. JR may have encouraged Ms. SW to fabricate the allegations or provided her incentive to do so.

Agreeing to admit the entire interview was a strategic choice on trial defense counsel's part. We do not find the choice unreasonable and we will not second-guess it. Indeed, one theory advanced by the Defense was that because Ms. SW did not tell the interviewers about any abuse committed by Appellant other than that which occurred on 23 May 2018, none of the allegations of prior abuse was true. Appellant was acquitted of the prior conduct, raising the inference that trial defense counsel's strategy worked to Appellant's advantage.

***c. Cross-examination of Ms. SW***

Appellant argues his counsel were ineffective in failing to cross-examine Ms. SW on two of the four alleged specifications, the two specifications of which the members found Appellant guilty. Appellant submits it was "inexcusable in

any circumstance to *not even mention half the charge sheet* or try to defend the client on those specifications."

We are not convinced. A failure to cross-examine a witness does not itself constitute ineffective representation. *Grigoruk*, 52 M.J. at 315. In order to prevail in this argument, Appellant must show what the missing cross-examination "might reasonably have accomplished." *Id.*

According to Ms. MK, the Defense reviewed all of Ms. SW's available statements and interviewed her twice. Ms. MK's assessment was that Ms. SW presented as calm, polite, and respectful. Moreover, in considering her extensive discussions with Appellant, Ms. MK believed that cross-examining Ms. SW about the specifics of the events of 23 May 2018 "would not result in any favorable information for [Appellant]."

"The decision whether to cross-examine a witness, and if so, how vigorously to challenge the witness'[s] testimony, requires a quintessential exercise of professional judgment." *Ford v. Cockrell*, 315 F. Supp. 2d 831, 859 (W.D. Tex. 2004), *aff'd*, 135 F. App'x 769 (5th Cir. 2005). On cross-examination, Appellant's trial defense counsel sought to portray Ms. SW as being frustrated with her marriage and having a financial incentive to fabricate allegations of assault. They further elicited the fact that Ms. SW would sometimes initially not consent to Appellant's sexual advances but eventually acquiesce to them—an important part of the Defense's overall theory. Appellant's complaint on appeal is somewhat misleading in that it suggests trial defense counsel cross-examined Ms. SW about some alleged assaults, but not others. In reality, trial defense counsel only asked about one particular alleged assault, and only on the point that Ms. SW had made an inconsistent statement as to what physical position she and Appellant were in at the time. The remainder of the cross-examination was focused on eliciting support for the argument that Ms. SW consented to all the conduct and fabricated allegations of assault.

Our assessment is that the defense team made a strategic decision to approach cross-examination in the manner they did, informed by their pretrial interviews of Ms. SW. Considering Ms. SW had detailed the events of 23 May 2018 during her direct examination and that her earlier interview was admitted into evidence, an entirely reasonable course of action for the Defense was to *not* have her allegations repeated for a third time. Appellant has not suggested what lines of questioning trial defense counsel should have pursued, much less demonstrated either what information would have been obtained or how it would have helped his case. Without doing so, Appellant cannot prevail on this claim.

***d. Closing Arguments***

Appellant argues his counsel were ineffective by giving a short closing argument which did not specifically address the 23 May 2018 events, comment on photographs of Ms. SW's bruises, or attempt to minimize Ms. JR's opinion about Ms. SW's character for truthfulness.

The Defense's closing argument was relatively streamlined, comprising four pages of the transcript, compared to the Government's 14-page argument. Nonetheless, it featured the Defense's core arguments: that sexual contact between Appellant and Ms. SW was consensual throughout their marriage; that Ms. SW would often say "no" at first, but then later consent; that Ms. SW had falsely accused Appellant for financial motives; that despite her trial testimony of long-lasting sexual abuse, Ms. SW married Appellant and never reported any abuse until she moved out of the house; that Ms. SW's testimony lacked detail as to when the alleged abuse prior to 23 May 2018 occurred; that when she made her report at the Hoke County Sheriff's Office, she made no reference to any of the other instances of abuse she alleged at trial; and that her report amounted to "my husband was mean to me" but evolved over time to be far more expansive. Trial defense counsel further pointed out that military law enforcement did not follow regulations and failed to record their interview with Ms. SW—depriving the members of the ability to see the changes in Ms. SW's allegations—and argued the Government only offered one of Ms. SW's statements to law enforcement, even though she gave five. Finally, trial defense counsel told the members to "pay attention" to the mistake of fact instruction.

"The right to effective assistance extends to closing arguments." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citations omitted). "Counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in [ ] closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Id.* at 5–6. Closing argument serves to "'sharpen and clarify the issues for resolution by the trier of fact,' but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Id.* at 6 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Thus, "[j]udicial review of a defense attorney's summation is therefore highly deferential . . . ." *Id.*

In her declaration, Ms. MK—who gave the closing argument—says she felt the Government's "overly long and technical" slide-based argument had left the members fatigued. She explains that, in her experience, "military panels prefer shorter, concise arguments."

Despite criticizing trial defense counsel for giving too short of a closing argument, Appellant offers little in the way of explanation as to how taking a different tack in closing would have resulted in a different outcome. Appellant

makes the sweeping generalization that "[i]t is inconceivable for counsel to not discuss half of the case" by not specifically talking about the 23 May 2018 events, yet he provides no indication of what he believes trial defense counsel should have said. As explained above, the Defense's approach was to paint sexual interactions between Appellant and Ms. SW during their marriage as routinely shifting from opposition to consent. Contrary to Appellant's assertion on appeal, Ms. MK did not carve the 23 May 2018 episode out of her argument—instead, she treated that complaint as false and characterized it as Ms. SW saying Appellant "was mean" to her.

Trial counsel argued that Ms. SW's bruises, which were photographed and admitted into evidence, corroborated her testimony. Essentially, the Government's theory was that some of the bruises were caused by Appellant grabbing her leg and by pinning her down. In making this argument, trial counsel told the members to look for "fingerprints" and "what looks like a thumbprint." Ms. MK did not refer to the bruises in her argument. On appeal, Appellant says Ms. MK "should have commented that the Government's failure to prove those fingerprints were [Appellant's] fingerprints is evidence of a conclusory, shoddy investigation." We, however, do not understand trial counsel's references to "fingerprints" to be fingerprints in the forensic-identification sense, and Appellant has offered nothing that would suggest a bruise can yield a fingerprint which could be matched with a suspect. Such a proposition runs counter to common human experience and seems implausible on its face—meaning, Appellant's proposed argument would have run the very real risk of losing credibility in the members' eyes.

During Ms. JR's testimony, trial counsel elicited her opinion that her sister was truthful. During cross-examination of one of the law enforcement witnesses, trial defense counsel demonstrated investigators had not attempted to determine whether Ms. SW was, in fact, a truthful person. In closing, trial counsel argued Ms. SW had a character for truthfulness, based upon Ms. JR's testimony. Ms. MK did not specifically refer to this character evidence in the Defense's closing argument; instead, she broadly cast Ms. SW as lying about her accusations. Appellant believes Ms. MK was deficient by not telling the members to discount Ms. JR's assessment based upon the facts Ms. JR is Ms. SW's sister and Ms. JR does not like Appellant. We are not convinced the absence of this comment is as significant as Appellant would have us conclude. For one, the military judge twice told the members that they should consider the witness's friendships, prejudices, "the relationship each witness may have with either side; and how each witness might be affected by the verdict." Moreover, Ms. JR's opinion apparently did not have as commanding an effect as Appellant now argues, given that the members acquitted him of the sexual assault and neck-grabbing offenses Ms. SW testified about.

Appellant would have us conclude the members would have acquitted him of all charges had trial defense counsel given a different closing argument, but he has failed to demonstrate that is a reasonable probability. Appellant was convicted of committing abusive and aggravated sexual contact on 23 May 2018. Ms. SW reported those offenses both to her sister and law enforcement shortly after they occurred. Photographs of her bruises corroborated her allegation, and her in-trial testimony was substantially similar to her initial report. In comparison, her testimony about the prior sexual assaults and neck-grabbing incident was vague, lacked specifics as to when those offenses occurred, and was undermined both by the fact she did not tell anyone about those offenses when they occurred and by her concession that sometimes she would consent to sexual activity that she initially objected to.

While other counsel may have given a different closing argument, Ms. MK's argument was well within the latitude afforded to trial defense counsel. Even if we assume for purposes of analysis that her argument did fall short, we are not persuaded Appellant would have seen a different result in his verdict.[24] In other words, Ms. MK has provided a reasonable explanation for giving the argument she did, her level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers, and—even if she was ineffective—Appellant has not shown a reasonable probability that, absent the errors, there would have been a different result. *Gooch*, 69 M.J. at 362.

***e. Expert Consultants***

Appellant next argues his counsel were ineffective by failing to request the appointment of a forensic pathologist and a fingerprint expert. He does not specifically explain what sort of information either expert would provide, but he contends they could have supported a theory that Appellant was "not so forceful" (because Ms. SW did not notice the bruises until Ms. JR pointed them out) or that the bruises "were attributable to another source."

According to Ms. MK, trial defense counsel did discuss the bruising with a medical consultant, and she determined "it was not an area where an expert would benefit [Appellant]." Mr. JO further explained that the Defense anticipated medical experts would likely corroborate, rather than refute, Ms. SW's version of events, based upon statements Appellant made to trial defense counsel. Appellant submitted a declaration in support of his complaint of ineffective

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[24] Our dissenting colleague contends trial defense counsel were ineffective by not arguing the lack of evidence that Appellant touched Ms. SW's "groin," an argument which Appellant has not advanced on appeal. For the same reasons discussed in Section II(B)(3), *supra*, we are skeptical this argument would have gained traction with the members, and we conclude the absence of the argument does not amount to ineffectiveness.

assistance of counsel, but he does not address this issue. Thus, we have nothing before us indicating Appellant did not agree with this assessment at the time.

"[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *United States v. Anderson*, 55 M.J. 198, 201–02 (C.A.A.F. 2001) (alteration in original) (citing *Strickland,* 466 U.S. at 691). "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691.

Appellant's perfunctory claim that expert assistance might have turned the tide in his case is insufficient to lead us to a conclusion his counsel were ineffective. He has not attempted to explain what information such assistance might have yielded or how it would have helped his case. He has not suggested that a fingerprint could be identified from a picture of a bruise or that an expert could look at the pictures and determine whether or not they corresponded with Ms. SW's description of the events. Instead, the information before us indicates trial defense counsel did seek medical guidance, determined expert assistance would not assist Appellant's case, and decided to focus their attention on other matters. We decline to conclude trial defense counsel needed to do more.

***f. Appellant's Decision to Not Testify***

Just before Appellant's court-martial began, the military judge held an R.C.M. 802 conference with counsel from both sides. According to Maj TK, Mr. JO told the military judge—in the presence of trial counsel—that he "always put[s his] guy on the stand," or words to that effect. Surprised by this comment, Maj TK informed Appellant of this revelation.[25] As the court-martial progressed, all three defense counsel advised Appellant against testifying, and he ultimately decided not to do so.

In support of this appeal, Appellant submitted a declaration in which he asserts that after he learned about Mr. JO's comment, he "received conflicting advice from [his] defense counsel about whether or not [he] should testify." He

[25] In his declaration, Mr. JO asserts that what he said during the R.C.M. 802 conference was that "in a he-said, she-said case, one can expect the Accused to testify." We need not reconcile the differences between Maj TK's and Mr. JO's respective recollections. Because Maj TK, at the very least, understood Mr. JO's comment to be a declaration Appellant would testify, we will analyze this issue from Maj TK's recollection, as he was the one who first informed Appellant of what had occurred. Having considered the factors articulated in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we conclude a post-trial hearing on this point is unwarranted.

also writes, "What made the difference for me in electing not to testify, when I had originally planned to and wanted to do so, was knowing that trial counsel had been notified of our intent and that he would be preparing his cross-examination that night accordingly."

In his declaration, Maj TK states that he was under the impression the decision as to whether or not Appellant would testify had not been made at the time of Mr. JO's comment. Maj TK also explains that while he did not agree with the disclosure, he also did not think Appellant testifying would be helpful to his case. Mr. JO and Ms. MK likewise took a dim view of Appellant testifying based upon his poor performance in mock examinations during trial preparation. All three defense counsel characterize Appellant as being agitated, emotional, and combative both in trial preparation and after hearing the testimony of the Government's witnesses. Mr. JO and Ms. MK note Appellant was prone to engaging in diatribes and making defamatory comments about Ms. SW during the practice examinations. Ms. MK says she was also concerned about Appellant's ability to control his anger on the stand and how he would respond to being confronted with alleged misconduct from his prior marriage. All three counsel say they had extensive discussions with Appellant about whether to testify and they emphasized to Appellant it was his decision whether or not to do so. Maj TK avers he provided Appellant this guidance both orally and in writing. After these discussions, Appellant decided not to testify on his own behalf.

Appellant argues there was no strategic reason to disclose that he would testify, and that by doing so, he was faced with the choice of "walk[ing] into a cross-examination a seasoned circuit trial counsel prepared on 24 hours advance notice or [forgoing] the opportunity to declare innocence and hope for the best." While some defense counsel may keep their client's decision to testify a secret in hopes of surprising trial counsel, we would imagine such a strategy would be ineffective against all but the most inexperienced prosecutors. The notion that a prosecutor would be unprepared for an accused to take the stand—especially in a case where the accused is the only other witness to the alleged events—strikes us as highly implausible. Appellant, meanwhile, was well aware he could be cross-examined because he had been practicing such with his counsel.

After the Defense rested its case, the military judge specifically asked Appellant if his decision to not testify in findings was his personal decision. Appellant stated, "Yes, Your Honor." While Mr. JO's statement in the R.C.M. 802 conference may have been one factor in Appellant's calculus, we see no indication that Appellant did not make a voluntary choice not to testify. By all accounts, trial defense counsel diligently worked with Appellant to prepare him for both being cross-examined as well as to intelligently determine whether or

not to testify. Appellant has not shown that Mr. JO's representation fell below the standards expected of defense counsel, and we do not find Mr. JO ineffective for disclosing Appellant's intent to testify.

***g. Absence of Unreasonable Multiplication of Charges Motion***

Appellant next argues his counsel were ineffective in failing to raise a motion alleging unreasonable multiplication of charges in light of the fact both convicted offenses occurred within mere seconds of each other. Appellant faced a total confinement time of 27 years; he asserts that had such a motion been filed and granted, his maximum sentence to confinement would have been limited to 20 years. Appellant argues, "There [was] no strategic or tactical decision to not even try to lower the sentence."

Under R.C.M. 307(c)(4), "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." To determine whether charges have been unreasonably multiplied, judges assess such factors as whether the specifications are aimed at distinct criminal acts, whether they exaggerate or misrepresent the charged criminality, whether they unreasonably increase an accused's punitive exposure, and whether the prosecutor overreached in drafting the charges. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). It is within a military judge's discretion to merge unreasonably multiplied charges for sentencing purposes. *See, e.g.*, *United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012).

In Appellant's case, he faced a maximum sentence to confinement of 20 years for the aggravated sexual contact offense (touching Ms. SW's groin) and 7 years for the abusive sexual contact offense (causing Ms. SW to touch his penis). 2016 *MCM*, pt. IV, ¶¶ 45.e.(3), (4). Arguably, these two offenses were part of Appellant's singular "transaction" of assaulting Ms. SW, but Appellant has failed to show how a reduction in his maximum sentence from 27 to 20 years would have resulted in a different adjudged sentence. Trial counsel told the members Appellant deserved "no less than seven years confinement and a dishonorable discharge," and the members adjudged three years, a dishonorable discharge, and reduction to the grade of E-1. Thus, Appellant was sentenced to a period of confinement well below either the 20-year sentence ceiling he would have faced after a favorable unreasonable multiplication ruling or trial counsel's recommended sentence. Appellant has not offered any explanation as to how a 20-year ceiling would have had any beneficial impact on Appellant's ultimate sentence, and we will not strain to contrive one for him. In failing to demonstrate any prejudice, Appellant's claim of error warrants no relief.

***h. Mr. BB's Testimony***

Appellant argues his counsel were ineffective by eliciting Mr. BB's opinion in presentencing proceedings that Appellant would not hurt anybody, an opinion which permitted the Government to inquire about an allegation that Appellant had been accused of sexually assaulting his ex-wife.

In their declarations, all three of Appellant's trial defense counsel assert Mr. BB's statement caught them by surprise, as they had spent time preparing him for his testimony. Mr. JO says he specifically told Mr. BB not to attempt to impeach the verdict.

We note that Mr. BB's statement about how Appellant would not hurt anybody came at the tail end of a longer narrative response to the open-ended question, "can you describe [Appellant] for the panel?" After Mr. BB made this comment, trial defense counsel moved on to other topics, such as whether Mr. BB would help Appellant find employment. Trial defense counsel were aware of the ex-wife's allegation, as it was one factor they considered when advising Appellant on the risks of him testifying. Thus, the record lends credence to the post-trial declarations that trial defense counsel did not purposely elicit this opinion.

Mr. BB's overall testimony was favorable to Appellant, portraying him as being a good friend and a good father, so the fact the Defense elected to call him as a witness for sentencing amounts to an unremarkable strategic choice. In questioning Mr. BB, Ms. MK could have attempted to ask more specific questions to constrain his answers, but that is not a degree of perfection we will impose upon counsel in our hindsight review of her performance. Based upon on all three trial defense counsel's declarations, we are convinced they made an informed and calculated decision to present rehabilitation-potential testimony in the hopes of obtaining a favorable sentence for Appellant. Mr. BB—a lay witness—offered an opinion he likely believed would be helpful to Appellant, not appreciating the consequences that would erupt. We see nothing to indicate trial defense counsel purposely elicited this particular aspect of his testimony, and we harbor no delusions that counsel can precisely predict how a witness will answer any given question, no matter how extensive their trial preparation. As with all witnesses, trial defense counsel took a risk by calling Mr. BB in the hopes of casting Appellant in a favorable light. This is precisely the sort of tactical decision we give great deference to, and we will not second-guess it on appeal. *See Mazza*, 67 M.J. at 475.

***i. Victim's Unsworn Statement***

Ms. SW intended to provide an unsworn statement to the court-martial. After reviewing a written copy of her proposed statement, Mr. JO objected on the basis that it referred to offenses for which Appellant was acquitted (i.e.,

grabbing her neck on one occasion and sexually assaulting her on divers occasions). Specifically, the Defense objected to the following line: "I was uncertain if anyone would even listen to me or if anyone would take me seriously or if they would just ignore me the way [Appellant] did whenever I told him no or stop." Trial defense counsel's position was that Ms. SW was referring to "multiple encounters" of which Appellant was acquitted.

Trial counsel briefly argued Appellant had been convicted of committing abusive sexual contact on Ms. SW while she was saying "no" and "stop," and thus Ms. SW's references to abuse would fairly include the offenses of which he was convicted. Prior to obtaining a ruling from the military judge, however, Mr. JO announced, "Sir, I withdraw. I withdraw. If the [G]overnment—[i]f they don't want to modify it, that's fine with me. I withdraw."

Appellant argues his counsel were ineffective by withdrawing their objection to Ms. SW's victim unsworn statement, effectively waiving the matter on appeal. Appellant asserts there was no strategic or tactical reason not to obtain a ruling from the military judge. In his declaration, Mr. JO explains he withdrew the objection out of concern that Ms. SW might take the opportunity to write "a much more powerful unsworn" than the "benign" one before the court. We have carefully considered Ms. SW's relatively short statement, and we conclude that while one could interpret the statement to refer to abuse throughout her relationship with Appellant, one could also read it to simply pertain to the events of 23 May 2018. Trial defense counsel's tactical decision to withdraw the Defense's objection in order to circumvent the risk that Ms. SW would add more prejudicial information was not unreasonable, and we decline to find trial defense counsel ineffective. Even if we had concluded Appellant's counsel were ineffective, we would not find any likelihood Appellant was prejudiced in light of the fact the members who heard the unsworn statement had also heard Ms. SW's testimony about abuse throughout the relationship. By acquitting Appellant of that conduct, the members had already determined that it had not been proven beyond a reasonable doubt, so it is extremely unlikely they would be influenced by Ms. SW's vague allusions to the conduct in an unsworn statement. Moreover, the military judge instructed the members that Appellant was "to be sentenced only for the offenses of which he [had] been found guilty," and we presume the members followed the military judge's instructions. *See Taylor*, 53 M.J. at 198.

***j. Conclusion on Ineffective Assistance Claims***

We evaluate trial defense counsel's performance not by the success of their strategy, "but rather whether counsel made . . . objectively reasonable choice[s] in strategy from the alternatives available at the [trial]." *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998) (additional citation omitted)). Even

when an appellant overcomes the strong presumption that counsel's performance was within the wide range of reasonable professional assistance, relief is only available when the appellant can establish a reasonable probability of a different outcome had the ineffective assistance not occurred. Appellant has failed to establish that relief is warranted in his case under the theory of ineffective assistance of counsel.

**G. Government Findings Argument**

Appellant contends trial counsel's closing argument improperly commented on his right to remain silent and that we should set aside the findings and sentence of his court-martial to remedy the error. We disagree and decline to grant Appellant's requested relief.

**1. Additional Background**

During his closing argument, circuit trial counsel told the members that in order to find Appellant had established a mistake of fact defense, they had to conclude Appellant was actually mistaken and that his mistake was reasonable. Trial counsel described the "actually mistaken" element of the defense as the mistake having "to have existed in the mind of the accused. Meaning, it had to actually be there. He had to actually think that she was consenting. It had to be an honest mistake." From this proposition, trial counsel argued,

> Now, let's turn to that first piece there. Let's talk about "honest." "It's not rape. We are married." "It's not rape. We're married." Is someone who says that—Is someone who says that mistaken about the consent of the other person or does that indicate they have knowledge of what they're doing; they have knowledge that the other person is not consenting[?] They have knowledge of it and they're talking about it, they're categorizing it, they're classifying it as a rape as something that is against the law. Is any mistake of fact honest when someone says those words? Okay. We can't get into his mind unless he tells us what's in his mind. And he told you—

At that point, trial defense counsel asked for an Article 39(a), UCMJ, hearing in order to move for a mistrial. In this hearing and outside the members' presence, trial defense counsel argued that the comment "unless he tells us" was an improper comment on Appellant's right to remain silent. Circuit trial counsel countered that he was referring to what Appellant had said to Ms. SW during the charged offenses. The military judge denied the motion, concluding that trial counsel was "specifically talking about the statement that was already into evidence, that it's not rape if you are married, and using that to demonstrate what was arguably in the accused's mind at the time he committed the offenses." The military judge said circuit trial counsel's final comment,

"[h]e told you," further placed the argument in context. Nonetheless, the military judge granted the Defense's request for a curative instruction.

When the members returned to the courtroom, the military judge advised them:

> Members of the Court, you have heard in the [G]overnment's closing argument that one will not know what is in [Appellant's] mind unless he tells us. As you have witnessed, [Appellant] has elected not to testify. You have taken an oath, and along with such oath, you have agreed not to consider the fact that [Appellant] did not testify. You must follow such an oath. The [G]overnment is also prohibited from commenting on [Appellant] exercising this right.

Circuit trial counsel then resumed his argument by saying, "The mistake of fact as to consent must be honest. Is it an honest mistake if the accused says, it's not rape if you're married? Honest." From there, circuit trial counsel moved on to a discussion about whether such a mistake could be reasonable.

**2. Law**

Whether a trial counsel's comments in closing argument improperly reference an accused's constitutional right to remain silent is a question of law we review de novo. *See United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (citing *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007)).

"It is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990) (citing *Griffin v. California*, 380 U.S. 609 (1965)). "Regardless of whether there was an objection or not, '[i]n the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.'" *Flores*, 69 M.J. at 369 (alteration in original) (quoting *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005)).

We examine prosecutorial comments "in light of [their] context within the entire court-martial." *Carter*, 61 M.J. at 33 (citation omitted). "[W]hether [an] error is harmless beyond a reasonable doubt 'will depend on whether there is a reasonable possibility that the evidence [or error] complained of might have contributed to the conviction.'" *United States v. Paige*, 67 M.J. 442, 451 (C.A.A.F. 2009) (alteration in original) (quoting *Moran*, 65 M.J. at 187). To find that an error did not contribute to the conviction is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Moran*, 65 M.J. at 187 (quoting *Yates v. Evatt*, 400 U.S. 391, 403 (1991), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991)).

**3. Analysis**

In looking at trial counsel's argument, and the context of the entire court-martial, we find no error. When trial counsel made this comment, he was addressing Appellant's defense of mistake of fact and how Appellant's comments to Ms. SW provided evidence of Appellant's mindset at the time of these offenses. This was a proper argument which did not refer to Appellant's decision not to testify, either explicitly or implicitly.

Even if we were to conclude the argument amounted to constitutional error, we would find such error to be harmless. In *United States v. Chisum*, the CAAF explained that a "constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 77 M.J. 176, 179 (C.A.A.F. 2018) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17–18 (2003)). Here, trial counsel's commentary on whether Appellant was honestly mistaken was brief and narrowly tailored to one prong of the defense of mistake of fact. The military judge further provided the members a curative instruction in the middle of trial counsel's argument. We presume court members follow instructions by a military judge, unless we have evidence to the contrary. *Taylor*, 53 M.J. at 198. Finally, the members returned a mixed verdict, acquitting Appellant of some offenses while convicting him of others—a strong indication the members arrived at their verdict unimpacted by any belief Appellant's decision not to testify should be held against him. We conclude that the members would have reached the same verdict even in the absence of circuit trial counsel's "unless he tells us" comment. Appellant is entitled to no relief on this point, even if we were to conclude the Government's argument constituted error.

**H. Sentence Appropriateness**

Appellant contends his sentence is inappropriately severe. He argues his convictions arose from "a matter of seconds" and was "not nearly as bad or violent as other crimes that yield the same type of punishment." He theorizes his sentence was as high as it was because the Government painted him as a serial offender through the question put to Mr. BB about Appellant's ex-wife's allegation Appellant had sexually assaulted her. He asks us to reduce his sentence to confinement, but we decline to do so.

**1. Law**

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). Our authority to determine sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296

(C.A.A.F. 2001) (citations omitted). We may 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), UCMJ, 10 U.S.C. § 866(d). "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. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

**2. Analysis**

Appellant faced a maximum sentence of a dishonorable discharge, confinement for 27 years, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. 2016 *MCM*, pt. IV, ¶¶ 45.e.(2), (3). His adjudged sentence consisted of a dishonorable discharge, confinement for three years, and reduction to the grade of E-1.

Appellant is correct that the conduct of which he was convicted spanned a relatively short timeframe. While his offenses may not have lasted a long time, Appellant used his physical strength to overpower his wife's physical and verbal resistance in order to molest her and force her to touch his penis.

Appellant suggests his sentence was influenced by the question that Mr. BB was asked, but the military judge instructed the members as to the proper use of that information, specifically advising them that "there is no evidence that [Appellant] assaulted his ex-wife." Appellant has not pointed to anything in the record that would lead us to conclude the members failed to follow that instruction or that they improperly inflated Appellant's sentence because of it.

We have considered Appellant, the nature and seriousness of the offenses, his long record of military service, the lack of any previously documented misconduct in his personnel records, and all matters he submitted in his case in extenuation, mitigation, and clemency. We conclude his sentence is not inappropriately severe.

**I. Completeness of the Record**

Although not raised by Appellant, we consider whether the record is substantially complete in the face of a missing appellate exhibit, the military judge's post-trial ruling regarding his omission of the definition of consent in his findings instructions.

**1. Additional Background**

In late May 2020, the military judge issued his ruling pertaining to the post-trial Article 39(a), UCMJ, hearing. Both parties, in their submissions to

this court related to this appeal, referred to this ruling as Appellate Exhibit XXXVIII and commented on the substance of the ruling. The ruling, however, was not included in the record of trial docketed with this court.

We issued the Government an order to show cause why we should not remand the record for correction. In response, the Government submitted a declaration from the circuit trial counsel who participated in Appellant's court-martial. This circuit trial counsel asserts that once the Government received our show-cause order, he located the military judge's email with the ruling attached, and he attached the ruling to his declaration. The ruling is unsigned and has no appellate exhibit number on it. We granted the Government's motion to attach the declaration. The Government asks us not to remand the case or grant other relief; Appellant, on the other hand, submits that the only way to remedy the defective record is to remand it for correction. Appellant concedes the ruling attached to the declaration appears to be "identical" to the one in the possession of his appellate counsel.

The military judge's ruling concludes Appellant waived the error with respect to the military judge's consent instructions, and if the error was simply forfeited, Appellant was not prejudiced. The military judge generally concluded that his instructions otherwise addressed the matter of consent and that, in any event, the term "consent" is generally known and further definition was not needed. The ruling briefly notes that whether trial defense counsel were ineffective was "outside the purview" of the military judge, and the ruling contains no substantive discussion of the matter.

**2. Law**

We review the question of whether a record of trial is complete de novo. *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). A complete record of trial includes all appellate exhibits. R.C.M. 1112(b)(6); R.C.M. 1112(d)(2). An incomplete or defective record of trial may be returned to the military judge for correction. R.C.M. 1112(d)(2).

When an omission from a record of trial is substantial, such omission gives rise to a presumption of prejudice which the Government 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). Insubstantial omissions, however, do not give rise to such a presumption "or affect that record's characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). 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).

**3. Analysis**

We considered the circuit trial counsel's declaration and its attachment to resolve this issue which was raised by the record. *See Jessie*, 79 M.J. at 444. Although we have the authority to return the record to the military judge for correction under R.C.M. 1112(d)(2), we decline to do so because even if the exhibit's omission is substantial, we conclude Appellant has not been prejudiced by the exhibit's omission.[26] We arrive at this determination because we have already concluded Appellant waived the error with respect to the military judge's findings instructions. Except for a passing reference to Appellant's ineffective assistance claims, the military judge's ruling exclusively addresses the question of whether he erred in providing the instructions he did. Because Appellant waived this issue, however, the military judge's post-trial ruling on it adds nothing material to the record. Similarly, because the ruling provides virtually no discussion of the ineffective assistance claim—a claim which we have considered—the ruling has no impact on that issue. Appellant acknowledges he had an apparently "identical" copy of the ruling when he submitted his assignment of errors, so Appellant has not been deprived of any of the information in the military judge's ruling. As such, we conclude that even if we impose a presumption of prejudice, that presumption has been effectively rebutted by virtue of our review of the declaration and ruling submitted by the Government.

**J. Post-Trial Delay**

Although not raised by Appellant, we consider whether he has been deprived of his due process right to speedy post-trial and appellate review.

Appellant's court-martial concluded on 16 January 2020, and the military judge entered judgment 134 days later, on 29 May 2020. The record of trial was not docketed with this court until 10 July 2020, which was 176 days after Appellant was sentenced. On 3 February 2022, Appellant demanded speedy appellate review. We are issuing our opinion more than 20 months after his case was docketed with us.

**1. Law**

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (first citing *United States v. Rodriguez*, 60

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[26] That we granted the Government's motion to attach does not change the fact that the ruling is still missing from the record of trial. Instead, we use the circuit trial counsel's declaration and its attached ruling in order to perform our responsibilities under Article 66, UCMJ, 10 U.S.C. § 866. *See, e.g.*, *United States v. King*, No. ACM 39583, 2021 CCA LEXIS 415, at *29–30 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.).

M.J. 239, 246 (C.A.A.F. 2004); and then citing *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the convening authority does not take action within 120 days of sentencing, when the case is not docketed with the Court of Criminal Appeals within 30 days of convening authority action, or when the Court of Criminal Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142. In *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020), this court established an aggregated 150-day standard for facially unreasonable delay from sentencing to docketing for cases referred to trial on or after 1 January 2019, in light of the new post-trial processing procedures that went into effect on that date.

Where there is such a 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 his right to a timely review; and (4) prejudice to the appellant. *Moreno*, 63 M.J. at 135 (first citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); and then citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an Appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. 63 M.J. at 138–39 (citations omitted).

**2. Analysis**

Two periods of delay are facially unreasonable in Appellant's case under *Moreno*—the period from sentencing to docketing, and the period from docketing to the release of our opinion. The first period's standard is 150 days, and 176 days elapsed here. The second period's standard is 18 months, and we exceeded that standard by just over two months.

***a. Sentence to Docketing***

The period between sentencing and docketing exceeded the standard by 26 days—just under four weeks. Because Appellant did not raise this issue, the record is not completely developed with respect to the reasons for this delay. However, we note Appellant's case did involve a post-trial hearing on 11 May 2020, or 116 days after sentencing. This hearing was delayed by approximately

two months due to logistical issues related to the COVID-19 pandemic. The military judge issued his ruling and entered judgment in the case on 29 May 2020, or 134 days after sentencing. Once judgment was entered, the Government took six weeks to docket the case with our court, pushing the total period from sentencing to docketing to 176 days.

Appellant did not assert his right to speedy post-trial processing, and he has not claimed the delay during this period has prejudiced any of the interests cited by the CAAF in *Moreno*. Appellant has not alleged he has suffered from oppressive incarceration; he has not asked for a rehearing and we are not granting him one on our own accord; and he has not asserted any grounds for appeal have been impaired. From our review of the record, it appears that one primary reason for the lengthy post-trial processing was the need to convene a post-trial hearing to address the matter of the military judge's instructions. The scheduling of this hearing was complicated by the pandemic—a matter plainly outside the control of either Appellant or the Government. The hearing did not result in any relief to Appellant in terms of his sentence, and we therefore conclude he has not been prejudiced by the delay between his sentencing and the docketing of his case. We have also considered whether—in the absence of any cognizable prejudice—the delay in this case was so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system, and thereby amount to a violation of Appellant's due process rights. Although we are at a loss to explain why it took the Government six weeks to simply docket the case with this court, we nevertheless conclude this delay was not so egregious as to warrant relief.

***b. Docketing to Opinion***

In producing this opinion, we exceeded the 18-month standard by over two months. While this total period lasted over 600 days, 234 of those days—just over seven and a half months—are attributed to Appellant filing his assignments of error after he received five enlargements of time over the Government's objections. Once Appellant filed his assignments, which included allegations of ineffective assistance of counsel, we ordered each of his trial defense counsel to submit declarations in response. After these declarations were filed, the Government submitted its answer to Appellant's assignments of error, and Appellant filed a subsequent reply. From Appellant's initial brief to his reply, 71 days passed, bringing the total time elapsed since docketing to 305 days—just over ten months. We took over ten months to produce our opinion, during which time we issued a show-cause order to the Government after we identified a missing appellate exhibit. Although the period from docketing to the release of this opinion exceeded the 18-month threshold for facially unreasonable delay, this period was exceeded by just over two months. Appellant raised a total

of twelve issues for our consideration, resulting in a lengthy and divided opinion from our court. For the reasons noted above related to the period of post-trial processing, we conclude there is no evidence demonstrating prejudice warranting relief for the period between docketing and this opinion, nor do we see any indication that the delay in our review of his court-martial rose to the degree that it would adversely affect the public's perception of the military justice system.

***c. Relief Under Article 66(d), UCMJ***

Recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate 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), and the particular facts presented by Appellant's case, we conclude it is not.

## III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

JOHNSON, Chief Judge (concurring in part and in the result):

I generally concur with the lead opinion, including the result, with one exception. With respect to Appellant's argument that a unanimous verdict of guilty is constitutionally required, the opinion notes Appellant cannot demonstrate that he was convicted by a less-than-unanimous vote of the court members. The implication of this observation is that, assuming *arguendo* the jury unanimity requirement did apply to courts-martial, Appellant would be required to make such a demonstration in order to secure relief. The Rules for Courts-Martial generally forbid polling court members to determine their votes, and their deliberations are—with very limited exceptions—generally privileged under the Military Rules of Evidence. *See* Rules for Courts-Martial 922(e), 1007(d); Mil. R. Evid. 509, 606 (*Manual for Courts-Martial*, *United States* (2019 ed.)). To the extent the lead opinion implies that the Rules for Courts-Martial or Military Rules of Evidence might effectively interfere with the protection of a constitutional right, I respectfully disagree.

MEGINLEY, Judge, (dissenting in part and in the result):

I agree with the court's finding that Specification 2 of Charge I (abusive sexual contact) is legally and factually sufficient. However, for the reasons stated below, I conclude Specification 1 of Charge I (aggravated sexual contact) is factually insufficient. Moreover, I find that by being denied the right to a unanimous verdict, Appellant was denied equal protection under the law. Accordingly, I would dismiss Charge I and its specifications with prejudice.

**A. Factual Sufficiency and Ineffective Assistance of Counsel Relating to Specification 1 of Charge I**

In reviewing the entire record, I found Ms. SW to be very credible. I have little doubt that Appellant grabbed her hand and placed it on his penis, nor do I have much doubt that Appellant touched Ms. SW's vagina over her clothing. Also, there was virtually no evidence to reasonably suggest Ms. SW consented to Appellant's acts on 23 May 2018, or that she fabricated Appellant's crimes for financial gain.

The issue I see is not with Ms. SW, but with the way the Government charged the allegation in Specification 1 of Charge I—that Appellant touched Ms. SW's *groin* with his hand. From Ms. SW's statement to local authorities and then later during her in-court testimony, *Ms. SW never said Appellant touched her groin*, as Appellant was charged. Perhaps Appellant touched Ms. SW in her groin as he was positioning himself on top of her, trying to pull her shorts down, and touching her vaginal region—especially given the bruising on her legs, which was indicative of that struggle. Ms. SW described how Appellant "hooked his fingers underneath [her] shorts and started moving his hands down towards [her] vagina." She also testified that Appellant "got down pretty far," in the context of trying to pull her shorts off, and that he was touching her "close to the outside of [her] vagina." And of course, she testified to the bruising on her legs. Yet notwithstanding this testimony, the majority does not know—nor did the members know—if Appellant actually touched her groin.

At first glance, this appears to be a possible oversight by trial counsel in their questioning of Ms. SW. Ms. SW was the Government's witness; the Government presumably discussed the case multiple times with Ms. SW and her special victims' counsel, charged the case based on the facts Ms. SW presented, and referred a charge to trial alleging that Appellant touched Ms. SW's groin. In order to try to glean the Government's intention, I reviewed of some of the pretrial papers—including the Hoke County Sherriff's Office report, the Air Force Office of Special Investigations (AFOSI) Report of Investigation, and the

Article 32, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832,[1] Preliminary Hearing Officer (PHO) report. However, none of these of these documents contain evidence from Ms. SW stating that Appellant touched her in the groin area; the focus is on the fact that Appellant touched her in the vaginal area. In fact, in my review of the record, the only time a "groin" appears to be mentioned is in a document within the Article 32, UCMJ, PHO report, where Ms. SW stated she slapped Appellant between the legs (the Hoke County report states she hit him in the genitals). Based on the material available, it appears the Government may have adopted an extremely broad interpretation of what constitutes the groin—which, based on trial counsel's questioning of Ms. SW, included Ms. SW's vagina.

As the majority notes, our sister services have addressed this nuance. In *United States v. McDonald*, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) determined that "groin" and "penis" are not synonymous, as the "groin" is "[t]he groove, and the part of the body around it, formed by the junction of the thigh with the abdomen, on either side." 78 M.J. 669, 680 (N.M. Ct. Crim. App. 2018) (alteration in original).[2] The NMCCA further noted that "groin" and "genitalia" are listed separately in the definition of "sexual contact" in Article 120, UCMJ, 10 U.S.C. § 920. *McDonald*, 78 M.J. at 680. In reference to an opinion by one of our sister service courts, the majority in this case notes,

> [T]he Army Court of Criminal Appeals [(ACCA)] concluded that the trial judge had failed to elicit a sufficient factual basis to support the appellant's guilty plea where he was charged with touching the victim's genitals but explained in his providence inquiry that he had touched the victim on her pubic mound, just above her genitals. The court concluded that substituting "groin" for the charged "genitals" during appellate review would amount to a material and possibly fatal variance under the theory that "'genitals' is not the same as 'groin' or 'groin area.'"

*Ante*, slip op. at 13 (quoting *United States v. Perez,* ARMY 20140117, 2016 CCA LEXIS 131, at *5 (A. Ct. Crim. App. 29 Feb. 2016) (unpub. op.).

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[1] All references in this dissent to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.). All other references to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.)

[2] The court cited J.E. SCHMIDT, M.D., ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER (Release No. 52 Sep. 2018).

The approach taken by our sister court makes sense, given the language of Article 120(g)(2)(A), UCMJ, 10 U.S.C. § 920(g)(2)(A), *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*), in which "sexual contact" is defined as "touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person . . . ." "Groin" is not defined, nor is there any suggestion that the groin encompasses every body part from crease to crease. Significantly, genitalia and groin are listed separately.

Trial counsel in Appellant's case may have made a similar error as counsel in *McDonald* and *Perez*. In his closing argument, trial counsel stated:

> But she doesn't give up, she keeps fighting. And with his other hand, he tries to pull her thigh[s] apart because she's trying to keep them together to keep him from sticking his hands between her legs on her vagina, in her *groin*. And so he grabs her left thigh and he yanks it, he tries to push it. He tries to overpower her. And they're struggling, they're fighting back and forth. And he's able to touch her over the clothes in her *groin* area over her vagina.

(Emphases added).

Trial counsel's argument takes some liberty with Ms. SW's actual testimony, but without Ms. SW describing what happened in more detail, the members were left with making assumptions that Appellant's touching of Ms. SW's vaginal area was the same as touching her groin. The majority opinion is comfortable making that determination as well. I am not. I respectfully decline to say that the touching of Ms. SW's vagina, or close to the outside of her vagina, constitutes the groin. Any such suggestion that the groin can be expansively read to include the groinal area is a legal fiction under the 2016 *MCM*. The Government controls the charge sheet, *see United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017), and could have alleged vagina, inner thigh, waist, and groin, all in the same specification. It chose not to. Thus, I can accept the majority's rationale in finding Specification 1 of Charge I legally sufficient—as articulated, for example, *ante*, slip. op. at 14 n.9. However, in holding the Government to its burden, I find this specification to be factually insufficient, as there simply was not enough evidence provided to the court-martial.

There is significant interplay between the Government's charging decision on Specification 1 of Charge I and two of Appellant's allegations of ineffective assistance of counsel. Assuming there was enough evidence to support a conviction, this court should nonetheless set aside the specification for ineffective assistance of counsel (IAC). To be clear, neither at trial, nor in his appeal, have

any of Appellant's counsel (trial or appellate) identified this issue, nor did Government counsel. Appellant alleged 12 instances of IAC—some of which are legitimate issues—but the issues worth reviewing more closely are the failure to adequately cross-examine Ms. SW and the deficient closing argument.

If trial defense counsel knew that trial counsel did not elicit enough testimony or present enough evidence to support the charge that Appellant touched Ms. SW's groin, the decision to limit Ms. SW's cross-examination to the penetrative offense could have been brilliant and worth a risk. The trade-off is that the panel would have to know that the Government's evidence was lacking—this fact is something that one would not reasonably suspect a panel to figure on its own. Yet, defense counsel failed to argue that the evidence was deficient. In what can be described as a perplexing and disconcerting closing argument, one could argue the Defense essentially conceded guilt to the 23 May 2018 incident, *not saying one word* in defense of Appellant's actions. In other words, had someone read the Defense's closing argument in a vacuum, that individual would not have known Appellant was charged with other crimes. Appellant's defense counsel latched onto consent and reasonable mistake of fact—which appears to have not existed for the 23 May 2018 incident—and Ms. SW's possible pecuniary interests, when the charging and evidence were flawed. There is nothing in the record to suggest they were not on notice as to what they were defending; in other words, they knew what they had to defend.

This is not to say Appellant would have been acquitted of both specifications relating to the 23 May 2018 incidents. However, when applying the test from *United States v. Gooch,* 69 M.J. 353, 362 (C.A.A.F. 2011), first, there is no reasonable explanation for counsel's actions—in fact, the explanation for this argument as articulated by Ms. MK (Appellant's civilian trial defense counsel), to be quite blunt, appears to be a significant blunder:

> I made the closing I believed appropriate for the evidence. Government counsel had made an overly long and technical argument with extensive [P]ower[P]oint slides and the panel appeared fatigued afterwards. In my experience, military panels prefer shorter, concise arguments. Merely because counsel does not comment on a particular piece of evidence does not foreclose it from consideration by the panel.

In this case, there is a reasonable probability, if not high probability that a technical argument would have earned an acquittal on this specification. Second, the level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. *See Gooch*, 69 M.J. at 362. There may have been a strategy behind a brief closing argument, but few criminal law litigators would adhere to this tactic. Third, I firmly believe there is a reasonable probability that there would have been a different result but for this misstep. *See id.* The

military judge did not give a definition of groin. There were no instructions on exceptions, substitutions, or variances. We can surmise that at least three members voted to acquit Appellant of the penetrative offense. Had the Defense challenged what constituted the "groin" in closing, there is a reasonable probability that there would have been a review of the instructions, a judicial definition of "the groin," a revamped rebuttal argument by trial counsel, or maybe even the possibility of a motion pursuant to Rule for Courts-Martial (R.C.M.) 917.[3] The Defense's failure to raise this glaring issue is enough of a "probability sufficient to undermine confidence in the outcome," and for me, there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *See United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (internal quotation marks and citations omitted).

Finally, this issue matters because given that there was a reasonable probability that there would have been a different result, the sentencing landscape would have dramatically changed. Appellant's maximum confinement time would have been reduced from 27 years to 7 years. It is highly unlikely that Appellant would have received three years for forcing his soon-to-be ex-wife to grab his penis as he was coming out of the shower.[4] I simply do not find Appellant's trial defense counsel's strategy to be reasonable, and I would find them ineffective in defending this specification.

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[3] While "it is a well-known principle that '[w]ords generally known and in universal use do not need judicial definition,'" *United States v. Bailey*, 77 M.J. 11, 15 (C.A.A.F. 2017) (alteration in original) (quoting *United States v. Nelson*, 53 M.J. 319, 321 (C.A.A.F. 2000)), note 10 of the majority opinion, *supra*, indicates that the use of the word groin is open to interpretation.

[4] I also believe Appellant's sentence to three years confinement is, on its face, inappropriately severe; however, such a sentence is not surprising given trial defense counsel's grave tactical error in allowing Mr. BB to testify, which opened the door to the "have you heard question" that Appellant's ex-wife had also accused Appellant of sexual assault. Specially, the panel asked the military judge, "Is it possible for the panel to learn more of the allegations [Appellant's] ex-wife made against him, specifically the nature of the claims in any findings related to them?" I have no doubt that the "have you heard question," related to an ex-wife, about an allegation that may have occurred in 2012, led to an increased sentence. Further, the military judge provided no meaningful explanation supporting his Mil. R. Evid. 403 balancing test other than to say, "Defense, you opened the door to that line of questioning through the, through your direct examination and so I find under [Mil. R. Evid.] 403, solely used to test this witness's knowledge or opinion, that the probative value is not substantially outweighed by unfair prejudice given that I'm also limiting trial counsel to just the one question on it." Allowing this information was prejudicial and arbitrary and constituted an abuse of discretion.

**B. Unanimous Verdict and *Ramos v. Louisiana***

Appellant claims that the United States Supreme Court's ruling in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which requires unanimous verdicts in federal and state criminal trials, renders his convictions invalid.[5] *Ramos* made clear that a unanimous jury verdict in a felony trial is a fundamental right. *Ramos* does not change the long-standing precedent that the accused in a court-martial does not have a Sixth Amendment[6] right to trial by a jury of his peers. However, numerous military court decisions have applied constitutional rights to servicemembers—including a Fifth Amendment[7] right to a fair and impartial panel. Continuing in that tradition, I find the lack of a unanimous panel verdict deprived Appellant of his constitutional right to equal protection under the law—especially when a potentially nonunanimous "conviction" triggers a sex offender registration requirement. I would therefore dismiss Charge I and its specifications without prejudice.

**1. Congressional Authority to Legislate on Military Affairs**

The Constitution gives Congress the power to raise, support, and regulate the armed forces under U.S. CONST. art. I, § 8 cl. 12–14.[8] Under this authority, Congress has enacted the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–946a, as well as the UCMJ's predecessors.

Article 29, UCMJ, 10 U.S.C. § 829, provides guidance for the assembly and impaneling of court members. Article 52 of the UCMJ authorizes non-unanimous verdicts, stating in relevant part:

> (a) IN GENERAL.—No person may be convicted of an offense in a general or special court-martial, other than—
>
> (1) after a plea of guilty under section 845(b) of this title (article 45(b));
>
> (2) by a military judge in a court-martial with a military judge alone, under section 816 of this title (article 16); or

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[5] Appellant raises this assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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

[7] U.S. CONST. amend. V.

[8] "[U]nder the Necessary and Proper Clause, Congress can give those rules force by imposing consequences on members of the military who disobey them." *United States v. Kebodeaux*, 570 U.S. 387, 400 (2013) (Roberts, C.J., concurring) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819)).

> (3) in a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken.

Article 52(a), UCMJ, 10 U.S.C. § 852(a).

Thus, at the time of Appellant's court-martial, concurrence of three-fourths of the members was required to convict.[9] Although Appellant's civilian defense counsel sought to poll the panel after the verdict, the military judge, in accordance with R.C.M. 922(e), denied the request. Accordingly, there is nothing in the record to indicate whether Appellant was convicted unanimously.

The Supreme Court traditionally grants Congress deference when it legislates on military affairs. For example, in *Solorio v. United States*, the Supreme Court stated:

> The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

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[9] Historically, the number was even lower. For example, in 1912, during a hearing before the House of Representatives Committee on Military Affairs, The Judge Advocate General, Major General Enoch H. Crowder, recommended to the committee increasing the required vote to convict on a death-eligible offense from a simple majority of the panel to a two-thirds' vote. *See Revision of the Articles of War: Hearing on H.R. 23628 Before the H. Comm. on Military Affairs*, 62d Cong. 12, 47 (1912), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/hearing_comm.pdf [hereinafter 1912 Hearing], *cited in* Findings and Conclusions RE: Defense Motion for Appropriate Relief (Unanimous Verdict) at 12*, United States v. Dial*, general court-martial, Fifth Judicial Circuit, Kaiserslautern, Germany (3 Jan. 2022) [hereinafter *Dial* Ruling]. "Between 1912 and 1948, Article of War 43 required a majority vote for conviction for all offenses except death eligible ones (which required a two-thirds vote)." *Dial* Ruling at 13 (citing H.R. REP. NO. 81-491, at 49 (28 Apr. 1949), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf). In 1948, via the Elston Act, Congress amended Article of War 43 to require a two-thirds vote for all offenses other than death-eligible ones. *See* Selective Service Act of 1948, S. 2655, 80th Cong. § 220 (1948), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/act-1948.pdf. In the Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542 (23 Dec. 2016), Congress increased the votes required in non-capital cases from two-thirds to three-fourths. *Id.* at § 5235. Reviewing the Report of the Military Justice Review Group, it appears the only reason for the change was to "eliminate inconsistencies and uncertainties in court-martial voting requirements by standardizing the requirements for each type of court-martial." REPORT OF THE MILITARY JUSTICE REVIEW GROUP 457 (22 Dec. 2015), *available at* https://ogc.osd.mil/Portals/99/report_part1.pdf.

483 U.S. 435, 440 (1987) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

The Court further noted:

> Congress has primary responsibility for the delicate task of balancing the rights of [servicemembers] against the needs of the military. As we recently reiterated, "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."

*Id.* at 447 (omission in original) (quoting *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986)).

**2. Sixth Amendment Right to "Jury Trial"**

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI (emphasis added).

However, "there is no Sixth Amendment right to trial by jury in courts-martial." *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citations omitted); *see also United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986). Additionally, "[a] service member has no right to have a court-martial be a jury of his peers, a representative cross-section of the community, or randomly chosen." *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing *Ex parte Quirin*, 317 U.S. 1, 39–41 (1942)) (additional citations omitted).

In 1950, the Supreme Court opined that "[t]he right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by *courts-martial* or military commissions. . . . The constitution of *courts-martial*, like other matters relating to their organization and administration, *is a matter appropriate for congressional action*." *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (emphases added) (citations omitted). Thus, *Whelchel* appears to lay to rest any question that the Court's rulings in *Ex parte Milligan*, 71 U.S. 2, 123 (1866), or *Quirin*, only referred to military commissions or commission cases.

Our superior court, the United States Court of Appeals for the Armed Forces (CAAF), has consistently abided by the precedent set forth by the Supreme Court that the Sixth Amendment right to trial by jury does not apply to courts-martial. Of note, however, the discussion on the right to a "jury trial" often focuses on the lack of a right to a "representative cross-section" of the accused's community. For example, the CAAF and its predecessor have noted that "[c]ourts-martial are not subject to the jury trial requirements of the Sixth Amendment, and, therefore, military members are not afforded a trial in front of a representative cross section of the military community." *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018) (citing *McClain*, 22 M.J. at 128); *see also Easton*, 71 M.J. at 175–76 ("By enacting Article 29, UCMJ, as it did, Congress evinced the intent that, in light of the nature of the military, an accused does not have the same right to have a trial completed by a particular court panel as a defendant in a civilian jury trial does."); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997) ("[S]ervicemembers do not have the right in a court-martial to a jury panel drawn from a representative cross-section of the population . . . ."); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988) ("The Sixth Amendment grants defendants in criminal cases the right to a jury trial. This right includes a requirement that the jury be drawn from a representative cross-section of the community. However, the right to trial by jury has no application to the appointment of members of courts-martial.").

However, as will be discussed below, the CAAF and its predecessor court have imported certain other constitutional protections pertaining to juries and applied them to courts-martial panels.

**3. Due Process and Equal Protection Application to Servicemembers**

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger*; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

Servicemembers have a right to due process of law under the Fifth Amendment. *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997). This includes,

in certain circumstances, the "right to equal protection [as] a part of due process under the Fifth Amendment." *Id.* (citation omitted).

Despite our court's deference to Congress, Congress is still "subject to the requirements of the Due Process Clause when legislating in the area of military affairs . . . . But in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces." *Weiss v. United States*, 510 U.S. 163, 176–77 (1994) (internal quotation marks and citations omitted). "The tests and limitations of due process may differ because of the military context." *Id.* at 177 (internal quotation marks and citation omitted).[10] As stated in *United States ex rel. Toth v. Quarles*:

> [I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. . . . [*M*]*ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts*.

350 U.S. 11, 17 (1955) (emphasis added).

"An 'equal protection violation' is discrimination that is so unjustifiable as to violate due process." *United States v. Akbar*, 74 M.J. 364, 405–06 (C.A.A.F. 2015) (quoting *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985)). Whether such a violation exists may depend on whether distinctions involve "suspect classifications" or encroach on fundamental constitutional rights:

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[10] In *Weiss*, a case where the appellants challenged the appointment of military judges, Justice Ginsburg observed:

> The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate as judges.

*Id*. at 194 (Ginsburg, J., concurring).

> For the Government to make distinctions does not violate equal protection guarantees unless constitutionally suspect classifications like race, religion, or national origin are utilized or unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly. The only requirement is that reasonable grounds exist for the classification used.

*United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981) (first citing *Oyler v. Boles*, 368 U.S. 448 (1962); and then citing *United States v. Batchelder*, 442 U.S. 114 (1979)).

In other words, for cases not involving substantive constitutional rights, "equal protection is not denied when there is a reasonable basis for a difference in treatment." *Akbar,* 74 M.J. at 406 (quoting *United States v. McGraner*, 13 M.J. 408, 418 (C.M.A. 1982)).[11] Under a rational basis test, the burden is on an appellant to demonstrate that there is no rational basis for the rule he is challenging. The proponent of the classification "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). "As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." *United States v. Paulk*, 66 M.J. 641, 643 (A.F. Ct. Crim. App. 2008) (first citing *Heller*, 509 U.S. at 320; and then citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938)).

In *United States v. Begani*, the Navy-Marine Corps Court of Criminal Appeals acknowledged that "[l]aws burdening fundamental rights are subjected to strict scrutiny and will be sustained only if they are '*necessary* to promote a *compelling* governmental interest.'" 79 M.J. 767, 777 (N.M. Ct. Crim. App. 2020) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972)), *aff'd*, 81 M.J. 273 (C.A.A.F. 2021), *cert. denied*, __ U.S. __, 142 S. Ct. 711 (2021). Yet, our sister court also wrote, "While there is no question the right to a grand jury and the right to a trial by jury are fundamental constitutional rights, *they are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place*." *Id.* at 776 (emphasis added).

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[11] "Absent a suspect classification or interference with a fundamental right, all that is needed for the statute to withstand constitutional scrutiny is a rational basis for the distinction between Appellant and future capital appellants." *United States v. Hennis*, 77 M.J. 7, 10 (C.A.A.F. 2017) (first citing *Akbar*, 74 M.J. at 406; and then citing *Tate v. District of Columbia*, 627 F.3d 904, 910 (D.C. Cir. 2010)).

**4. Military Justice System Incorporates Constitutional Protections**

"[A] court-martial is now the only place in America where a criminal defendant can be convicted without consensus among the jury." Nino Monea, *Reforming Military Juries in the Wake of Ramos v. Louisiana*, 66 Naval L. Rev. 67, 72 (2020) [hereafter Monea].Virtually all the other provisions of the Sixth Amendment have already been incorporated into the military justice system:[12]

***a. Right to Speedy Trial:*** "In the military justice system, an accused's right to a speedy trial flows from various sources, including the Sixth Amendment, Article 10 of the Uniform Code of Military Justice, and R.C.M. 707 of the Manual for Courts-Martial." *United States v. Cooper,* 58 M.J. 54, 57 (C.A.A.F. 2003); *see also United States v. Danylo,* 73 M.J. 183, 186 (C.A.A.F. 2014).

***b. Right to Public Trial:*** "Without question, the [S]ixth [A]mendment right to a public trial is applicable to courts-martial." *United States v. Hershey,* 20 M.J. 433, 435 (C.M.A. 1985) (citing *United States v. Grunden,* 2 M.J. 116 (C.M.A. 1977)).

***c. Right to Confront:*** "We hold that where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross-examination." *United States v. Blazier,* 69 M.J. 218, 222 (C.A.A.F. 2010).

***d. Right to Notice:***

> The rights at issue in this case are constitutional in nature. The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, and the Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation," U.S. CONST. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with.

*United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citations omitted); *see also United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (applying the protections of the Fifth and Sixth Amendments to set aside convictions under Article 134, UCMJ).

***e. Right to Compel:*** "The right to present a defense has many aspects. Under the Compulsory Process Clause, a defendant has a 'right to call witnesses whose testimony is material and favorable to his defense.'" *United*

[12] With the exception, for example, of the Vicinage Clause in the Sixth Amendment.

*States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) (quoting *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)).

***f. Right to Counsel:*** "The first question we address is when did appellant's right to counsel under the [S]ixth [A]mendment attach. . . . In the military, this sixth-amendment right to counsel does not attach until preferral of charges." *United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985) (citations omitted).

***g. Right to the Effective Assistance of Counsel:*** "The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel." *Gooch*, 69 M.J. at 361 (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)).

**5. Judicial Recognition of *Jury-Related* Constitutional Rights as Applied to Court-Martial Panels**

Notwithstanding the deference afforded Congress to legislate on military matters, as noted above, military appellate courts have applied certain constitutional protections to courts-martial. Moreover, and especially relevant to the present issue, military appellate courts have imported certain *jury-specific* constitutional rights to court-martial panels.

For example, the CAAF has held that an accused has a right to an impartial panel. On the Sixth Amendment right to an impartial panel, the CAAF held that "the Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations." *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) (citations omitted). On the Fifth Amendment, the CAAF noted: "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994)); *see also United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.").

Moreover, the CAAF's predecessor reviewed and applied Supreme Court precedent on equal protection to racially discriminatory jury selection practices. *United States v. Santiago-Davila*, 26 M.J. 380, 389–90 (C.M.A. 1988). It noted that *Batson v. Kentucky*, 476 U.S. 79 (1986), was "not based on a right to a representative cross-section on a jury but, instead, on an equal-protection right to be tried by a jury from which no 'cognizable racial group' has been excluded." *Santiago-Davila*, 26 M.J. at 389–90 (C.M.A. 1988) (quoting *Batson*, 476 U.S. at 96). The *Santiago-Davila* court continued: "This right to equal protection is a part of due process under the Fifth Amendment; and so it applies

to courts-martial, just as it does to civilian juries." *Id.* at 390 (citations omitted).

**6. Supreme Court Recognizes "Judicial" Nature of Courts-Martial**

There used to be greater distinction between civilian criminal trials and military courts-martial. Recognizing this distinction, in 1974, the Supreme Court noted, "Just as military society has been a society apart from civilian society," so too is military law "a jurisprudence *which exists separate and apart from the law which governs in our federal judicial establishment*." *Parker v. Levy*, 417 U.S. 733, 744 (1974) (emphasis added) (citation omitted). The Court noted that the UCMJ "cannot be equated to a civilian criminal code." *Id.* at 749.

Times have changed, however—as evidenced by numerous updates to the UCMJ to add punitive offenses, the development of Military Rules of Evidence that largely mirror the Federal Rules of Evidence, and, as described above, the application of numerous constitutional trial rights to the courts-martial system. Recognizing these changes, in 2018, the Supreme Court stated:

> The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions we review. Although their jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service.

*Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018) (citations omitted).[13] The Court further noted that "[t]he sentences meted out are also similar: Courts-martial can impose, on top of peculiarly military discipline, terms of imprisonment and capital punishment." *Id.* at 2175 (citations omitted). A court-martial is, "'in the strictest sense' a 'court of law and justice'—'bound, like any court, by the fundamental principles of law' and the duty to adjudicate cases 'without partiality, favor, or affection.'" *Id.* at 2175–76 (quoting 2 W. WINTHROP, MILITARY LAW AND PRECEDENTS 54 (2d ed. 1896)). The Court thus recognized that "[t]he military justice system's essential character" is "in a word, judicial." *Id.* at 2174. The Court, in praising this judicial nature, stated, "It is in fact one of the glories of this country that the military justice system is so deeply rooted in the rule of law." *Id.* at 2176 n.5.

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[13] Even 24 years before *Ortiz* was decided, the Supreme Court stated, "Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice . . . ." *Weiss*, 510 U.S. at 179.

**7. Supreme Court's Ruling in *Ramos v. Louisiana***

In *Ramos v. Louisiana*, the Supreme Court held that the Sixth Amendment right to a jury trial, as incorporated against the states under the Fourteenth Amendment,[14] required a unanimous verdict for an accused charged with a serious offense. 140 S. Ct. at 1408.

Prior to the *Ramos* decision, Louisiana and Oregon were the only remaining states that allowed for nonunanimous jury verdicts, both allowing for a "10–2 verdict."[15] Yet Justice Gorsuch, delivering the opinion of the Court, explained:

> The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it *some* meaning about the content and requirements of a jury trial.
>
> One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

*Id*. at 1395.

In *Ramos*, the Supreme Court noted it had "commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years." *Id.* at 1397. The Court then stated that "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment." *Id.* at 1397 (quoting *Duncan v. Louisiana*, 391 U. S. 145, 148–150 (1968)). The court concluded: "There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." *Id.*

When the scope of *Ramos*' retroactivity was addressed in *Edwards v. Vannoy*,[16] the Supreme Court stated *Ramos* was a "momentous and consequential" decision—much like *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Crawford v. Washington*, 541 U.S. 36 (2004); and *Batson v. Kentucky*, 476 U.S. 79 (1986)—as those cases "fundamentally reshaped criminal procedure throughout the

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[14] U.S. CONST. amend. XIV.

[15] Prior to the *Ramos* decision, in 2018, Louisiana dispensed with the 10–2 verdict in favor of unanimous juries, but nonunanimous verdicts were allowed for cases prior to 2019. Oregon remained the only state allowing for nonunanimous juries. *Monea* at 73.

[16] *Edwards* held that *Ramos* does not apply retroactively on federal collateral review. 141 S. Ct. 1547, 1554 (2021).

United States and significantly expanded the constitutional rights of criminal defendants." 141 S. Ct. 1547, 1559 (2021).

In her dissent in *Edwards*, Justice Kagan stated that "the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital,' 'essential,' 'indispensable,' and 'fundamental' to the American legal system," and noted the court had made "a fundamental change in the rules thought necessary to ensure fair criminal process." *Id.* at 1573–74 (Kagan, J., dissenting). Justice Kagan later cited to *In Re Winship*, 397 U.S. 358, stating that "*Winship* rested on an 'ancient' legal tradition incorporated in the Constitution" and "that a jury must find guilt "beyond a reasonable doubt," and "[a]s in *Ramos*, that tradition served to 'safeguard men' from 'unjust convictions, with resulting forfeitures' of freedom." *Id.* at 1576 (Kagan, J., dissenting) (quoting *Winship* 397 U.S. at 362). Justice Kagan continued:

> Allowing conviction by a non-unanimous jury impairs the purpose and functioning of the jury, undermining the Sixth Amendment's very essence. It raises serious doubts about the fairness of a trial. And it fails to assure the reliability of a guilty verdict. So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, there has been no jury verdict within the meaning of the Sixth Amendment.

*Id.* at 1577 (alterations, internal quotation marks, and citations omitted).

**8. Analysis—Sixth Amendment Right to a Jury Trial**

For over 150 years, the Supreme Court and military appellate courts have consistently held that the Sixth Amendment right to a jury trial does not extend to trial by courts-martial. *See United States v. Wolff*, 5 M.J. 923, 924 (N.C.M.R. 1978) (first citing *United States v. Kemp*, 46 C.M.R. 152 (C.M.A. 1973); and then citing H. Moyer, *Justice and the Military*, § 2-585 (1972)). There can be no doubt that when *Ramos* was decided, most military practitioners considered this case a watershed moment in the administration of justice; the language Justice Gorsuch uses is unequivocal. Yet neither Justice Gorsuch, nor any of the concurring or dissenting justices, mentioned the potential effect of *Ramos* on the military justice system. Notwithstanding a servicemember's lack of Sixth Amendment right to a "jury trial," the member does enjoy a Sixth Amendment right to an "impartial panel." *See Lambert*, 55 M.J. at 295. Given the *Ramos* court's holding that a "trial by an impartial jury" required a unanimous verdict, one could find that an *impartial court-martial panel* similarly requires unanimity. However, there is nothing in the Court's majority opinion on whether *Ramos* has any effect on the military justice system. I do not believe this was an oversight. If the Supreme Court had wanted *Ramos* to apply to the

military, it could have said as much.[17] Although this specific issue may not have been squarely addressed by our superior courts—and indeed the CAAF may find that *Ramos* compels a finding that an "impartial court-martial panel" must be unanimous—I ultimately do not part from the long-standing precedent on the servicemember's lack of a Sixth Amendment right to a "jury trial."[18]

**9. Analysis—Fifth Amendment and Equal Protection**

Our deference to Congress on military matters is not absolute. Indeed, notwithstanding the fact that courts-martial are Article I courts, numerous trial rights have been guaranteed to servicemembers as *constitutional* rights.

Given that our military justice system is "judicial"—as described in *Ortiz*—I find the right to a unanimous verdict is a fundamental constitutional right, as articulated in *Ramos*.[19] As such, the denial of this right is subject to strict

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[17] If one goes back to the Supreme Court's decision in *Ortiz* (decided less than two years prior to *Ramos*), in which the Court addressed its role in the military appellate review process, Justice Alito, dissenting, stated, "Our appellate jurisdiction permits us to review one thing: the lawful exercise of *judicial* power." *Ortiz,* 138 S. Ct. at 2190 (Alito, J., dissenting). Justice Alito then stated, "As currently constituted, military tribunals do not comply with Article III, and thus they cannot exercise the Federal Government's judicial power. That fact compels us to dismiss Ortiz's petition for lack of jurisdiction." *Id.* In the 7–2 ruling in *Ortiz*, the only person who agreed with Justice Alito was Justice Gorsuch. Two-and-a-half years later, in *United States v. Briggs*, Justice Gorsuch made it clear that he "continue[s] to think [the Supreme Court] lacks jurisdiction to hear appeals from the CAAF." 141 S. Ct. 467, 474 (2020) (Gorsuch, J., concurring). Logically, if Justice Gorsuch believed the Supreme Court did not have jurisdiction over the *Ortiz* or *Briggs* cases, then the Court would not have jurisdiction to address servicemembers' right to a jury, which may explain why he did not reference the military justice system in *Ramos*.

[18] *Stare decisis* encompasses two distinct concepts: (1) vertical *stare decisis*—the principle that courts "must strictly follow the decisions handed down by higher courts," and (2) horizontal *stare decisis*—the principle that "an appellate court[ ] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citation omitted). "We are not bound by precedent where 'there has been a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis,' and we are 'willing to depart from precedent when it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.'" *Id.* at 399 (citing 20 AM. JUR. 2D *Courts* § 127 (2018)).

[19] The Supreme Court in *Ramos* relied on the Sixth Amendment when holding that criminal defendants in serious cases enjoy the right to a unanimous verdict. *See Ramos*, 140 S. Ct. at 1397. Thus, it might appear unusual to deny relief on Sixth Amendment grounds then conduct an equal protection analysis. However, equal protection under the Fifth Amendment applies to various constitutional rights. *See, e.g.*, *United*

scrutiny, and not rational basis. *See Begani*, 79 M.J. at 777 (noting that restrictions "burdening fundamental rights are subjected to strict scrutiny"). "Strict scrutiny analysis requires the challenged statute to serve a 'compelling governmental interest,' and the means taken to be 'narrowly tailored' to accomplish this goal." *Begani*, 79 M.J. at 793 (Crisfield, C.J., dissenting) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). As the dissent articulated in *Begani*, "I do not see any contradiction in performing a strict scrutiny analysis while providing Congress with great deference. Judicial deference does not mean abdication." *Id*. at 792 (internal quotation marks and citation omitted).[20]

What is the compelling governmental interest in justifying a nonunanimous panel verdict? In an unpublished opinion, one of our sister courts posited possible reasons:

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*States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981) (discussing equal protection analysis when applied to "an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly").

[20] *Begani* involved the Navy's jurisdiction over reserve personnel. On congressional deference, the court stated:

> [I]t still strikes us as odd that in one scenario, Congress would be free to legislate based on the differences between the two dissimilar groups and courts would be satisfied with some rational reason for Congressional action, but in the present scenario, we would not only find the groups suddenly similar, but would be compelled to apply strict scrutiny.
>
> We also must keep in mind we are delving into "Congress' authority over national defense and military affairs, and perhaps no other area has the [Supreme] Court accorded Congress greater deference."

79 M.J. at 779 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981)). The Court continued:

> We look to the Supreme Court for guidance in whether to formally apply strict scrutiny analysis or to generally defer to Congress in military matters. *Rostker*, and other cases concerning the military, arose in more pure equal protection categories, such as sex discrimination, rather than cases more focused on the fundamental rights aspect of the equal protection component of the Due Process clause. But we believe the same sort of deference is due to Congress in military matters for equal protection challenges based on the deprivation of a fundamental right.

*Id.* at 780. It is worth noting that in its *Begani* opinion, the CAAF rejected the contention that the Sixth Amendment right to jury trial was implicated and that strict scrutiny should be applied. *Begani*, 81 M.J. at 280 n.2.

> [C]urrent practice helps reduce the possibility of impermissible influences on panel members both inside and outside the deliberation room. These pernicious concerns of improper influence will be most acutely felt when the case involves high stakes, when the case involves infamous acts, or when the personalities involved are less likely to yield to prophylactic instructions. That is, concerns of improper influence are most likely to be a problem in the most problematic of circumstances.

*United States v. Mayo*, ARMY 20140901, 2017 CCA LEXIS 239, at *22 (A. Ct. Crim. App. 7 Apr. 2017).

Due to "military life and custom," the court suggested that our system "allows a panel member to cast what they might perceive to be an unpopular vote," yet concluded a requirement of unanimity "would only frustrate the goal of deliberating until all panel members are in agreement. As a result, a requirement to keep deliberating until all members agree poses special concerns when one panel member outranks the other." *Id.* at *20.

Essentially, that panel was concerned about unlawful command influence. Perhaps the Government thus has an interest in nonunanimous panels, but the law concerning unlawful command influence is—supposedly—in place to protect an accused. "[T]o say that one protection for an accused servicemember is a reason to diminish another protection is a non-sequitur." *Dial* Ruling at 15 (full citation in n.8, *supra*).

Regardless of how one views the question of whether military members have a constitutional right to a unanimous verdict, the *Mayo* rationale as justification to deny servicemembers the right to a unanimous jury should give anyone pause about the fairness of the military justice system. The *Mayo* opinion on improper influence is contrasted by that espoused by a federal court of appeals:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict, and we are unwilling to surrender the values of that mode of fact-finding, or to examine the constitutional implications of

> an attempt to do so, absent a clear mandate in the Rules or a controlling statute.

*United States v. Lopez*, 581 F.2d 1338, 1341–42 (9th Cir. 1978). Justice Kavanaugh echoed some of this sentiment in his *Ramos* concurrence:

> Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class."

*Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J. concurring in part) (quoting *Johnson* v. *Louisiana*, 406 U. S. 356, 397 (1972) (Stewart, J., dissenting)).

Other potential reasons to preserve nonunanimous verdicts are perhaps expediency[21] or the ability to procure members to sit on panels—specifically at remote locations or in times of war or crisis. Also, a nonunanimous panel allows for the finality of a verdict, thus preventing hung juries. With respect to expediency, cases generally take much longer to get to trial than they did in 1950, especially when scientific testing of evidence is involved; it is not uncommon for a case to proceed to trial a year after the offense was committed. Regarding the procurement of members, this may have been a significant issue in 1950, but is not so in 2022, as it is not uncommon to travel servicemembers to sit on panels at other installations. Finally, as the military judge noted in *Dial*, and which I agree, when it comes to hung juries and re-voting, these are only issues "if either the Constitution or congressional legislation requires a unanimous vote to acquit." *Dial* Ruling at 15. Having considered these possible reasons, none warrant denial of equal protection regarding a unanimous verdict when viewed in context of the consequences of such a verdict.

That nonunanimous verdicts deprive servicemembers of equal protection under the law is further evidenced by cases—such as Appellant's—in which the crime lacks a specific military nexus and the military specifically requests prosecutorial jurisdiction from civilian authorities. Appellant's crime occurred in North Carolina. North Carolina officials "ceded" jurisdiction to military authorities. Appellant had a constitutional right to a unanimous jury in North

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[21] In *Solorio,* dissenting, Justice Marshall wrote,

> [T]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

483 U.S. at 461 (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

Carolina; under longstanding military precedent, in a court-martial he did not. In other words, he had at least one less fundamental right in the military than had he been tried in North Carolina. It thus became easier to secure a conviction—and not just under the Louisiana/Oregon standard of 10–2, but under a standard of 6–2. The only significant connection between the military and the offenses at issue was the fact that Ms. SW was a military dependent. Thus, failing to require unanimous panel verdicts gives military prosecutors an advantage of constitutional proportions over their state and federal counterparts, making it easier for our system to secure convictions, and exposing the possibility of forum shopping among jurisdictions. While the Air Force maintains a position of "maximizing Air Force jurisdiction,"[22] unanimous panels would limit the prosecutorial advantage gained by obtaining jurisdiction in the military justice system.[23]

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[22] Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 4.18.1 (18 Jan. 2019).

[23] Regarding issues of double jeopardy, Justice Alito stated it would be rare for a servicemember to be prosecuted for the same offense. "States usually have concurrent jurisdiction over such crimes when they are committed off base and sometimes possess jurisdiction over such offenses when committed on base. These offenses, however, are rarely prosecuted in both a military and a state court, and therefore when a servicemember is court-martialed for a sex offense over which the State had jurisdiction, this is usually because the State has deferred to the military." *United States v. Kebodeaux*, 570 U.S. 387, 404 (2013) (Alito, J., concurring in the judgment). For an example of a rare and extraordinary case, *see United States v. Hennis*, 79 M.J. 370 (C.A.A.F. 2020). Justice Alito also advised,

> Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused. Rule 201(d)(3). And as the commentary to Rule 201(d) explains, the determination which agency shall exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military officials . . . and appropriate civilian authorities. [I]t is constitutionally permissible to try a person by court-martial and by a State court for the same act, however, as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act.

*Kebodeaux,* 570 U.S. at 405 n.2 (alterations in original) (internal quotation marks omitted) (Alito, J., concurring in the judgment).

**10. Consequences of Denying Equal Protection**

Some may argue that Congress, with the "exceptional" powers granted to it by the Constitution, can do what it wants with the military and thus choose to deny servicemembers the right to a unanimous verdict. I conclude that under our judicial system, Congress cannot do so.

However, if Congress has this power, it may be time to accept that a "conviction" in the military system is not equivalent to a state or federal conviction[24] and reevaluate the words spoken in *Parker*, that the military system is "a jurisprudence *which exists separate and apart from the law which governs in our federal judicial establishment*." *Parker*, 417 U.S. at 744 (emphasis added) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

Even our "separate system," however, must review whether servicemembers' fundamental rights are being violated. "For the Government to make distinctions does not violate equal protection guarantees unless constitutionally suspect classifications like race, religion, or national origin are utilized or *unless there is an encroachment on fundamental constitutional rights* like freedom of speech or of peaceful assembly." *Means*, 10 M.J. at 165 (emphasis added) (citing *Oyler*, 368 U.S. at 446). *Ramos* constituted "a fundamental change in the rules thought necessary to ensure fair criminal process." *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting). By not having the right to a unanimous panel, what Congress defines as "fair criminal process" is very different from the federal and state systems.

Upon a military conviction, servicemembers may be subject to various post-trial proceedings and requirements. These include DNA processing required under 10 U.S.C. § 1565 and Department of Defense Instruction (DoDI) 5505.04;[25] firearms prohibition, triggered under 18 U.S.C. § 922; domestic violence ramifications under 18 U.S.C. § 922(g)(9); and sex offender notification

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[24] *See Gourzong v. AG United States*, 826 F.3d 132, 137 (3d Cir. 2016) ("Courts are in wide agreement that convictions by general courts-martial receive the weight of equivalent convictions in the civilian system."); *see also United States v. Shaffer*, 807 F.3d 943, 948 (8th Cir. 2015) ("[W]e hold that Shaffer's conviction by general court-martial is a conviction in 'a court of the United States' within 18 U.S.C. § 3559(c).").

[25] Department of Defense Instruction (DoDI) 5505.14, *Deoxyribonucleic Acid Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders* (22 Dec. 2015, incorporating Change 2, 7 May 2021).

requirements, in accordance with DoDI 1325.07,[26] the latter of which I will focus on.

By virtue of Appellant's conviction, he will have to register as a sex offender in North Carolina. In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20901 *et seq.*,[27] "a federal statute that requires those convicted of federal sex offenses to register in the States where they live, study, and work." *Kebodeaux*, 570 U.S. 387, 389 (2013).[28] Given that Congress can promulgate the UCMJ under U.S. CONST. art. I, § 8, cl. 14, it could "specify that the sex offense of which [the appellant] was convicted was a military crime under that Code." *Kebodeaux*, 570 U.S. at 395. Moreover, Congress could "punish that crime through imprisonment and by placing conditions upon [the appellant's] release" and "make the civil registration requirement at issue here a consequence of [the appellant's] offense and conviction." *Id.*

Under 18 U.S.C.S. § 2250(a), whoever

> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (*including the Uniform Code of Military Justice* [10 USCS §§ 801 et seq.]), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

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[26] Department of Defense Instruction (DoDI) 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (11 Mar. 2013, incorporating Change 4, 19 Aug. 2020).

[27] SORNA has been transferred to 34 U.S.C. § 20901 *et seq.* from 42 U.S.C. § 16901.

[28] *Kebodeaux* involved a former Airman who was convicted of statutory rape in 1999 and thus subject to sex offender registration under the Wetterling Act, which was replaced by SORNA. The Court noted that "the fact that the federal law's requirements in part involved compliance with state-law requirements made them no less requirements of federal law." *Kebodeaux*, 570 S. Ct. at 393 (citations omitted).

(Emphasis added).

However, Congress's broad and "expansive power is constrained by the Fifth Amendment's guarantee of Due Process and the imputed guarantee of Equal Protection." *Begani*, 79 M.J. at 791 (Crisfield, C.J., dissenting). In terms of sex offender registration, SORNA considers a military conviction equal to a federal or state conviction. If a servicemember is denied a unanimous panel, it is not equal.

In Appellant's case, if he and a civilian were successfully prosecuted for the same sex crime in state or federal court with the benefit of a unanimous verdict, both would be similarly situtated as both would be subject to the same SORNA requirements. However, if Appellant were tried and convicted under the UCMJ, and a civilian were tried and convicted in a civilian jurisdiction for the same sex crime, the civilian defendant would have the fundamental constitutional right to a unanimous verdict from 12 jurors. Appellant, on the other hand, would not only be denied a unanimous verdict, but could be convicted by as few as six persons. Both Appellant and the civilian, however, would face the same SORNA consequences. This is not equal protection under the law. I am convinced that servicemembers and civilians are similarly situated for purposes of equal protection analysis when it comes to evaluating nonunanimous verdicts and their consequences under SORNA.

SORNA is nothing to simply dismiss. Long after Appellant has served his confinement, the collateral consequences of his crimes will remain; sex offense registration may place significant qualifications and restrictions on his life and liberty for an indeterminate period of time. I go back to my dissent in *United States v. Palacios Cueto*, where I noted how appellant's convictions, along with the expansion of sex offender requirements in recent years, begs the question as to when the collateral consequences of such convictions look more like a punishment. No. ACM 39815, 2021 CCA LEXIS 239, at *64 n.3 (A.F. Ct. Crim. App. 18 May 2021) (unpub. op.) (Meginley, J., dissenting), *rev. granted on other grounds*, __ M.J. __, No. 21-0357, 2022 CAAF LEXIS 114 (C.A.A.F. 7 Feb. 2022). With the denial of such a fundamental right, coupled with a finding of guilty from as few as six out of eight people, SORNA implications as a result of a court-martial conviction appear to be more of a punishment than a mere collateral consequence. Finally, it is worth reiterating that DoDI 1325.07 makes it clear that Appellant will have to register as a sex offender. *See* DoDI 1325.07, Appendix 4 to Enclosure 2, Table 6, at 84.

While the vast majority of sexual assault cases are prosecuted in the general court-martial forum, there are some sex offense cases that are prosecuted in a special court-martial forum. Again, in these instances, servicemembers face sex offender registration under SORNA, yet, only *three out of four* panel members are needed to convict. In *Ballew v. Georgia*, Justice Blackmun noted

that a unanimous conviction by a five-person jury for a non-petty offense violated an accused's right to jury trial, and relying on empirical studies, concluded that

> [T]he purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.

435 U.S. 223, 239 (1978).

If a sexual assault allegation is brought to a special court-martial, and a servicemember faces sex offender registration for an indeterminate period of time, this is not a petty offense.

**11. Unanimous Verdict—Conclusion**

In *Reid v. Covert*, the Supreme Court noted: "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." 354 U.S. 1, 21 (1957). The Court noted the military's jurisdiction was always intended "to be only a *narrow exception* to the normal and preferred method of trial in courts of law." *Id.* (emphasis added). Yet, the majority of the offenses committed by servicemembers are common law offenses and not military-specific offenses. Perhaps because the military often prosecutes non-military-specific offenses, the military justice system has evolved to incorporate many of the protections and safeguards of our civilian court counterparts.

The "judicial" nature of our system, *see Ortiz*, 138 S. Ct. at 2174–76, makes it difficult for Congress to demonstrate what particular need or objective it is trying to accomplish in the denial of this "fundamental right." Given the significant changes our military justice system has undergone over the last 15 years, and the amount of scrutiny we have received, some might say the only reason to maintain the current system of nonunanimous verdicts is to make it easier for the Government to secure convictions. Yet, are we concerned with convictions or justice?

In *Solorio*, the Supreme Court held that the military could try a servicemember for a criminal offense even if the offense lacked a "service connection." 483 U.S. at 436. In his dissent, Justice Marshall stated:

> Unless Congress acts to avoid the consequences of this case, every member of our Armed Forces, whose active duty members number in the millions, can now be subjected to court-martial jurisdiction -- without grand jury indictment or trial by jury -- for *any* offense, from tax fraud to passing a bad check, regardless of its lack of relation to "military discipline, morale and fitness." Today's decision deprives our military personnel of procedural protections that are constitutionally mandated in trials for purely civilian offenses. The Court's action today reflects contempt, both for the members of our Armed Forces and for the constitutional safeguards intended to protect us all.

*Id.* at 467 (Marshall, J., dissenting) (citation omitted).

Justice Marshall's words have proven partly true. Fortunately, military members have been afforded numerous "procedural protections that are constitutionally mandated in trials for purely civilian offenses." *See id.* Although each servicemember takes an oath to support and defend the Constitution, a fundamental constitutional right is denied to those who are accused of a crime in our system. I have no doubt that some reading this opinion will be concerned about the consequences of imposing a unanimous verdict requirement for courts-marial; however, as Justice Gorsuch noted in *Ramos*: "Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." 140 S. Ct. at 1408. The consequence of being right will not dilute or hamper or impede military justice; it will strengthen the integrity and fairness of our judicial system. I respectfully dissent.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 39980**

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**UNITED STATES**
*Appellee*

**v.**

**Robert A. MARDIS**
Airman (E-2), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 6 January 2022

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*Military Judge*: Colin P. Eichenberger.

*Sentence:* Sentence adjudged 19 August 2020 by GCM convened at Mountain Home Air Force Base, Idaho. Sentence entered by military judge on 10 September 2020: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

*For Appellant:* Major Ryan S. Crnkovich, USAF.

*For Appellee*: Lieutenant Colonel Matthew J. Neil, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, KEY, and MEGINLEY, *Appellate Military Judges*.

Judge MEGINLEY delivered the opinion of the court, in which Chief Judge JOHNSON and Senior Judge KEY joined.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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MEGINLEY, Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of sexual abuse of a child who had not attained the

age of 16 years by communicating indecent language to her, one specification of sexual abuse of a child who had not attained the age of 16 years by intentionally exposing his penis to her, and one specification of sexual abuse of a child who had not attained the age of 16 years by intentionally causing her to touch his penis, all in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and one specification of possession of obscene visual depictions of minors, as assimilated under 18 U.S.C. § 1466A, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence.

Appellant raises two issues on appeal: (1) whether the record of trial is substantially complete, and (2) whether Appellant was subjected to a multiplicious prosecution.[2] Because we agree with Appellant's first raised issue, we need not address his second issue at this time. For the reasons discussed below, we remand the case to correct a substantial omission in the record.

## I. BACKGROUND

During Appellant's court-martial, as part of Appellant's plea agreement, both the Government and Defense agreed to a 12-page stipulation of fact, marked as Prosecution Exhibit 1. As part of this stipulation, the parties agreed to include seven attachments. However, upon review of the record of trial, Appellant noted that two of the attachments, both pertaining to interviews of Appellant by the Air Force Office of Special Investigations (AFOSI), were missing. Specifically, Attachment 4, "[AF]OSI Interviews_abridged (Part 1 and Part 2), dtd 31 May 2018, 2 vids," and Attachment 5, "[AF]OSI Interview Transcript for Part 3, dtd 31 May 2018, 16 pgs," were not included with the stipulation in the original record of trial docketed with the court. Instead, in place of each

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[1] All references in this opinion to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2016 ed.). The charges and specifications were referred to trial after 1 January 2019; accordingly, all other references to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.). *See* Exec. Order 13,825, §§ 3, 5, 83 Fed. Reg. 9889, 9889–90 (8 Mar. 2018).

[2] Appellant's full assignment of error on this issue is,

> Whether the specification alleging that Appellant committed a lewd act upon a child by intentionally exposing himself, as amended at trial, was a lesser included offense of the specification alleging sexual abuse of a child by causing sexual contact and therefore amounted to a multiplicious prosecution in violation of the double jeopardy clause of the Fifth Amendment. [U.S. CONST. amend. V.]

item is a page directing the reviewing authority to other parts of the record; the Defense calls these pages "jump sheets." For Attachment 4, the reader is directed to "Appellate [Exhibit XIII];" for Attachment 5, the reader is directed to "Appellate [Exhibit XVI]."

Appellant states in his brief that the use of these "jump sheets" has created a problem for his appeal, arguing: "This practice . . . created an issue in this case because it is now unclear what exactly was introduced at trial. Specifically, it is impossible to discern precisely what was included in two attachments that accompanied Pros. Ex. 1—namely, Attachment 4 and Attachment 5."

On 16 November 2021, this court granted a government motion to attach, which included declarations from Captain (Capt) RK, assistant trial counsel in this case, and Capt CS, the Chief of Military Justice at Mountain Home Air Force Base, on this matter.[3] In her declaration, Capt RK stated:

> Attachment 4 was an "abridged" version of [Appellant]'s interview with the Air Force Office of Special Investigations ([AF]OSI). The attachment contained "Part 1" and "Part 2" of the [AF]OSI interview. The attachment was "abridged" because we removed dead-space (e.g., when agents were not in the room talking to [Appellant]) from the exhibit. The Defense was provided the time-hacks for the edits prior to sentencing and concurred with the removal of these dead spaces (see Attachment 1).[4]

Capt RK stated Attachment 5 was a 16-page transcript from "Part 3" of Appellant's AFOSI interview, and included those 16 pages as an attachment to her declaration (the court notes that the 16 pages submitted by Capt RK are identical to 16 pages found within Appellate Exhibit VIII, but are only a part of a 59-page attachment to Appellate Exhibit VIII). Capt RK further stated that Attachments 4 and 5 were attached to the stipulation of fact and that the complete exhibit was "provided to the military judge on a compact disc and

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[3] We considered the declarations and attachments to resolve this issue, which we find to be raised by the record. *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding Courts of Criminal Appeals may consider affidavits when doing so is necessary for resolving issues raised by materials in the record).

[4] According to an email on 16 August 2020 between trial counsel and the Defense attached to Capt RK's declaration, these were the agreed-upon portions of Appellant's interview that were cut out: OSI SUB Int 1 (Player time) 00:52-01:32, 01:25:00-01:43:35, 01:56:40-01:59:50, 02:00:47-02:06:26; OSI SUB Int 2 (Player time) 01:03:00-end of video; OSI SUB Int 3 (Player time) 00:00-16:12, 40:33-1:13:00.

admitted during presentencing proceedings." Capt CS declared that Attachment 4, Appellant's interview with AFOSI, is divided into three files. He attached the "edited" versions of "Part 1" and "Part 2" to his declaration.

## II. DISCUSSION

### A. Law

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.*

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). A record of trial that is missing exhibits may be substantially incomplete. *See id.* at 27 (holding that the record was substantially incomplete for appellate review of the sentence, when all three defense sentencing exhibits were missing); *but see Henry*, 53 M.J. at 111 (holding that four missing prosecution exhibits were insubstantial omissions, when other exhibits of similar sexually explicit material were included). Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

"In assessing either whether a record is complete or whether a transcript is verbatim, the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)). "[O]missions are qualitatively substantial if the substance of the omitted material 'related directly to the sufficiency of the Government's case on the merits,' and 'the testimony could not ordinarily have been recalled with any degree of fidelity.'" *Id.* (quoting *Lashley*, 14 M.J. at 9). "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)).

When a matter concerning an incomplete record is raised, Rule for Courts-Martial (R.C.M.) 1112(d)(2) states that "[t]he military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction. All parties shall be given reasonable access to any court reporter notes or recordings of the proceedings."

**B. Analysis**

The court notes we considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial, given that they were introduced as part of a prosecution exhibit during the court-martial and were required to have been included in the record; we did not consider the exhibits as a means to complete the record. *See* R.C.M. 1112(b)(6)); *see also United States v. Perez*, No. ACM S32637, 2021 CCA LEXIS 285, at *3–4 (A.F. Ct. Crim. App. 14 Jun. 2021) (unpub. op.) (returning an incomplete record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for reconstruction of the record, where a prosecution exhibit was incomplete).

We have reviewed the aforementioned Appellate Exhibits XIII and XVI referred to on the "jump sheets" inserted in place of Attachments 4 and 5 to Prosecution Exhibit 1. Appellate Exhibit XIII is a disc labeled "OSI Subj. interview (1 disc)," which consists of three files identified in parts, and is approximately four hours and 35 minutes long. Specifically, Part I is approximately two hours and seven minutes long, Part II is approximately one hour and 13 minutes long, and Part III is approximately one hour and 14 minutes long. The interviews are not edited. Appellate Exhibit XVI, which is marked "Government Response to Defense Motion to Abate," is 66 pages long. It contains a transcript, totaling 42 pages, of a portion of Appellant's interview with AFOSI, conducted on 31 May 2018. However, contrary to the reference on the "jump sheet," Appellate Exhibit XVI does not include "Part 3" of the interview as described in the stipulation. As the Government points out, "Part 3" is actually a portion of an attachment to Appellate Exhibit VIII, and is found at pages 103–118 of Appellate Exhibit VIII.

Having reviewed the record, we find the omissions of both Attachment 4 and Attachment 5 are substantial. The stipulation states that Attachment 4 is "abridged." While trial counsel and defense counsel, in communications outside of court, apparently agreed upon certain time-hacks and the removal of "dead space" from Appellant's interview with AFOSI (an abridged version), the court does not know which time-hacks (as articulated in note 4, *supra*) were ultimately relied upon by the military judge in determining the outcome of this case. Additionally, although Attachment 5 can be found in Appellate Exhibit VIII, the "jump sheet" directs the reviewer to the wrong exhibit; even if the correct exhibit is found, the reviewer has to carve the applicable pages out of a larger document. Looking at the entire record of this case, and having reviewed the two discs from the Government's motion to attach, as well as the transcript provided by Capt RK, we find the omitted portions of the stipulation of fact to be qualitatively and quantitatively substantial. Appellant's confession and admissions to AFOSI provided key evidence and information referred to within the stipulation of fact. Furthermore, trial counsel referred to the attachments

in argument. Therefore, we find it appropriate to return the record of trial for correction. We defer consideration of whether the omissions are prejudicial pending correction of the record.

## III. CONCLUSION

Accordingly, the record of trial is **RETURNED** to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) by reconstructing Prosecution Exhibit 1, Attachments 4 and 5. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2), (3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).[5,6]

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

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[5] Legal offices should be advised that the court does not condone this practice of using "jump sheets" specifically for exhibits, as this practice has caused unnecessary confusion for the court and the parties. Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial*, ¶ 2.1.5 (21 Apr. 2021), states, "If attachments are listed on a document, the attachments will remain with the document and be included in the ROT [record of trial]." Further, ¶ 2.1.6 states,

> For documents (other than exhibits) that appear in multiple locations, after the first occurrence it is permissible to use a cross-reference sheet in place of the document(s) indicating the location of the document(s) within the ROT. *Never use a cross-reference sheet in place of any exhibit included in the completed ROT*. (T-1). Exhibits must be included at each location in the ROT, unless the exhibit has been sealed by the military judge. (T-1). See paragraph 2.2.

(Emphasis added).

[6] The court advises that we had difficulty opening Attachment 2 to the stipulation of fact, described as a "CARES Interview and video player, dtd 22 May 2018." Although we could see the files, upon review, we were unable to view the contents of the files because the software used to view the exhibit was not present on the disc. However, in Volume 4 of the ROT, this same disc is found under the "Pretrial" section. Upon our review of that disc, and comparing the files in Attachment 2, the files appear to be identical. The court was able to view the interview on that disc and is confident the evidence is the same.

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40012**

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**UNITED STATES**
*Appellee*

**v.**

**Sean M. DALEY**
Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 5 January 2022

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*Military Judge:* Colin P. Eichenberger.

*Sentence:* Sentence adjudged 3 December 2020 by GCM convened at Holloman Air Force Base, New Mexico. Sentence entered by military judge on 12 January 2021: Dishonorable discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

*For Appellant:* Captain David L. Bosner, USAF.

*For Appellee:* Lieutenant Colonel Matthew J. Neil, USAF; Major Abbigayle C. Hunter, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, KEY, and MEGINLEY, *Appellate Military Judges*.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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PER CURIAM:

In accordance with Appellant's pleas and pursuant to a plea agreement, a general court-martial composed of a military judge sitting alone found Appellant guilty of one specification of disobeying a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892; and one specification of sexual assault of a child, in violation of Article 120b, UCMJ, 10

U.S.C. § 920b.[1] As part of his plea agreement with the convening authority, Appellant waived his right to a trial by members and requested to be tried by military judge alone. Appellant also agreed to plead guilty to the aforementioned charges and specifications.[2] The military judge sentenced Appellant to a dishonorable discharge, a total of 24 months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant's sole assignment of error stems from initial omissions from the record of trial. Specifically, Appellant stated his "purported confession to [the Air Force Office of Special Investigations] and admissions to a confidential informant," Attachments 1 and 5, respectively, to Prosecution Exhibit 1, an agreed-upon stipulation of fact, were not included in the record. Appellant claims that because these were substantial omissions from the record of trial, he is entitled to sentence relief.

On 4 November 2021, this court granted a government motion to attach, which included a declaration from the trial counsel in this case along with the purported missing attachments from the stipulation of fact.[3] In his declaration, trial counsel stated he "reviewed the copy of the [r]ecord of [t]rial for the court-martial of [Appellant] that is maintained at Holloman AFB, New Mexico," and that the discs containing a copy of Attachments 1 and 5 are contained in that copy of the record. Appellant did not oppose this motion to attach. We considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial, given that they were introduced as part of a prosecution exhibit during the court-martial and were required to have been included in the record; we did not consider the attachments as a means to complete the record. *See* Rule for Courts-Martial (R.C.M.) 1112(b)(6); *see also United States v. Perez*, No. ACM S32637, 2021

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[1] All references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Pursuant to the plea agreement, after the military judge found Appellant guilty of the two aforementioned offenses, two charges and three specifications were withdrawn and dismissed with prejudice: a charge and specification for wrongful communication of a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; another specification of sexual assault of a child, in violation of Article 120b, UCMJ; and one charge and one specification of possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

[3] We considered the declaration and attachments to resolve this issue, which we find to be raised by the record. *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding Courts of Criminal Appeals may consider affidavits when doing so is necessary for resolving issues raised by materials in the record).

CCA LEXIS 285, at *3–4 (A.F. Ct. Crim. App. 14 Jun. 2021) (unpub. op.) (returning an incomplete record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for reconstruction of the record, where a prosecution exhibit was incomplete).

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.*

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). A record of trial that is missing exhibits may be substantially incomplete. *See id.* at 27 (holding that the record was substantially incomplete for appellate review of the sentence, when all three defense sentencing exhibits were missing); *but see Henry*, 53 M.J. at 111 (holding that four missing prosecution exhibits were insubstantial omissions, when other exhibits of similar sexually explicit material were included). Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

"In assessing either whether a record is complete or whether a transcript is verbatim, the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)). "[O]missions are qualitatively substantial if the substance of the omitted material 'related directly to the sufficiency of the Government's case on the merits,' and 'the testimony could not ordinarily have been recalled with any degree of fidelity.'" *Id.* (quoting *Lashley*, 14 M.J. at 9). "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)).

When the issue of an incomplete record is raised, R.C.M. 1112(d)(2) states that "[t]he military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction. All parties shall be given reasonable access to any court reporter notes or recordings of the proceedings."

There is no question that the authenticated record of trial provided to this court did not contain the two attachments to the stipulation of fact at issue. Looking at the entire record of this case, and having reviewed the two discs from the Government's motion to attach, we find the missing portions of the

stipulation of fact to be qualitatively substantial. Appellant's confession and admissions to the confidential informant provided key evidence and information contained within the stipulation of fact. Also, trial counsel specifically referred to both attachments in his argument. Therefore, we find it appropriate to return the record for correction. We defer consideration of whether the omissions are prejudicial, pending correction of the record of trial.

Accordingly, the record of trial is **RETURNED** to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d), by reconstructing the portion of the affected exhibit. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2), (3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66(d), UCMJ, 10 U.S.C. § 866(d).

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# APPENDIX F

# United States Navy–Marine Corps
# Court of Criminal Appeals

**UNITED STATES**
***Appellee***

**v.**

**Keven C. MCNULTY**
**Electrician's Mate (Nuclear)**
**Petty Officer First Class (E-6)**
**U. S. Navy**
***Appellant***

**NMCCA No. 202300070**

**Special Panel 1**

**ORDER**

***Correcting Post-Trial Processing Errors***

A military judge convicted Appellant at a special court-martial, pursuant to his pleas, of one specification of violating a lawful order, and one specification of abuse of position as a military recruiter, in violation of Articles 92 and 93a, Uniform Code of Military Justice [UCMJ]. Appellant was sentenced to reduction to E-3, confinement for five months, and a bad-conduct discharge. On 9 March 2023, Appellant's case was docketed with the Court. On 7 August 2023, Appellant filed a brief asserting two assignments of error. Specifically, Appellant maintains: (1) trial defense counsel was ineffective in not seeking a Rule for Courts-Martial [R.C.M.] 706 mental health examination of Appellant; and (2) the court-martial lacked jurisdiction because the military judge did not have an active bar license in California.

On 6 December 2023, Appellee filed its Answer asserting that trial defense counsel was not ineffective and that the court-martial had jurisdiction over Appellant's case.

While reviewing the record of trial, the Court identified that the transcriptionist's Certification of Transcript is incorrect in two places. At the beginning of the record of trial, the transcriptionist certifies the court-martial proceeding in the case of *U.S. v. FC3 Joshua R. Zimmerman, USN*, rather than the court-martial concerning Appellant. Additionally, the dates of Appellant's court-martial on the Certification of Transcript are incorrect. The transcriptionist certifies the court-martial occurred on 18 March 2022, 21 June 2022, 6 July 2022, and 3 November 2022. Appellant's court-martial occurred on 1 July 2022, 12 September 2022, and 2 November 2022. A second, incorrect, copy of the Certification of Transcript – again certifying the transcript as *U.S. v. FC3 Joshua R. Zimmerman, USN* – is found immediately after transcript page 176.

Accordingly, it is, by the Court, this 3rd day of January 2024,

**ORDERED:**

1. That the record of trial is returned to the Judge Advocate General for submission to the military judge to ensure proper certification in compliance with R.C.M. 1112(c) as well as proper verification in compliance with Dep't of the Navy, Judge Advocate General Instr. 5800.7G CH-2, *Manual of the Judge Advocate General*, 0157d (Dec. 1, 2023).

2. That once properly certified and verified, the record will be returned to this Court for completion of appellate review.

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

Copy to:
45 (CDR Pepi);
46 (LtCol Burkart, Maj Finnen);
02

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**
***Appellee***

**v.**

**Stanford N. KAPAYOU**
**Lance Corporal (E-3),**
**U. S. Marine Corps**
***Appellant***

**NMCCA No. 202300145**

**Panel 2**

**ORDER**

***To Produce Complete Record of Trial***

Upon review of the record of trial, the Court notes that documents related to pre-referral proceedings under Article 30a, Uniform Code of Military Justice [UCMJ], are missing from the record of trial. Prior to conducting Appellant's arraignment, the military judge stated on the record that, "[w]e briefly discussed Article 30a proceedings, and the court reporter and the government confirmed that they had uploaded the 30a proceedings to … the judicial Sharepoint, and those will be added to the record of trial within the allied papers."[1] This document is required to be forwarded to the convening authority or commander with authority to dispose of charges or offenses in a court-martial.[2]

Accordingly, it is, by the Court, this 7th day of December 2023,

**ORDERED:**

1. That the Government produce from the certified record of trial, on or before 15 December 2023, the Article 30a, UCMJ, matters missing from the record.

FOR THE COURT:

Mark K. Jamison
MARK K. JAMISON
Clerk of Court

Copy to:
45 (CDR Kneese); 46; 02

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[1] R. at 11.

[2] Rule for Courts-Martial [R.C.M.] 309(e).

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**

***Appellee***

**v.**

**Roger O. ROACHE, JR**
**Lance Corporal (E-3),**
**U. S. Marine Corps**

***Appellant***

**NMCCA No. 202200128**

**Special Panel 2**

**ORDER**

***To Produce Complete Record of Trial***

Upon review of the record of trial, the Court notes that Prosecution Exhibit 5, except for the portion of Prosecution Exhibit 5 that contained images,[1] which was entered as evidence on the record by the military judge,[2] is missing from the record of trial. This document is a required part of the certified record of trial according to Rule for Courts-Martial 1112(b)(6).

Accordingly, it is, by the Court, this 18th day of October 2023,

**ORDERED:**

1. That the Government produce from the certified record of trial, on or before 27 October 2023, the portions of Prosecution Exhibit 5 admitted into evidence.

FOR THE COURT:

J. TRAVIS WILLIAMSON
Acting Clerk of Court

Copy to:
45 (Maj Keefe); 46 (LCDR LaPlante, LT Gyasi); 02

---

[1] R. at 71.

[2] R. at 246.

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**

***Appellee***

**v.**

**Jeremy W. HARBORTH**
**Chief Master-at-Arms (E-7),**
**U.S. Navy**

***Appellant***

**NMCCA No. 202200157**

**Panel 3**

**ORDER**

***To Produce Complete Record of Trial***

Upon review of the record of trial, the Court notes that transcript pages 1464-1487 are missing from the record of trial. These pages are a required part of the certified record of trial according to Rule for Courts-Martial 1112(b)(6).

Accordingly, it is, by the Court, this 17th day of October 2023,

**ORDERED:**

1. That the Government produce from the certified record of trial, on or before 24 October 2023, the missing pages of the transcript.

FOR THE COURT:

J. TRAVIS WILLIAMSON
Acting Clerk of Court

Copy to:
45 (LtCol Neely); 46 (LCDR LaPlante, Capt Blair); 02

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**

***Appellee***

**v.**

**Ian A. SCHMIDT**
**Sergeant (E-5),**
**U. S. Marine Corps**

***Appellant***

**NMCCA No. 202300069**

**Panel 3**

**ORDER**

***To Produce Complete Record of Trial***

Upon consideration of Appellant's motion and the record of trial, the Court notes that Prosecution Exhibits 7 and 8 are missing from the record of trial. Prosecution Exhibits 7 and 8 are required parts of the certified record of trial according to Rule for Courts-Martial 1112(b)(6).

Accordingly, it is, by the Court, this 13th day of June 2023,

**ORDERED:**

1. That the Government produce from the certified record of trial, on or before 27 June 2023, **Prosecution Exhibit 7** and **Prosecution Exhibit 8**.

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

Copy to:
45 (Capt Hotard); 46; 02

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**

***Appellee***

**v.**

**Rodney D. HARVEY**
**Hospital Corpsman Petty Officer First Class (E-6),**
**U. S. Navy**

***Appellant***

**NMCCA No. 202200040**

**Panel 3**

**ORDER**

***To Produce Complete Record of Trial***

Upon consideration of Appellant's motion, Appellee's opposing motion, and the record of trial, the Court notes that Appellate Exhibit XLV is missing from the record of trial. Appellate Exhibit XLV is a required part of the certified record of trial according to Rule for Court-Martial (R.C.M.) 1112(a) and 1112(b)(6).

Accordingly, it is, by the Court, this 28th day of June 2022,

**ORDERED:**

1. That the Government produce from the certified record of trial, on or before 13 July 2022, a complete record of trial to Appellant and to this Court, including:

a. Appellate Exhibit XLV.

2. In the event that the above materials are not included in the certified record of trial, the Government shall "attach a memorandum to the original record of trial identifying the missing document(s) or other deficiency and setting forth the actions taken to produce the missing documents or resolve any other deficiency," in accordance with N-M. Ct. Crim. App. Rule 1.4.

FOR THE COURT:

KYLE D. MEEDER
Clerk of Court

Copy to:
45 (LT Dempsey); 46; 02

# United States Navy-Marine Corps
# Court of Criminal Appeals

| | |
|---|---|
| **In Re B.M.**<br>Petitioner | **NMCCA NO. 202300050** |
| **UNITED STATES**<br>Respondent | **Panel 3** |
| **Dominic R. BAILEY**<br>Lieutenant Commander (O-4), U.S. Navy<br>Real Party in Interest | **ORDER**<br>***To Produce Complete Record of Trial*** |

On 1 February 2023, Petitioner requested this Court issue extraordinary relief via a writ of mandamus. Having reviewed the pleadings, we find review of the record of trial is necessary prior to ruling on Petitioner's request.

Accordingly, it is, by the Court, this 8th day of March 2023,

**ORDERED:**

That the Government produce, on or before the 31st day of March 2023, a complete record of trial.

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

Copy to:
45;
46;
02;
LTC Murphy
CPT McCroskey
Capt Carbone

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**
***Appellee***

**v.**

**Darryl A. GRANT**
**Yeoman First Class (E-6)**
**U.S. Navy**
***Appellant***

**NMCCA NO. 202200168**

**Panel 1**

**ORDER**

***To Produce Complete Record of Trial***

On 17 January 2023, Appellant submitted his case to this Court without specific assignments of error. In reviewing the record, the Court discovered that many of the sealed prosecution exhibits contain redacted versions of the evidence admitted at trial.

Accordingly, it is, by the Court, this 24th day of February 2023,

**ORDERED:**

That the Government produce, on or before the 10th day of March 2023, a complete record of trial, including unredacted versions of Prosecution Exhibits 5, 6, 9, 10, 11, 13, and 18.

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

Copy to:
NMCCA;
45 (LCDR Fontenot);
46;
02

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**

***Appellee***

**v.**

**Alvaro M. RODRIGUEZ**
**Corporal (E-4)**
**U.S. Marine Corps**

***Appellant***

**NMCCA No. 202200179**

**Panel 2**

**ORDER**

***To Produce Complete Record of Trial***

Upon consideration of the pleading of Appellant and the record of trial, the Court notes that the record of trial does not include at least one initial Article 39(a), UCMJ, session. The record of trial begins on page 1 with the court-martial being called *back* to order. Appellant's arraignment is missing from the record.

Accordingly, it is, by the Court, this 13th day of December 2022,

**ORDERED:**

That the Government produce, on or before the 5th day of January 2023, a complete record of trial, including all Article 39(a) sessions that took place to include a record of Appellant's arraignment and rights advisements.

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

Copy to:
51;
45 (CDR Roper);
46;
02

# United States Navy-Marine Corps
# Court of Criminal Appeals

| | |
|---|---|
| **UNITED STATES**<br>***Appellee***<br><br>**v.**<br><br>**Roman A. MATOSSEGURA, Jr.**<br>**Corporal (E-4)**<br>**U.S. Marine Corps**<br>***Appellant*** | **NMCCA No. 202200090**<br><br>**Panel 1**<br><br>**ORDER**<br><br>***To Produce Complete Record of Trial*** |

Upon consideration of the pleading of Appellant and the record of trial, the Court notes that the record of trial does not include a Marine Aviation Logistics Squadron 29 Special Court-Martial Convening Order 1-21 of 6 December 21 required by Rule for Court-Martial (R.C.M.) 1112(b)(3) and JAGINST 5813.1 (series).

Accordingly, it is, by the Court, this 24th day of August 2022,

**ORDERED:**

That the Government produce, on or before the 14th day of September 2022, a complete record of trial, including: Marine Aviation Logistics Squadron 29 Special Court-Martial Convening Order 1-21 dated 6 December 21.

FOR THE COURT:

S. TAYLOR JOHNSTON
Interim Clerk of Court

Copy to:
51;
45 (CAPT Hinson);
46;
02

# United States Navy-Marine Corps
# Court of Criminal Appeals

**UNITED STATES**

***Appellee***

**v.**

**Jeffrey D. NTIAMOA**
**Private (E-1)**
**U.S. Marine Corps**

***Appellant***

**NMCCA No. 202200064**

**Panel 3**

**ORDER**

***To Produce Complete Record of Trial***

Upon consideration of the pleading of Appellant and the record of trial, the Court notes that the record of trial does not include a complete verbatim transcript of the trial proceedings as required by Rule for Court-Martial (R.C.M.) 1114 and JAGINST 5813.1 (series). The Court Granted Appellant's motion on the 3rd day of August 2022. The Court informed the parties of its ruling, but did not issue a written order at that time.

Accordingly, it is, by the Court, this 10th day of August 2022,

**ORDERED:**

That the Government produce, on or before the 3rd day of September 2022, a complete record of trial, including: a verbatim transcript of any court sessions between May 4, 2021, and October 8, 2021.

FOR THE COURT:

S. TAYLOR JOHNSTON
Interim Clerk of Court

Copy to:
51;
45 (CDR Roper);
46 (LT Tuosto);
02

# APPENDIX G

8 February 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Airman First Class (E-3)<br>**BRADLEY D. LAMPKINS**, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR<br><br>Before Panel No. 1<br><br>No. ACM 40048 (f rev) |

**TO THE HONORABLE, THE JUDGES OF**
**THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

## ISSUES PRESENTED

**I.**

**WHETHER THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THIS COURT WAS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(B); 2) THIS COURT DEEMED THE OMISSION "SUBSTANTIAL" AND REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE TOTAL DELAY UNTIL THE GOVERNMENT RE-DOCKETED A COMPLETE RECORD OF TRIAL WAS 820 DAYS?**

**II.**

**THE GOVERNMENT RESTRICTED A1C LAMPKINS TO BASE ON 11 MARCH 2019 AND DID NOT RE-DOCKET A COMPLETE RECORD OF TRIAL WITH THIS COURT UNTIL 9 NOVEMBER 2022, A TOTAL OF 1,339 DAYS. WHETHER THIS COURT SHOULD GRANT A1C LAMPKINS SPECIAL RELIEF BECAUSE THE GOVERNMENT ENGAGED IN *BOTH* A SPEEDY TRIAL VIOLATION AND A POST-TRIAL DELAY, AS CONFIRMED BY THE MILITARY JUDGE AND THIS COURT?**

**III[1].**

**WHETHER THE MILITARY JUDGE'S ANALYSIS OF THE *BARKER* FACTORS IN HIS RULING ON A1C LAMPKINS' SECOND SPEEDY TRIAL MOTION FULLY ALIGNED WITH THAT OF *UNITED STATES V. HARRINGTON*, 81 M.J. 184 (C.A.A.F. 2021)?**

## STATEMENT OF THE CASE

Appellant's statement of the case is correct.

## STATEMENT OF FACTS

Facts necessary to answer each assignment of error are included in the Argument section below.

## ARGUMENT

**I.**

**APPELLANT IS NOT ENTITLED TO RELIEF AS THE RECOGNIZED DELAY IN THIS CASE IS NONPREJUDICIAL, EXPLAINABLE, AND NOT SO EGREGIOUS AS TO WARRANT RELIEF.**

### *Additional Facts*

Appellant was sentenced on 12 August 2022. (R. at 380-81.) His case was originally docketed with this Court on 30 July 2021. A total of 352 days elapsed between the conclusion of Appellant's court-martial and his case being docketed with this Court. On 25 October 2022, this Court remanded Appellant's ROT to the Chief Trial Judge to correct the record pursuant to R.C.M. 1112(d) and attach the military judge's missing speedy trial ruling. (*Remand Order*, dated 25 October 2022.) On 7 November 2022, the detailed military judge signed a Certificate of Correction pursuant to R.C.M. 1112(d) attaching the missing ruling. (*Certificate of*

[1] This assignment of error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

*Correction*, dated 7 November 2022.) On 9 November 2022, Appellant's case was re-docketed with this Court. (*Notice of Docketing*, dated 9 November 2022.) A total of 15 days elapsed from when this Court remanded Appellant's case for correction and when it was re-docketed with this Court.

Since the case was initially docketed with this Court, Appellant has requested eight enlargements of time to file his assignments of error. All were opposed by the Government but granted by this Court. These enlargements of time have resulted in 329 days elapsing before Appellant filed his initial Assignments of Error with this Court. The Government was also granted one enlargement of time for a total of 30 days.

***Standard of Review***

This Court reviews *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 United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

***Law***

In Moreno, the CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold: 150 days from the day the appellant was sentenced to docketing with this Court. Id. When evaluating whether a case has been docketed within the appropriate timeframe, this Court has not required the ROT to be complete

and without errors to stop the clock. United States v. Muller, No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.).

When a case does not meet one of the above standards, the delay is presumptively unreasonable and a test to review claims of unreasonable post-trial delay evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. 135 (citing Barker v. Wingo, 407 U.S. 514, 530) (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

A complete record of proceedings, including all exhibits and a verbatim transcript, 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.

R.C.M. 1112(f) instructs that "[i]n accordance with regulations prescribed by the Secretary concerned, a court reporter shall attach" certain matters to the record before forwarding for appellate review. Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial,* 21 April 2021, ¶ 1.4 instructs on what must be included in a "completed ROT." DAFMAN 51-203, ¶ 1.4.4. further directs: "A completed ROT (Part 1 and Part 2) is required for

post-sentencing and appellate review. The completed ROT triggers the metrics and milestones mandated in DAF 51-201 (identified as "ROT Completion.")

***Analysis***

Applying Livak, as the Government acknowledged in its original brief, there is a facially unreasonable delay. From the conclusion of trial to the docketing of Appellant's case with this Court, 352 days passed, which is more than the 150 days for a threshold showing of facially unreasonable delay. Since there is a facially unreasonable delay, this Court must assess whether there was a due process violation by considering the four Barker factors. Analyzing each of the Barker factors, Appellant is not entitled to relief for post-trial delay because there are reasonable explanations for the delay, and Appellant suffered no prejudice.

(1) *Length of the delay*

This factor weighs in favor of Appellant. While the length of the delay in this case is not "egregious," it is more than double the 150-day benchmark outlined in Livak. United States v. Van Vliet, 2010 CCA LEXIS 279 (A.F. Ct. Crim. App. 23 August 2010) (unpub. op.) (finding 951-day delay "egregious" and "outrageous".)

But even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.") Even though the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis.

Furthermore, it only took the Government 15 days to comply with this Court's order to correct the record. Even in Muller, where it took the Government 52 days to comply with this Court's order to correct the record, this Court found the "lengthy of the delay does not favor Appellant" and "did not cause a presumption of unreasonable delay." 2021 CCA LEXIS at *16.

(2) *Reasons for the delay*

This factor slightly weighs in Appellant's favor. The Government provided detailed and specific reasons for the delay in every aspect of post-trial processing. (Capt Jenna Stewart Declaration and Chronology, 9 July 2021, ROT Vol. 3.) And the Government asks this Court to rely on its reasons articulated in the original answer brief.

Appellant now asserts that this Court should find, categorically, that the Government fails to meet its Moreno and Livak deadline if a ROT if the ROT that is submitted for docketing does not comport with statutory and regulatory requirements. (App. Br. at 8.) Applying this *per se* rule to his case, Appellant argues the presumption of unreasonably delay should be 820 days versus 352 days. (Id.) Appellant argues this 468-day excess should *all* be attributed to the Government even though Appellant asked for 329 days' worth of delay. (Id.) It is unclear why, especially when only 15 days of total delay is attributable to the process of remanding Appellant's record for correction and then re-docketing with this Court.

Appellant claims, "Whether the Government complies with its post-trial processing deadlines by submitting an incomplete ROT for appellate review is a question of law this Court has not explicitly decided." (App. Br. at 7.) This is not correct. Albeit an unpublished case, in Muller, this Court explained, "CAAF has not articulated that a record must be complete to forestall a presumption of post-trial delay." 2021 CCA LEXIS, at *14[2]. In that case, the

[2] Additionally, in

appellant's only EPR, a sentencing prosecution exhibit, was missing from the ROT. Id. at *7. This Court found that the failure to include the exhibit "was not shown to be anything other than simple negligence." Id. at *14-15. Relying on the fact that the omission was not "intentional, much less deliberate," this Court found "no facially unreasonable delay." Id. at *15.

In that regard, the Court distinguished Muller from cases where the Government docketed "[a] plainly deficient record," deliberately omitting evidence on which it relied to convict. United States v. Bavender, No. ACM 39390, 2019 CCA LEXIS 340, at *67, *68 n.28 (A.F. Ct. Crim. App. 23 August 2019) (unpub. op.). Here, the Government did not docket a "plainly deficient record wanting considerably important evidence." Id. The Government docketed a ROT that was missing a singular exhibit.

Moreover, accepting Appellant's argument that the delay in this case is still not over post-docketing because of a missing exhibit could incentivize appellants to delay bringing incomplete records to the Court's attention. That, in turn, will just further delay appellate review. After all, if Appellant had brought the omission of the appellate exhibit to the Court's attention months ago, it could have already been remedied months earlier than it was. While it is the Government's responsibility to compile a complete record of trial, Appellant should not be able to profit from his choice to delay raising the issue to the Court.

Here, like Muller, there is no evidence of ill intent regarding the missing exhibit. On the contrary, the missing exhibit simply seems a matter of inattention to detail. The court reporter who attested to the corrected record confirmed the military judge's ruling was omitted from the original ROT simply due to "error." (*Certificate of Correction*, dated 25 October 2022.) Given that the Government is ultimately responsible for timely post-trial processing, this factor slightly weighs in favor of Appellant. Anderson, 82 M.J. at 87.

Appellant speculates that if this Court allows the Government to docket an incomplete record, such a rule will incentivize the Government to intentionally avoid its regulatory and statutory responsibilities to docket a complete record. There is no evidence to suggest this will be the case. On the contrary, the Government is obligated by statute (Article 54, UCMJ), rule (R.C.M. 1112), and regulation (DAFMAN 51-203) to compile a "complete ROT" before docketing the case with the Air Force Court.

Appellant argues that if this Court tolls the presumption of unreasonable delay when the Government dockets an incomplete ROT, the Government will be encouraged to willfully docket incomplete ROTs "merely to meet processing deadlines." (App. Br. at 9.) But Article 6, UCMJ, mandates "frequent inspections in the field of supervision of the administration of military justice." The administration of military justice, in turn, is governed by DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022. DAFI 51-201 explicitly instructs, "Incomplete ROTs (e.g., records of trial that are missing documents) should not be forwarded to JAJM. Incomplete ROTs will be returned to the responsible legal office and will not be considered transferred to JAJM for purposes of metrics and milestones." Therefore, not only will the Government run the risk that forwarding an incomplete ROT is rejected and returned to them, but they will also be inspected by TJAG pursuant to Article 6 on military justice processing. And so *if* the Government defies its own instructions and *if* JAJM accepts an incomplete record, the Government still runs the risk that they will receiving a failing, or negative, inspection grade for failing to docket complete ROTs. More importantly, there is no evidence of bad faith in this case. Nor is there evidence that the Government intentionally docketed Appellant's case as incomplete to deny him speedy appellate review. This Court should dismiss Appellant's theoretical concerns as speculative.

There are other reasons for the delay that are in large part not attributable to the Government. These are outlined in the Government's initial answer brief and so will not be repeated here. (*See* Answer Br. at 6-7.)

(3) *Appellant's request for speedy post-trial processing*

This factor favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528).

Appellant concedes he did not make a post-trial demand for speedy trial until he filed this brief. (App. Br. at 9.) Furthermore, he did not assert his right to speedy post-trial processing to the convening authority. (*Submission of Matters*, 21 August 2020, ROT, Vol. 1.)

(4) *Prejudice*

This factor favors the Government. The CAAF has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Appellant only raises one type of prejudice—anxiety. (App. Br. at 12.) In an attempt to establish particularized prejudice, Appellant points to six different areas of his life that have been affected by his ongoing appeal. But all of Appellant's claims of prejudice are "unverified and

unverifiable." United States v. Dunbar, 31 M.J. 70, 73 (C.M.A. 1990)[3]. Appellant has not met his burden to show prejudice.

To find a due process violation where there is no prejudice, this Court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey, 63 M.J. at 362. This Court should conclude that the delay in Appellant's case was not so egregious as to impugn the fairness and integrity of the military justice system. A delay like the one in this case is not severe enough to taint public perception of the military justice system. It did not involve years of post-trial delay like in Moreno (over four years), Toohey (over six years), and Bush (over seven years). Furthermore, "there is no indication of bad faith on the part of any of the Government actors." Anderson, 82 M.J. at 88.

While Appellant's case was not initial the model of celerity, he was not harmed by the delay, and it would be a windfall if he was granted sentence relief without showing that he has been harmed. In sum, this Court should decline to find that Appellant's case involved a deprivation of his due process right to speedy post-trial review, and this Honorable Court should deny his requested relief.

Finally, Appellant does not request relief pursuant to United States v. Tardif in his supplemental brief. 57 M.J. 219 (C.A.A.F. 2002). Therefore, the Government relies on the argument in its first brief that Appellant is not entitled to Tardif relay for any delay. (*See* Answer Br. at 12-14.)

Prejudice, then, weighs in the Government's favor.

[3] The United States fully responded to Appellant's claims of particularized anxiety in its original answer and so that response will not be repeated here. (*See* Answer Br. at 9-12.)

## II.

## APPELLANT IS NOT ENTITLED TO "SPECIAL RELIEF" BECAUSE OF A SPEEDY TRIAL VIOLATION THAT OCCURRED AT TRIAL AND AN ALLEGATION OF POST-TRIAL DELAY.

### *Standard of Review*

This Court reviews claims of cumulative error *de novo*[4]. United States v. Pope, 69 M.J. 328, 335 (C.A.A.F. 2011).

### *Law and Analysis*

Appellant argues that he is entitled to "special relief" because of the cumulative effect of a speedy trial violation *and* a post-trial delay. (App. Br. at 12.) Despite having the burden on appeal, and conceding this special relief is "a question of first impression," Appellant cites no law in support of his request. (Id.) Nor is the Government aware of any. It appears Appellant is requesting relief under the cumulative error doctrine.

The doctrine of cumulative error provides that "a number of errors, no one perhaps sufficient to merit reversal, [may] in combination necessitate" relief. United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992) (quoting United States v. Walters, 16 C.M.R. 191, 209 (C.M.A. 1954)). However, "[a]ssertions of error without merit are not sufficient to invoke this doctrine." United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999). In addition, "appellate courts are far less likely to find cumulative error where the record contains overwhelming evidence of a

[4] Due to the novel nature of Appellant's argument, and the lack of case law cited, the Government has analyzed this argument as a request for relief based on the cumulative error doctrine. Should this Court disagree, and instead analyze this Assignment of Error as a claim for entitlement to relief for post-trial delay, the standard of review would still be *do novo*. Livak, 80 M.J. at 633.

defendant's guilt." United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011) (citing United States v. Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996)).

The Court "will reverse only if it finds the cumulative errors denied Appellant a fair trial." Pope, 69 M.J. at 335. In this regard, the Court does "not lightly find reversible error[.]" Banks, 36 M.J. at 171.

Here, while the trial judge did find a speedy trial violation under R.C.M. 707, the trial judge already granted Appellant relief in the form of dismissed charges. (App. Ex. XXVIII at ¶ 26.) Appellant is not entitled to double relief now on appeal. Moreover, the speedy trial issue at issue was a regulatory issue, under R.C.M. 707, as opposed to a Fifth or Sixth Amendment constitutional issue. Appellate delay, conversely, only implicates Due Process under the Fifth Amendment. Therefore, it is illogical to combine a regulatory trial speedy trial violation with a constitutional post-trial delay and analyze them together for purposes of cumulative error.

Even so, taken cumulatively, these alleged errors did not have a substantial impact on the verdict or sentence. Moreover, this court is "far less likely to find cumulative error where the record contains overwhelming evidence of a defendant's guilt." Flores, 69 M.J. at 373. And here, Appellant's guilty plea conclusively established his guilt. Based on the record before this Court, Appellant was not denied a fair trial. This was not a case where the defense was denied exculpatory or favorable evidence that went to the very heart of its theory. *See, e.g.*, Banks, 36 M.J. at 170 (reversing for cumulative error when the military judge erroneously admitted the prosecution's damaging profile evidence that "permeated the trial" while excluding essential defense evidence regarding the same). Appellant raises errors that were more minor than those in Banks. His case does not fall within the ambit of the doctrine of cumulative error and no relief is warranted.

## III.

## THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE DEFENSE'S SECOND SPEEDY TRIAL MOTION.

### *Standard of Review*

This Court reviews the decision of whether an accused has received a speedy trial *de novo* as a legal question, giving substantial deference to a military judge's findings of fact that will be reversed only if they are clearly erroneous. United States v. Mizgala, 61 M.J. 122, 127 (C.A.A.F. 2005) (citations omitted).

### *Law and Analysis*

Appellant contends the military judge abused his discretion in denying relief on the defense's second speedy trial motion because the military judge's analysis of the Barker factors do not align with United States v. Harrington, 81 M.J. 184 (C.A.A.F. 2021), a case that was decided after the military judge's ruling. (App. Br. at 14.) But Harrington did not announce any "changes to the law." United States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019). Harrington did not overrule Barker or change the four-factor Barker test. There is no new law that sprang from Harrington. CAAF in Harrington merely held that the military judge in that case did not abuse his discretion by granting the appellant's motion to dismiss under a different set of facts. 81 M.J. at 185.

Also, Appellant does not contend that any of the military judge's findings of fact were clearly erroneous; rather, he disagrees with the military judge's conclusion to deny relief, as relief was granted in Harrington. Despite having the burden to establish entitlement to relief, Appellant's only argument is: "In this case, the Military Judge stated that 'Here, the reasons for delay were myriad.'" (App. Br., Appendix at 14.) Appellant does not demonstrate how that finding was clearly erroneous or violative of Harrington.

The military judge issued thorough, well-supported findings of fact concerning Appellant's motion at trial, referencing the evidence he received on the issue. The military judge's written ruling was 13 pages long and methodologically marched through all four Barker factors. (App. Ex. XXVIII.) The trial judge was "in the best position" to evaluate the facts and Appellant cannot show a "clear abuse of discretion" with a one-line conclusory argument. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997).

Since the military judge did not abuse his discretion in denying the defense motion at trial, this Court should deny Appellant's request for relief.

## CONCLUSION

**WHEREFORE**, the United States respectfully requests this Court to deny Appellant's claims and affirm the findings and sentence.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 February 2023.

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# APPENDIX H

# *United States v. Lemire*

United States Court of Appeals for the Armed Forces

March 9, 2022, Decided

No. 22-0037/AR.

**Reporter**
2022 CAAF LEXIS 182 *; 82 M.J. 263

U.S. v. Matthew D. Lemire.

**Notice:** DECISION WITHOUT PUBLISHED OPINION

**Prior History:** CCA 20190129 [*1] .

## Opinion

On consideration of Appellant's petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is ordered that said petition is granted, and the decision of the United States Army Court of Criminal Appeals is affirmed.*

End of Document

* It is directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender.

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40290 (f rev)**

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**UNITED STATES**
*Appellee*

**v.**

**Keen A. FERNANDEZ**
Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

*Upon Further Review*

Decided 9 January 2024

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*Military Judge*: Elijah F. Brown.

*Sentence*: Sentence adjudged 28 January 2022 by GCM convened at Hurlburt Field, Florida. Sentence entered by military judge on 16 March 2022: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

*For Appellant*: Major Spencer R. Nelson, USAF.

*For Appellee*: Lieutenant Colonel Thomas J. Alford, USAF; Major Morgan R. Christie, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, CADOTTE, and MASON, *Appellate Military Judges*.

Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge CADOTTE and Judge MASON joined.

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JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone found Appellant guilty, contrary to his pleas, of one specification of wrongfully distributing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for six months, total forfeiture of pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority did not modify the sentence and he provided the adjudged reprimand.

After Appellant's record of trial was docketed with this court, the court discovered a disc constituting one of the prosecution exhibits was cracked and inoperable. Accordingly, this court returned the record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record. *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668, at *1–2 (A.F. Ct. Crim. App. 17 Nov. 2022) (order).

After correction and re-docketing, Appellant raised eight issues which we have reordered and rephrased in part: (1) whether the military judge erred by denying Appellant's motion for a mistrial; (2) whether the military judge should have recused himself; (3) whether the military judge erroneously admitted testimonial statements in violation of the Confrontation Clause of the Sixth Amendment;[2] (4) whether the 18 U.S.C. § 922 firearm prohibition reflected on the Statement of Trial Results is unconstitutional, and whether this court can review that question; (5) whether there was a presumptively unreasonable post-trial delay under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), where a defective exhibit caused this court to remand and re-docket the record of trial; (6) whether the military judge erred in denying Appellant's motion to require a unanimous verdict; (7) whether Appellant is entitled to relief because Air Force Office of Special Investigation (OSI) agents asked for his phone passcode after he invoked his right to remain silent; and (8) whether the Government was allowed to prefer a new charge and specification against Appellant after a preliminary hearing officer determined probable cause was lacking for the original charge and specifications, which the convening authority dismissed.[3] We have carefully considered issues (6), (7), and (8), and find they do not require discussion or relief. *See United States v. Matias*, 25 M.J. 356,

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[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

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

[3] Appellant personally raises issues (7) and (8) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

361 (C.M.A. 1987). As to the remaining issues, as described below we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

## I. BACKGROUND

Appellant was born in the Philippines and moved to the United States when he was 13 years old. He joined the Air Force in January 2019, and his first permanent duty station was Cannon Air Force Base (AFB), New Mexico. On 11 December 2019, Appellant sent two videos via Facebook Messenger to an individual in the Philippines. Each video depicted an unidentified female apparently under the age of 18 years engaged in sexually explicit conduct. As a result, Facebook sent a report to the National Center for Missing and Exploited Children (NCMEC), which in turn sent its own report to the New Mexico Attorney General's Internet Crimes Against Children (ICAC) unit. Both reports identified Appellant as the sender of the videos and were accompanied by copies of the videos. An analyst in the ICAC unit reviewed one of the videos and confirmed it depicted apparent sexually explicit conduct involving a child. Information in the NCMEC report indicated Appellant was an Air Force member stationed at Cannon AFB; accordingly, the analyst referred the case to the OSI.

During their investigation, OSI agents obtained directly from Facebook evidence of Appellant's activity on Facebook Messenger, including copies of the same two videos Facebook originally reported to NCMEC as well as records of messages indicating Appellant distributed the two videos to another user. Appellant's messages discussed the contents of the videos with the other user. Among other comments, Appellant asked "isn't it weird" that Appellant "like[d] those videos :)."[4]

## II. DISCUSSION

### A. Motion for Mistrial

#### 1. Additional Background

During the Government's case in chief, trial counsel called a pediatrician, Dr. KG, to testify about the physical characteristics and likely age of the females depicted in the two videos Appellant distributed. During the direct examination, trial counsel played the two videos so that the military judge, witness, counsel, and court reporter could view them, but the spectators in the

[4] These messages originally were written in Cebuano and later translated into English.

courtroom could not. During cross-examination, the court reporter, Ms. N, abruptly withdrew from the courtroom. The military judge called a recess.

When proceedings resumed one hour and 21 minutes later, trial counsel announced that a replacement court reporter had been detailed.[5] The military judge described three conferences he held with counsel during the recess in accordance with Rule for Courts-Martial (R.C.M.) 802, which related to communications during the recess between Ms. N and the military judge, and between the military judge and counsel. The military judge allowed trial defense counsel to voir dire him. During the questioning, the military judge explained in more detail his observations and understanding of what had occurred with respect to Ms. N:

> The first time I noticed something was amiss was during the [D]efense's cross-examination when suddenly [Ms. N] scooted her chair back, moved her hand up to her mouth and said, "I'm sorry, I can't," and at that point she stepped down from the court reporter box and then went into the judge's chambers. So what I -- I put the court into recess, and my immediate concern was what was happening with Ms. [N] and whether she was having some kind of medical issue, medical emergency. Because she had motioned with her hand to her mouth it looked like she was feeling nauseous, as opposed to suffering from something like chest pains or something that might be indicative of some sort of cardiovascular issue. And so, if I remember correctly, once the court was in recess I walked into my judge's chambers -- into the judge's chambers. At that point Ms. [N] was not there in the chambers and I thought she must be somewhere else in the building, maybe in a restroom. But when I came back out to the bench to retrieve my laptop and some books and the witness, Dr. [KG], was still on the stand, he offered what I understood as some sort of assistance in case there was some sort of medical issues, and because, I understand he is a pediatrician, I understood that as an offer of some sort of medical assistance, should that be necessary. And I responded to Dr. [KG] as saying, "I think it's nausea," or something to do with nausea based on her motioning with her hand to her mouth. And so at that point I wasn't sure why she was experiencing a feeling of nausea. . . . I

[5] This replacement court reporter had served as court reporter for the arraignment and motions hearing held three months earlier. On both occasions, he participated in the proceedings via video-teleconference with the assistance of a paralegal present in the courtroom.

> thought, perhaps, maybe that is something that would happen here, she was ill, that the main question is[:] what impact would that have on these proceedings and whether we can continue or whether there would be a delay. When I returned -- I think at that point actually I said, "Counsel, could we have an [R.C.M.] 802 [conference]?" I don't remember if the counsel initiated that or if I said, "Counsel, let's have an 802," and we began to approach the judge's chamber. When I walked into the judge's chamber I saw that Ms. [N] was exiting the adjacent bathroom that's in the judge's chamber, and seemed to be apologizing. And so I thought, since I didn't know what her condition was, rather than have all of the parties crowd into the room I thought I would ask her what was happening, what was going on. And so I think I told the counsel to stand by. At that point I spoke with Ms. [N], and she was repeatedly apologizing, saying, "I'm sorry, I'm sorry. It's just that the evidence that I saw had an unexpected impact on me. I just felt ill." I asked her if she had -- at some point I asked her, "Well, how long have you been a court reporter? Are you -- do you think you can continue, you know, serving as a court reporter in this case if you take some time? Maybe take a walk, get some fresh air," and she indicated that she believed that she could if she had a break. And so that led me to believe that this was not a medical situation at all, it was her emotional reaction that she experienced to the evidence. At that point I asked counsel to come back into the [R.C.M.] 802 [conference] and I explained what had just transpired.

As stated above, Ms. N did not return to the court-martial, and she was replaced as the court reporter. In response to additional questioning by trial defense counsel, the military judge asserted he had "zero concerns about any impact on [his] ability to impartially assess the evidence." The military judge expressed surprise at Ms. N's reaction, given her long experience as a court reporter and that "the subject that's been charged in this case is commonly charged in Air Force courts-martial." The military judge stated he did not view Ms. N's reaction as "reflecting anything about the evidence itself," that it impacted him "not at all," and that it did not "change [his] analysis of the evidence whatsoever." In response to questioning by trial counsel, the military judge agreed that in judge-alone trials military judges are commonly called upon to determine whether evidence is admissible, and to not consider inadmissible evidence when determining guilt or innocence.

Trial defense counsel then called Chief Master Sergeant (CMSgt) RS, who was present in the courtroom observing the trial when Ms. N abruptly exited. CMSgt RS testified regarding his observations:

> When the video first started showing I noticed the court reporter started to watch the video. A few seconds later she started looking away toward her left and to her right, and then moments later she started covering her face with a white paper, I think it's an 8 x 11 white paper. And then suddenly she stood up and reached out to the judge and walked out.

CMSgt RS testified that "[a]s a spectator in the back," he felt "like [Ms. N] saw something disgusting, and it might influence the decision of the case." However, he further testified that he "trust[ed] the judge" was "going to make the right decision for the case," and agreed that he had "confidence" in "this specific judge."

The military judge then heard argument from counsel on an oral defense motion for a mistrial. Trial defense counsel argued such a mistrial was warranted due to the court reporter's reaction to the evidence, "her unique position . . . [,] how the public viewed her, and [ ] her interactions with" the military judge, because "the perception of fairness has been impeded." In response, trial counsel cited case law to the effect that a mistrial is a "drastic remedy" to be granted "only as a last resort to protect and guarantee a fair trial," and emphasized that military judges are expected to evaluate admissible evidence without considering irrelevant matters.

After a recess, the military judge issued an oral ruling denying the Defense's motion for a mistrial. After stating his findings of fact—which were consistent with his voir dire and the testimony of CMSgt RS—and reciting the applicable law, the military judge explained:

> I find that Ms. [N]'s displaying a visible reaction to evidence offered by the [G]overnment, her abruptly leaving the courtroom during the [D]efense's cross-examination, and the military judge having a conversation with her following her departure, does not cast substantial doubt upon the fairness of the proceedings, such that declaring a mistrial is manifestly necessary in the interests of justice. In reaching this finding I considered the forum of the court, which is military judge alone. Ms. [N]'s behavior had and will have no bearing whatsoever on the court's evaluation on the evidence in this case. Additionally, the court has no concerns at all about its ability to disregard entirely what transpired with the court reporter. Since it is a judge[-]alone case I am confident I can and will disregard her behavior entirely.

The trial then resumed with the continued cross-examination of Dr. KG.

**2. Law**

"A military judge has discretion to 'declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.'" *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013) (quoting R.C.M. 915(a)). Mistrial is "'a drastic remedy' which should be used only when necessary 'to prevent a miscarriage of justice.'" *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999) (quoting *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991)). "A military judge has a superior vantage point over appellate courts in making this determination and thus gets 'considerable latitude in determining when to grant a mistrial.' We will not reverse a military judge's determination unless there is 'clear evidence of abuse of discretion.'" *United States v. Flores*, 80 M.J. 501, 507 (C.A.A.F. 2020) (quoting *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)).

> A military judge abuses his or her discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts.

*United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).

A military judge is "presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted).

**3. Analysis**

On appeal, Appellant asserts the military judge abused his discretion in three ways when he denied the motion for a mistrial. First, Appellant contends the military judge failed to "fully consider" that "he made himself a witness in this case." Second, Appellant argues the military judge "failed to analyze whether he should have recused himself because he made himself a witness." Third, Appellant claims the military judge unreasonably applied the applicable law to the facts because the military judge "did not explain *why* no 'substantial doubt' would be cast upon the fairness of the proceedings even though [Appellant] had chosen a [m]ilitary [j]udge[-]alone forum." We address each point in turn.

We disagree with the premise of Appellant's first point, that the military judge became a witness. Appellant is correct that Mil. R. Evid. 605(a) prohibits the presiding military judge from "testify[ing] as a witness at any proceeding of that court-martial." However, a military judge does not become a testifying

witness, and therefore disqualified, merely by answering voir dire questions posed by counsel. *See, e.g.*, R.C.M. 902(d)(2) ("Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter."); *United States v. King*, No. ACM 39583, 2021 CCA LEXIS 415, at *30, 35 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.) (noting the military judge "permitted the [d]efense an extensive opportunity to voir dire him" and did not abuse his discretion by declining to recuse himself), *aff'd on other grounds*, 83 M.J. 115 (C.A.A.F. 2023). Moreover, military judges are charged with "exercis[ing] reasonable control over the proceedings." R.C.M. 801(a)(3). In this case, those proceedings were brought to an unexpected halt when the court reporter abruptly left the courtroom. We find nothing untoward in the military judge calling a recess and briefly investigating the cause of the disruption and the court reporter's status—particularly where the military judge kept the parties informed through multiple R.C.M. 802 conferences and the opportunity to voir dire him. Ms. N herself was not a witness in the case, and the military judge did not discuss evidentiary matters with her beyond a very brief reference to what they had both already observed during the court-martial. In short, the military judge did not depart from his role as the presiding judge, and he had not become a "witness" that such a status should have factored into his analysis of the motion for a mistrial.

As to Appellant's second point, because the military judge had not become a "witness," he had no cause to recuse himself on that basis, nor to factor such a recusal into his mistrial analysis. Whether the military judge erred in failing to recuse himself *sua sponte* is a distinct assignment of error we analyze below.

Appellant's third point—that the military judge failed to adequately explain his reasoning—is also unpersuasive. A "mistrial is an unusual and disfavored remedy" to "be applied only as a last resort," *Diaz*, 59 M.J. at 90 (citation omitted), and the military judge's determination that it was unnecessary is entitled to considerable deference. In this case, the military judge made findings of fact supported by the record, recited the applicable standards, and explained why Ms. N's reaction would have no improper influence on the court and why observers could be confident in the integrity of the proceedings. Absent evidence to the contrary, military judges are presumed to disregard inadmissible and irrelevant matters during their deliberations. Nothing in the record before us undermines the presumption the military judge could disregard Ms. N's reaction when deciding the merits of the case, or otherwise indicates the military judge abused his discretion when he denied the mistrial motion.

**B. Military Judge Disqualification**

**1. Additional Background**

The relevant additional background is the same as that for the military judge's denial of the motion for a mistrial, Section II.A.1, *supra*.

**2. Law**

We review a military judge's decision whether to recuse himself for an abuse of discretion. *United States v. Sullivan*, 74 M.J. 448, 454 (C.A.A.F. 2015) (citations omitted). However, "[w]hen an appellant . . . does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (citing *United States v. Jones*, 55 M.J. 317, 320 (C.A.A.F. 2001)). An appellant is entitled to relief for plain error "where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused." *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (citation omitted).

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (citations omitted). Rule for Courts-Martial 902(a) requires disqualification "in any proceeding in which th[e] military judge's impartiality might reasonably be questioned." Disqualification pursuant to R.C.M. 902(a) is determined by applying an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *Sullivan*, 74 M.J. at 453 (citing *United States v. Hasan*, 71 M.J. 416, 418 (C.A.A.F. 2012)). In addition, R.C.M. 902(b)(3) provides a military judge shall disqualify himself where he "has been or will be a witness in the same case." *See also* R.C.M. 902(b)(5)(C) (disqualifying a military judge who "[i]s to the military judge's knowledge likely to be a material witness in the proceeding").

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001) (citation omitted). "Although a military judge is to 'broadly construe' the grounds for challenge, he should not leave the case 'unnecessarily.'" *Sullivan*, 74 M.J. at 454 (quoting R.C.M. 902(d)(1), Discussion).

**3. Analysis**

Appellant contends the military judge's interactions with the court reporter, Ms. N, after she withdrew from the courtroom, and his subsequent voir dire by counsel, made him a witness in the case and therefore disqualified him under R.C.M. 902(b)(3). Because Appellant makes this argument for the first

time on appeal, we review for plain error. We find the military judge did not plainly or obviously err by failing to recuse himself *sua sponte*.

As noted above in relation to the mistrial motion, the Rules for Courts-Martial indicate a military judge does not become a witness in the case merely because counsel ask him questions through voir dire. Rule for Courts-Martial 902(d)(2) permits parties to question the military judge on an issue of possible disqualification "*before* the military judge decides the matter," which necessarily implies the fact of voir dire does not per se disqualify a military judge. (Emphasis added). Moreover, in this case the nature of the voir dire related to the military judge's role in exercising reasonable control over the court-martial proceedings by briefly investigating the reason for Ms. N's abrupt departure from the courtroom. *See* R.C.M. 801(a)(3). The questioning did not directly relate to the substance of the offenses or factfinding related to presentencing proceedings. Allowing voir dire was an appropriate step to help ensure the parties and public (and appellate courts) were fully informed as to whether there was any cause to declare a mistrial or for the military judge to recuse himself. For the reasons explained *supra* in relation to issue (1), we found the military judge did not abuse his discretion by denying the mistrial motion; we are also satisfied the military judge did not plainly err by failing to recuse himself *sua sponte* on the grounds that he had become a "witness" in the case or that his impartiality might reasonably be questioned.

**C. Confrontation Clause**

**1. Additional Background**

The Government's first witness for findings was Ms. HR, a criminal analyst who worked for the New Mexico Attorney General's ICAC unit. Ms. HR explained her role was to receive "CyberTips" from NCMEC reporting possible child exploitation. Ms. HR testified she received such a report from NCMEC regarding Appellant. Trial counsel then presented Ms. HR with Prosecution Exhibit 4 (PE 4), which Ms. HR agreed was "a fair and accurate representation of the [document] portion of the CyberTip."

Trial counsel then offered PE 4 into evidence. The military judge asked trial defense counsel whether there was any objection. The record reflects the following subsequent exchange:

> [Trial Defense Counsel]: I didn't actually see the document from the copy that we have.
>
> [Military Judge]: Trial Counsel, could you please show a copy to defense counsel?
>
> [Trial counsel and [trial] defense counsel conferred.]
>
> [No objection from [D]efense.]

(Third and fifth alteration in original). The military judge then admitted PE 4 while "not[ing] for the record that there appear[ed] to be a number of redactions in the document."

Trial counsel then had Ms. HR review and comment on various portions of PE 4. The exhibit consisted of 12 pages divided into four sections. Unredacted portions of "Section A: Reported Information" contained information provided by the "Electronic Service Provider" (Facebook) which reported the suspected child pornography to NCMEC. This section contained significant details about the "Suspect" (Appellant), including *inter alia* his name, phone number, date of birth, email addresses, Facebook profile, and estimated location at the time of the reported incident, as well as the name and certain personal information of the "recipient of the reported content." Section A further indicated Facebook had uploaded three files to NCMEC associated with the reported incident, including two video files of "child exploitation imagery," one of which Facebook personnel had viewed. "Section B: Automated Information Added by NCMEC Systems," is largely redacted, but a subsection labeled "Geo-Lookup (Suspect)" identified three geographic areas—one in the Philippines and two in New Mexico—as well as Internet Protocol (IP) addresses and Internet Service Providers (ISPs) associated with the incident. "Section C: Additional Information Provided by NCMEC" was also largely redacted, but provided the date NCMEC processed the report, categorized the report as "Apparent Child Pornography (Unconfirmed)," indicated NCMEC did not review the uploaded files, and stated NCMEC had reported the matter to law enforcement. Finally, "Section D: Law Enforcement Contact Information" provided contact information for the New Mexico Attorney General's office.

Trial counsel then presented Ms. HR with Prosecution Exhibit 5 (PE 5), a disc containing an electronic version of the NCMEC report and the three files Facebook had uploaded with the report. After Ms. HR identified these as the files she received from NCMEC, trial counsel offered PE 5 into evidence. Trial defense counsel objected to admission of one of the video files on lack of authentication grounds. After hearing argument from counsel, the military judge overruled the objection. The two video files contained in PE 5 appear to depict actual minors engaged in sexually explicit conduct.

Ms. HR further testified that after she received the NCMEC report, she viewed one of the videos which depicted "a pubescent male engaged in sexual acts with a prepubescent female" who appeared to be under the age of 18 years. Ms. HR determined from Appellant's Facebook profile that Appellant was an Airman stationed at Cannon AFB. Therefore, she referred the case to the OSI.

Subsequent prosecution findings witnesses included, *inter alia*, the case agents for the OSI's investigation of Appellant. The agents described investigative steps the OSI took after Ms. HR referred the case to the Air Force. As a

result of these steps, the OSI obtained evidence regarding Appellant directly from Facebook. This evidence included copies of the same two videos of apparent child pornography that had been uploaded with the NCMEC report and admitted as PE 5, as well as records of Facebook Messenger exchanges involving Appellant indicating he distributed the same two videos to a recipient in the Philippines. The Government introduced these videos and messages at trial as additional prosecution exhibits.

**2. Law**

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (footnote omitted).

"[A] statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011) (quoting *United States v. Blazier*, 68 M.J. 439, 442 (C.A.A.F. 2010)). "[M]achine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not 'testimonial.'" *United States v. Blazier*, 69 M.J. 218, 224 (C.A.A.F. 2010) (footnote and citations omitted). Chain of custody documents may also be non-testimonial. *United States v. Tearman*, 72 M.J. 54, 59 (C.A.A.F. 2013).

Whether a statement is testimonial for purposes of the Sixth Amendment is a question of law we review de novo. *United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020) (citation omitted). However, when an appellant did not object to the admission of evidence at trial, we must determine whether the appellant forfeited or waived the objection. *United States v. Bench*, 82 M.J. 388, 392 (C.A.A.F. 2022) (citation omitted), *cert. denied*, 143 S. Ct. 580 (2023). "[F]orfeiture is the failure to make the timely assertion of a right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Waiver occurs when an accused intentionally relinquishes or abandons a known right, but it may also occur by operation of law. *Bench*, 82 M.J. at 392 (citation omitted). However, appellate courts apply a presumption against finding waiver of constitutional rights. *Id.* (citation omitted).

We review forfeited issues for plain error. *Jones*, 78 M.J. at 44 (citation omitted). "When a constitutional issue is reviewed for plain error, the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id*. (citation omitted).

**3. Analysis**

Appellant contends the military judge plainly erred by admitting PE 4 and the "accompanying images" in PE 5 because PE 4 contained testimonial statements in violation of the Confrontation Clause under *Crawford*. Appellant therefore asks us to set aside the findings of guilty and the sentence. In response, the Government contends: (1) Appellant waived his Confrontation Clause objection; and (2) PE 4 contained only machine-generated data rather than testimonial hearsay.

We do not find waiver. We acknowledge PE 4 appears to have been redacted to remove certain narrative portions, likely in an effort to remove objectionable statements. We further acknowledge the record suggests PE 4 was offered in the redacted form trial defense counsel anticipated. However, the record is not clear that there was an affirmative, intentional relinquishment of Appellant's rights under the Confrontation Clause. It is possible the Defense only considered whether to object on hearsay or other non-constitutional grounds. In light of the presumption against finding waiver of constitutional rights, we are not persuaded the record "*clearly established* that there was an intentional relinquishment of a known right." *Sweeney*, 70 M.J. at 303 (emphasis added) (citation omitted). Accordingly, we find Appellant forfeited the objection and we review for plain error.

The parties disagree as to whether PE 4 contained "testimonial statements" for purposes of Confrontation Clause analysis. However, Appellant is not entitled to relief if we conclude beyond a reasonable doubt the asserted error did not materially prejudice Appellant's substantial rights. In the context of an alleged constitutional error, that standard is met where we find "no reasonable possibility that the error might have contributed to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citation omitted).

Assuming *arguendo* the military judge plainly erred by admitting PE 4, in this case we find no reasonable possibility the asserted error influenced the guilty finding. First, the exclusion of PE 4 would not have been fatal to the admission of the two videos of apparent child pornography in PE 5 the Government admitted through the testimony of Ms. HR. Those videos were not testimonial statements and therefore did not implicate the Confrontation Clause.

More importantly, even if neither PE 4 nor PE 5 had been admitted, the Government introduced equivalent evidence—and more—that the OSI obtained directly from Facebook during its investigation. This included not only the same two videos of apparent child pornography included in PE 5, admitted as additional prosecution exhibits, but also records of Facebook messages demonstrating Appellant intentionally distributed the videos to another individual, and that he had viewed the videos before he sent them. Without PE 4

and PE 5, the strength of the Government's proof that Appellant distributed child pornography in violation of Article 134, UCMJ, would have been essentially unchanged. Moreover, whether Appellant distributed the videos was not a contested issue in this case; instead, the Defense suggested the Government failed to prove the videos depicted actual minors, that Appellant knew the videos depicted actual minors, or that his conduct was service discrediting. Thus, the data in PE 4 associating Appellant with the two videos played a negligible role in overcoming the Defense's chosen strategy.

Because we are satisfied beyond a reasonable doubt the admission of PE 4 and the "accompanying images" in PE 5 did not materially prejudice Appellant's substantial rights, Appellant is not entitled to relief.

**D. Firearm Prohibition**

**1. Additional Background**

The Statement of Trial Results (STR) and entry of judgment (EoJ) in the instant case—signed by the military judge in accordance with R.C.M. 1101 and R.C.M. 1111, respectively—have attached indorsements from the convening authority's staff judge advocate which recite, *inter alia*, "[t]he following criminal indexing is required . . . Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes . . . ." The indorsements do not specify which subsections of 18 U.S.C. § 922 trigger the firearm prohibition in Appellant's case.

**2. Law**

We review questions of jurisdiction de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019) (citing *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016)). "The burden to establish jurisdiction rests with the party invoking the court's jurisdiction." *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Statutory interpretation is also a question of law this court reviews de novo. *United States v. Buford*, 77 M.J. 562, 564 (A.F. Ct. Crim. App. 2017) (citation omitted). "Proper completion of post-trial processing is [also] a question of law this court reviews de novo." *United States v. Valentin-Andino*, 83 M.J. 537, 541 (A.F. Ct. Crim. App. 2023) (citation omitted).

"The [C]ourts of [C]riminal [A]ppeals [(CCAs)] are courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). This court's authority to review the results of Appellant's court-martial is governed by Article 66, UCMJ, 10 U.S.C. § 866. Article 66(d), UCMJ, provides that a CCA "may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c]." 10 U.S.C. § 866(d).

18 U.S.C. § 922(g) provides, in part:

> It shall be unlawful for any person[ ] who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

In *United States v. Lepore*, this court held it lacked authority under a previous version of Article 66, UCMJ (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)), to direct correction of an 18 U.S.C. § 922(g) firearms prohibition annotated on a court-martial promulgating order. 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc).

**3. Analysis**

Relying on *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), and *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023), Appellant contends the Government cannot meet its burden to demonstrate the 18 U.S.C. § 922(g) firearm prohibition recited in the indorsements to the STR and EoJ are "consistent with the nation's historical tradition of firearm regulation" and therefore lawful in accordance with the Second Amendment.[6] Appellant accordingly "requests this [c]ourt find the Government's firearm prohibition is unconstitutional . . . ."[7] However, we find this court lacks statutory authority to decide the question.

This court's opinion in *Lepore* would appear to control resolution of the issue. There we explained that Article 66(c), UCMJ (2016 *MCM*), "specifically limit[ed] our authority such that we 'may only act with respect to the findings and sentence' of a court-martial 'as approved by the convening authority.'" *Lepore*, 81 M.J. at 762 (quoting 10 U.S.C. § 866(c)). We held that because the allegedly erroneous 18 U.S.C. § 922(g) firearm prohibition annotation on the promulgating order in that case was a collateral consequence of the conviction, and "not a finding or part of the sentence, nor [a matter] subject to approval by the convening authority," it was beyond our statutory authority to correct. *Id.* at 763 (citations omitted). As Appellant notes, *Lepore* was decided under a previous version of Article 66(c), UCMJ (2016 *MCM*), and the relevant restrictive language has since moved to Article 66(d), UCMJ—in a slightly modified form accounting for the advent of entry of judgment in accordance with Article 60c, UCMJ. However, the limitation that the CCA "may act only with respect to the

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[6] U.S. CONST. amend. II.

[7] Appellant additionally requests this court "order that the Government correct the [STR] to reflect which subsection of [18 U.S.C.] § 922 it used to prohibit his firearm possession."

findings and sentence" is unchanged. 10 U.S.C. § 866(d). The firearms prohibition remains a collateral consequence of the conviction, rather than an element of the findings or sentence, and is therefore beyond our authority to review.

Appellant contends the unpublished decision of the United States Court of Appeals for the Armed Forces (CAAF) in *United States v. Lemire*, 82 M.J. 263 (C.A.A.F. 2022) (mem.), contravenes *Lepore*, which Appellant urges us to overrule. The text of the CAAF's decision in *Lemire* reads, in its entirety: "On consideration of [the a]ppellant's petition for grant of review of the decision of the United States Army Court of Criminal Appeals [ACCA], it is ordered that said petition is granted, and the decision of the [ACCA] is affirmed." *Id.* Appellant focuses on the single footnote, which reads: "It is directed that the promulgating order be corrected to delete the requirement that [the a]ppellant register as a sex offender." *Id.* at 263 n*. Appellant argues that *Lemire* demonstrates: (1) the CAAF has the power to order corrections to administrative errors in promulgating orders; (2) the CAAF "believes that [CCAs] have the power to address collateral consequences under Article 66[, UCMJ,] since it 'directed' the [ACCA] to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender;" and (3) CCAs also must have the power to address constitutional errors in promulgating orders even if they relate to collateral consequences of the conviction.

We are not persuaded. Even if we accept that the sex offender registration requirement referred to in *Lemire* is analogous to the firearms prohibition in Appellant's case,[8] we do not find that decision vitiates this court's published opinion in *Lepore*.

First, the circumstances and reasoning behind the CAAF's direction to correct the promulgating order are opaque. Neither the CAAF's unpublished summary disposition nor the ACCA's summary per curiam opinion provide information about the circumstances of the case. *See Lemire*, 82 M.J. at 263; *United States v. Lemire*, No. ARMY 20190129, 2021 CCA LEXIS 461 (A. Ct. Crim. App. 13 Sep. 2021) (per curiam) (unpub. op.), *aff'd*, 82 M.J. 263 (C.A.A.F. 2022). Accordingly, we cannot discern the rationale behind the CAAF-ordered correction—for example, whether the sex offender registration notation was a clerical error, or whether some deeper legal principles and analysis were involved.

Second, Appellant is incorrect when he asserts the CAAF "directed" the ACCA "to fix—or have fixed" the promulgating order. The CAAF's decision in

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[8] *Cf. United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006) (describing sex offender registration as a collateral consequence of conviction "separate and distinct from the court-martial process"). *But cf. United States v. Riley*, 72 M.J. 115, 121 (C.A.A.F. 2013) ("[W]e hold that in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea.").

*Lemire*, quoted in its entirety above, does not direct the ACCA to do anything. Notably, it affirms the ACCA's decision without remanding the case to ACCA for any purpose. Presumably its direction to correct the promulgating order was directed to "an appropriate convening authority." *See* R.C.M. 1114(b)(2)(B) (2016 *MCM*). Accordingly, *Lemire* does not imply the CAAF believes the CCAs have the authority to address alleged constitutional errors relating to collateral consequences of a court-martial conviction annotated on promulgating orders.

Third, this court's unanimous, en banc, published decision in *Lepore* reflects the consistent recent trend of this court's opinions finding collateral consequences of a court-martial are beyond our statutory authority to review. *See Lepore*, 81 M.J. at 762 (citing cases in which this court found it lacked jurisdiction "where appellants have sought relief for alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence" (citations omitted)). We do not find any aspect of Appellant's case gives us cause to revisit or overrule the decision in *Lepore*.

Accordingly, we do not address the substance of Appellant's argument that the 18 U.S.C. § 922(g) firearms restriction is unconstitutional in this case.

**E. Post-Trial Delay**

**1. Additional Background**

The military judge sentenced Appellant on 28 January 2022. Appellant's record of trial was initially docketed with this court on 10 June 2022. Appellant subsequently moved for and, over the Government's opposition, was granted three enlargements of time in which to submit his assignments of error, until 7 December 2022.

On 4 November 2022, Appellant moved to examine certain sealed material in the original record of trial. As a result, this court discovered a disc constituting a sealed prosecution exhibit was cracked and inoperable. Accordingly, on 17 November 2022, this court returned the record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for correction. The defective exhibit was replaced via a certificate of correction dated 15 December 2022, and the corrected record was re-docketed with this court on 19 December 2022.

Appellant thereafter requested and received an additional enlargement of time before filing his assignments of error on 3 April 2023. The Government requested and was granted one enlargement of time before filing its answer brief on 2 June 2023. Appellant submitted a reply brief on 8 June 2023.

**2. 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 [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. 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.

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 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. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

**3. Analysis**

***a. Pre-Docketing Delay***

Appellant contends the 325 days which elapsed between his sentencing on 28 January 2022 and the re-docketing of the corrected record of trial on 19 December 2022 amounts to a facially unreasonable delay. Although Appellant's case was originally docketed with this court only 133 days after he was sentenced—within the 150-day standard established by *Livak*—Appellant argues "[t]his [c]ourt should find that the Government fails to meet its *Moreno* and *Livak* deadline if the [record] it submitted for docketing does not comport with statutory and regulatory requirements." Appellant contends that our failure to do so will "incentivize" the Government to, in effect, prioritize speed over accuracy, increasing the likelihood that this court will need to remand the record for correction and ultimately delaying our final decision in the case. Having

asserted a facially unreasonable delay, Appellant does not provide a full analysis of the *Barker* factors or allege any specific prejudice. However, Appellant implies this court should find a due process violation and requests we not approve the adjudged bad-conduct discharge.

We decline to interpret *Moreno* and *Livak* in the manner Appellant suggests. To do so would be contrary to the plain meaning of those opinions. In *Moreno*, the CAAF stated the presumption of unreasonable delay applies "where the record of trial is not docketed" by the CCA within the specified time frame. 63 M.J. at 142. As applied by *Livak*, that timeframe is within 150 days of sentencing. 80 M.J. at 633. In Appellant's case, the record *was* docketed within 150 days, and therefore the per se facially unreasonable sentencing-to-docketing delay does not apply. Appellant does not direct our attention to any ruling by the CAAF or this court holding that a subsequent remand by the CCA to correct one or more errors in the record effectively extends or reopens the period under consideration for facially unreasonable delay until the corrected record is re-docketed, and we are aware of none. *Cf. United States v. Gammage*, No. ACM S32731 (f rev), 2023 CCA LEXIS 528, at *5–6 (A.F. Ct. Crim. App. 15 Dec. 2023) (unpub. op.) (finding original docketing of record with CCA 55 days after sentencing "categorically complied" with 150-day *Livak* standard for facially unreasonable delay despite subsequent remand due to incomplete record of trial).

On the other hand, neither the CAAF nor this court has held that the specific time standards in *Moreno* are the exclusive means by which an appellant may demonstrate a facially unreasonable delay for due process purposes. *See United States v. Greer*, No. ACM 39806 (f rev), 2022 CCA LEXIS 411, at *15 (A.F. Ct. Crim. App. 18 Jul. 2022) (unpub. op.) (citing *United States v. Swanson*, No. ACM. 38827, 2016 CCA LEXIS 648, at *21 (A.F. Ct. Crim. App. 27 Oct. 2016) (unpub. op.)). Put another way, *Moreno* and *Livak* are a shield for an appellant's due process rights, not a sword for the Government to wield against appellants. Accordingly, a facially unreasonable delay could potentially have occurred between Appellant's sentencing on 28 January 2022 and initial docketing on 10 June 2022. However, Appellant has not alleged such a delay, and we discern none from the record. Accordingly, we find no violation of Appellant's due process rights during the period prior to docketing.

Recognizing our authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d), we have also considered whether relief for excessive post-trial delay is appropriate for delay between sentencing and docketing. *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.

***b. Appellate Delay***

Next we consider whether Appellant is entitled to relief for post-docketing delay—that is, any delay that occurred after initial docketing on 10 June 2022. Over 18 months have elapsed since Appellant's record of trial was originally docketed. Assuming for purposes of our analysis that the November 2022 remand and December 2022 re-docketing of the record did not "reset" the *Moreno* timeline, there is a facially unreasonable delay in the appellate proceedings. Accordingly, we have considered the *Barker* factors to assess whether Appellant suffered a due process violation. However, because Appellant has suffered no cognizable prejudice, we will find a due process violation only if delays were so egregious as to affect the public's perception of the fairness and integrity of the military justice system. *See Toohey*, 63 M.J. at 362.

With respect to the length of the delay, although we assume for purposes of our analysis it is facially unreasonable, we do not find it is egregious or weighs heavily in Appellant's favor. Appellate review has exceeded the *Moreno* standard by less than one month.

We similarly find the reasons for delay are not egregious. We have specifically considered the delays associated with the remand as part of our analysis. In this case, the deficiency in the record was a damaged exhibit rather than a missing one. The Government is required to include functional exhibits in the record, but the fact that the exhibit was present rather than missing entirely made the error less obvious. Moreover, the fact that it was a sealed exhibit meant (a) it was not included in most copies of the record of trial, and (b) a very limited number of people had authority to view or inspect the disc. Furthermore, it is unclear at what point in time the disc was damaged; it is possible the Government had no practical opportunity to inspect the disc after it was damaged. In addition, we note that once the record was remanded to the Chief Trial Judge, it took approximately one month to accomplish the correction and re-docket the record. As for other contributing reasons for delay, we note much of the elapsed time is attributable to the time afforded Appellant to file his assignments of error, augmented by several motions for enlargements of time. Although the five-volume record of trial is not especially voluminous, we do not find the reasons for delay, considered together, to undermine the public's perception of the fairness or integrity of the military justice system.

Appellant has not made a demand for speedy appellate review. Although Appellant's assignment of errors asserted the delay between his sentencing and the post-remand re-docketing was facially unreasonable, complaining about a past delay is distinct from demanding speed at the present time. Accordingly, we find this factor weighs against finding a due process violation.

As stated above, Appellant asserts no qualifying particularized prejudice from the delay, and we perceive none.

For the foregoing reasons, we find the delay is not so egregious as to impugn the fairness or integrity of the military justice system. Accordingly, we find no violation of Appellant's due process rights.

Again mindful of our Article 66, UCMJ, authority to grant relief for appellate delay in the absence of a due process violation, we have considered whether such relief is appropriate and find it is not. *See Tardif*, 57 M.J. at 225; *Gay*, 74 M.J. at 742.

## III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40341**

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**UNITED STATES**
*Appellee*

**v.**

**Thomas M. SAUL**
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 29 December 2023

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*Military Judge*: Christopher D. James.

*Sentence*: Sentence adjudged 15 April 2022 by GCM convened at Tinker Air Force Base, Oklahoma. Sentence entered by military judge on 15 June 2022: Bad-conduct discharge, confinement for 9 months, forfeiture of $1,000.00 pay per month for 9 months, reduction to E-2, and a reprimand.

*For Appellant*: Major Spencer R. Nelson, USAF.

*For Appellee*: Colonel Zachary T. Eytalis, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, GRUEN, and KEARLEY, *Appellate Military Judges*.

Judge GRUEN delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge KEARLEY joined.

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GRUEN, Judge:

A military judge sitting as a general court-martial found Appellant guilty, in accordance with his pleas, of one specification of willfully disobeying a superior commissioned officer in violation of Article 90, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 890, and one specification of wrongful destruction of non-military property under a value of $1,000.00 in violation of Article 109, UCMJ, 10 U.S.C. § 909.[1] The military judge convicted Appellant, contrary to his pleas, of one specification of wrongful use of a Schedule III controlled substance on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced Appellant to a bad-conduct discharge, confinement for nine months, forfeiture of $1,000.00 pay per month for nine months, reduction to the grade of E-2, and a reprimand.[2] The convening authority took no action on the findings or the sentence, and denied Appellant's request for waiver of all automatic forfeitures.

Appellant raises two issues on appeal which we reword as follows: (1) whether the military judge abused his discretion when he accepted Appellant's guilty plea to the Article 109, UCMJ, specification; and (2) whether relief is required to correct the staff judge advocate's indorsement to the Statement of Trial Results (STR) that states a firearm prohibition was triggered.[3,4] With respect to issue (2) and consistent with our reasoning in *United States v. Lepore*,

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[1] All references in this opinion to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant received four months' confinement for disobeying a superior commissioned officer, two months' confinement for wrongful destruction of non-military property, and three months' confinement for wrongful use of a controlled substance on divers occasions—with each period of confinement to run consecutively.

[3] Appellant phrases the second assignment of error as follows:

> Whether the Government can prove 18 U.S.C. § 922 is constitutional by "demonstrating that it is consistent with the nation's historical tradition of firearm regulation" when [Appellant] was not convicted of a violent offense, and whether this court can decide that question under *United States v. Lemire*, 82 M.J. 263 (C.A.A.F. 2022) [(mem.)] or *United States v. Lepore*, 81 M.J. 759 (A.F. Ct. Crim. App. 2021) [(en banc).]

(Footnote omitted).

[4] Although not raised by Appellant, we note that more than 150 days elapsed between the date Appellant was sentenced and the date his record of trial was docketed with this court. This period constitutes a facially unreasonable post-trial delay. *See United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020); *see also United States v. Moreno*, 63 M.J. 129, 135–42 (C.A.A.F. 2006) (citations omitted) (addressing a convicted servicemember's due process right to timely post-trial and appellate review).

we find this court lacks authority under Article 66, UCMJ, 10 U.S.C. § 866, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition in the staff judge advocate's indorsement to the STR. 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc). Therefore, Appellant is not entitled to relief for this issue.

Finding no error that materially prejudiced Appellant's substantial rights, we affirm the findings and sentence.

## I. BACKGROUND

The events that led to the wrongful destruction of non-military property began on 19 February 2021 when Appellant and his wife, AS,[5] argued at their home in Yukon, Oklahoma. As a result of this argument, AS left the house with their children and went to a friend's home. Appellant was upset and began drinking alcohol around 0200 hours on 20 February 2021. At some point thereafter he fell asleep. Later that morning, Appellant awoke between 0800 and 1000 hours. When he awoke, he found his wife and children had returned to the home. Appellant testified that he was still drunk yet was able to converse with his wife coherently.

Appellant was upset that his wife had returned and not wanting her in the home, he told her to leave. Appellant then went to the rental car she was utilizing at the time, which was parked near their garage, turned on the engine and heat, and began demanding his wife take the vehicle and leave. AS refused and informed Appellant that if he insisted, she would call the police. During this dialogue, Appellant slammed his hand down on the windshield with an open palm in frustration, which caused extensive cracking and rendered the vehicle unusable until the windshield was repaired. Appellant later paid to have the windshield professionally repaired.

During the plea inquiry, the military judge questioned Appellant extensively about Appellant's state of "drunkenness" and how that affected, if at all,

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Appellant has asserted no prejudice from the delay, and we perceive none. Accordingly, having considered the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), and finding the delay is not so egregious as to be detrimental to the public's perception of the fairness and integrity of the military justice system, we find no violation of Appellant's due process rights. *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 135 (citations omitted). Additionally, recognizing our authority to grant relief for excessive post-trial delay in the absence of a due process violation, we conclude no such relief is warranted. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002); *United States v. Gay*, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

[5] During the time of the charged allegations, AS was a noncommissioned officer on active duty in the United States Air Force.

the "willfulness" of his conduct in striking and destroying the windshield of his wife's rental car. After conferring with Appellant, circuit defense counsel stated that voluntary intoxication was not "an issue to find the guilty plea provident." When the military judge asked why that was, circuit defense counsel responded that while Appellant was "certainly drunk" when the offense happened it was "not to a degree where [Appellant] c[ould]n't appreciate the nature of his conduct."

Appellant testified during his plea inquiry that while he intended to hit the windshield forcefully, he did not intend the damage he caused, but understood the natural or probable consequence of his conduct would damage the windshield. He also testified that while he was drunk at the time, he "had control over [his] actions and could have avoided breaking the windshield if [he] had wanted to." He made clear that he "was not so impaired by alcohol that [he] didn't know what [he] was doing." After the windshield was broken, Appellant paid to replace the windshield at a cost of "between $400[.00] and $600[.00]."

## II. DISCUSSION

### A. Law

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Blouin*, 74 M.J. 247, 251 (C.A.A.F. 2015) (citation omitted). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea -- an area in which we afford significant deference." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citation omitted).

"The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea." *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014) (citation omitted). We apply a "substantial basis" test by determining "whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322. An appellant bears the "burden to demonstrate a substantial basis in law and fact for questioning the plea." *United States v. Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014) (quoting *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)).

"The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." Rule for Courts-Martial 910(e). When entering a guilty plea, the accused should understand the law in relation to the facts. *United States v. Care*, 40 C.M.R. 247, 251 (C.M.A. 1969). "An essential aspect of informing

[an appellant] of the nature of the offense is a correct definition of legal concepts. The judge's failure to do so may render the plea improvident." *Negron*, 60 M.J. at 141 (citations omitted).

The record of trial must show that the military judge "questioned the accused about what he did or did not do, and what he intended." *Care*, 40 C.M.R. at 253. This is to make clear to the military judge whether the accused's acts or omissions constitute the offense to which he is pleading guilty. *Id.* "If an accused sets up matter inconsistent with the plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (internal quotation marks and citation omitted).

"[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be viewed in the light most favorable to the [G]overnment." *United States v. Arnold*, 40 M.J. 744, 745 (A.F.C.M.R. 1994) (citation omitted). "This [C]ourt must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient." *Hines*, 73 M.J. at 124 (internal quotation marks and citation omitted).

In reviewing the providence of an appellant's guilty pleas, "we consider his colloquy with the military judge, as well [as] any inferences that may reasonably be drawn from it." *United States v. Timsuren*, 72 M.J. 823, 828 (A.F. Ct. Crim. App. 2013) (quoting *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (citation omitted)).

Article 109, UCMJ, states: "Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct." 10 U.S.C. § 909.

The specification for which the military judge found Appellant guilty stated that Appellant

> did, at or near Yukon, Oklahoma, on or about 20 February 2021, willfully and wrongfully destroy a vehicle windshield, of a value under $1,000[.00], the property of Avis Rental Car.

Article 109, UCMJ, "proscribes the willful and wrongful *destruction or damage* of the personal property of another. To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose. Damage consists of *any physical injury* to the property." *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 45.c.(2) (emphasis added).

**B. Analysis**

Appellant contends his guilty plea is not provident because the providence inquiry was not sufficient to support a conviction under Article 109, UCMJ. Specifically, he claims that even though he intended to hit the windshield of the rental car with his hand, he did not intend the damage he ultimately caused to occur. It is well established in law that the "intent to cause certain results can be established by evidence that such results flow naturally and probably from the action that was taken." *United States v. White*, 61 M.J. 521, 523 (N.M. Ct. Crim. App. 2005) (internal quotation marks and citation omitted). It is a longstanding legal principle that "as a rule of circumstantial evidence, a court-martial is certainly free to infer that a sane person intends the natural and probable consequences of his conduct." *United States v. Hoyt*, 48 M.J. 839, 842 (N.M. Ct. Crim. App. 1998) (quoting *United States v. Christensen*, 15 C.M.R. 22, 25 (C.M.A. 1954)). At trial, there was no question regarding Appellant's sanity.

During the plea inquiry, the military judge inquired extensively into whether Appellant's state of drunkenness might present him a defense. That question was fleshed out and determined in the negative with no objection by Appellant. The military judge also explored the "willfulness" element, inquiring extensively into whether the qualified admission by Appellant that he intended to strike the windshield with force, but he did not anticipate or intend the actual damage he caused, affected the providency of the plea. In that connection, Appellant was clear in the plea inquiry that he "did intend to hit the windshield" with a "large amount of force" and that he "had control over [his] actions and could have avoided breaking the windshield if [he] had wanted to." In a colloquy between the military judge and circuit defense counsel, the military judge inquired into the "natural consequences" aspect of the law on this issue and circuit defense counsel replied:

> [I]f you were to ask [Appellant], what was it your specific intention to completely destroy the windshield, like when you set out, when you were angry, I think the answer would be no, like [he] didn't strike it with the intent of making it completely unusable or annihilate it, but it is, did you have the intent of very forcefully hitting this windshield with, you know, reckless disregard for the consequences or with full knowledge of the likely consequences of your actions? The answer is squarely yes. That was [his] intent, [he] wanted to hit it, [he] recognized when [he] was using that force that was a very real possibility that it would damage. . . .

After this colloquy with circuit defense counsel, the military judge took a break to review cases on point counsel provided him. The judge carefully considered the "willful" aspect of Article 109 and wanted to be certain Appellant understood the law regarding the charged offense to which he was pleading guilty. In this connection, the following colloquy between the military judge and Appellant occurred:

> [Military Judge (MJ)]: So, let me ask you this, Sergeant Saul, can you say that you intended to strike the windshield?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: Do you agree that you striking the windshield, and the windshield cracking out and spidering [ ] like it did is a natural consequence of you striking the windshield? Or a probabl[e] consequence?
>
> [Appellant]: Yes, Yes, Your Honor.
>
> MJ: Okay. I kind of spoke over you, so I want to make sure it's clear; do you agree that you smacking the windshield, a natural consequence of that action is that the windshield will spider out?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: And therefore, be destroyed as I've defined it for you?
>
> [Appellant]: Yes, sir.

The record establishes that Appellant's frustration led him to purposely strike the windshield of the rental car with a "large amount of force"—that was in fact the direct object of his action. Additionally, Appellant confirmed during the plea inquiry that it was highly foreseeable that a natural or probable consequence of his conduct would be damage to the windshield. The military judge made a substantial inquiry of Appellant in order to satisfy himself that there was a factual basis for the plea. This court must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient and we find no such substantial conflict. Viewing the facts in the light most favorable to the Government, we therefore find the military judge did not abuse his discretion when he found Appellant guilty of the offense of Article 109, UCMJ, according to his pleas.

## III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40302**

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**UNITED STATES**
*Appellee*

**v.**

**Nikolas S. CASILLAS**
Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 15 December 2023

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*Military Judge*: Colin P. Eichenberger.

*Sentence*: Sentence adjudged 18 March 2022 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Sentence entered by military judge on 8 April 2022: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

*For Appellant*: Major Spencer R. Nelson, USAF.

*For Appellee*: Lieutenant Colonel Thomas J. Alford, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

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

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

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RICHARDSON, Senior Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault in

violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority took no action on the findings or sentence.

Appellant raises six issues on appeal, asking whether: (1) Article 120(b)(2) and (g)(7), UCMJ, 10 U.S.C. § 920(b)(2), (g)(7), are unconstitutionally vague because they fail to put defendants on fair notice of the specific charge against them; (2) as applied, Article 120(b)(2) and (g)(7), UCMJ, did not give Appellant fair notice when the military judge denied trial defense counsel's request for a tailored jury instruction; (3) the military judge abused his discretion when (a) he ruled that the declarant-witness can state what the effect on the listener was, instead of the listener themselves, (b) the statement was character evidence that Appellant "wasn't a good person," and (c) he did not conduct a Mil. R. Evid. 403 balancing test; (4) the military judge abused his discretion when he denied Appellant's challenge for cause of a court member for actual and implied bias; (5) relief is required to correct the staff judge advocate's indorsement to the Statement of Trial Results that states a firearm prohibition was triggered;[3] and (6) whether Appellant's convictions are legally and factually insufficient.[4] We have carefully considered issues (1), (2), and (5) and find they do not require discussion or warrant relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)). We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

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[1] Unless otherwise noted, all references in this opinion to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant was acquitted of a second specification of sexual assault.

[3] Appellant phrases this assignment of error as follows:

> The [G]overnment cannot prove 18 U.S.C. § 922 is constitutional by "demonstrating that it is consistent with the nation's historical tradition of firearm regulation" when [Appellant] was convicted of a non-violent offense and this court can decide that question under *United States v. Lemire*, 82 M.J. 263 (C.A.A.F. 2022) [(mem.)] or *United States v. Lepore*, 81 M.J. 759 (A.F. Ct. Crim. App. 2021).

[4] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

## I. BACKGROUND

The victim in this case, SF, hosted a birthday party at her off-base apartment for a fellow Airman.[5] Through a mutual friend, SF invited HC, who in turn invited Appellant. During the party, SF became intoxicated from alcohol. She also showed romantic interest in Appellant. After the party ended, Appellant, a civilian female MM, and SF stayed at SF's apartment to sleep. SF was feeling "super woozy," and "really tired." She changed into shorts and a t-shirt, and went to sleep on her bed, along with MM. SF testified that she awoke to Appellant penetrating her vulva with his penis. Appellant pulled up SF's shorts and walked to the bathroom. MM was asleep in another room, having moved at some point before the assault.

After HC left the party but before the sexual assault, she communicated with both SF and Appellant. HC went to SF's house because SF told her on the phone "she no longer wanted [Appellant] to stay at her house." After she arrived, HC asked SF "if she was okay with [Appellant] staying at her house." At first SF did not answer, then—with her eyes closed—she mumbled something to the effect that it was okay. Before she left, HC talked to Appellant, who assured her he would be leaving within 30 minutes.

After the sexual assault, SF texted her friend ES, and asked him to come over to get Appellant out of the house. SF and Appellant interacted until ES arrived, then Appellant left. SF "was shaking" and told ES she "didn't want to stay there anymore." SF woke MM, and they left with ES to go to his house. HC later joined them.

## II. DISCUSSION

### A. Challenge for Cause

Appellant asserts the military judge abused his discretion in this case when he denied Appellant's challenge for cause based on actual and implied bias for a member whose wife had been "raped." We find the military judge did not abuse his discretion.

#### 1. Additional Background

In group voir dire, the military judge asked, "Has anyone, any member of your family, or anyone close to you personally ever been the victim of any offense similar to . . . the charged offense in this case?" Chief Master Sergeant (CMSgt) AG and eight other court members answered in the affirmative.

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[5] The victim and, except where indicated, the witnesses were active-duty Airmen at the time of the offense.

In individual voir dire by the military judge, CMSgt AG elaborated. In 1992, his wife told him she was a rape victim. Since then, it came up in conversation no more than two or three times. When asked whether this affected him personally, he said, "I don't know that it necessarily affected me personally other than feeling bad for her and what she went through and trying to understand that." The military judge asked CMSgt AG several questions about what he thinks:

> Q. Do you *think* that knowledge of what your wife went through, your knowledge of that matter might impact your ability to be a fair and impartial panel member in a case that involves an allegation of sexual assault?"
>
> A. I *think* I can be impartial, Your Honor.
>
> . . . .
>
> Q. Why do you *think*, even though you're aware of what happened with your wife, you can kind of set that aside and you can be a fair and impartial panel member in this case?
>
> A. So, I *think* that any incident that is separate from another incident—you know, this we've lived with for a long time and I *think* we've processed it. And I just *think*—I *think* I can separate that incident from basically any other incident that I might hear of or try to assess, I guess, for lack of a better word.
>
> . . . .
>
> Q. If you remained as a panel member in this case, after the presentation of evidence, you know, you honestly kind of thought, you know, the [G]overnment hasn't really met their burden, "I think the right outcome here is a finding of not guilty." Do you *think* you'd have any difficulty disclosing that to your wife or letting her know that ultimately the decision reached was a not guilty verdict?
>
> A. I don't *think* I'd have a problem with that.
>
> . . . .
>
> Q. And, again, just similar, just kind of a broad, wide question. If you got to sentencing, why don't you *think* this wouldn't have any impact on your sentencing determinations?
>
> A. So, again, I just *think* that I can separate different cases—I shouldn't say that because it wasn't a case before, but different incidents. I don't think I have a much better answer than that.

(Emphasis added). CMSgt AG then affirmed he could separate his wife's incident from the incident alleged at trial, he could base his decisions on evidence and not personal experiences, he could follow the law, and he believed he could give Appellant a full, fair, and impartial hearing.

After the military judge concluded his questions for CMSgt AG, trial defense counsel questioned CMSgt AG:

> Q. A few follow-up questions for you. You mentioned that when asked if you thought this could impact—a finding of not guilty would impact your wife and your relationship in any way. You said, "I think it wouldn't impact." Why did you use "I think"?
>
> A. Well, yeah, I hate to assume anything, how she might feel, but—so, if I may, not to give too long of an answer, but she's a social worker; so I know she—she deals with these—you know, kind of sensitive issues, if you will. So, I just—I think our relationship, you know, that—that it just wouldn't—I know I said "I think." I didn't—I guess I didn't really focus on the word I was using. I know words mean things. So that's interesting that I said "I think." I just—You never know, right, when you're talking about [a] relationship with somebody else on what they might think, what they might—how they might act. I just don't want to assume that—that it won't affect her, that she won't have a different reaction than what I'm thinking.
>
> Q. And I just noticed a little bit of hesitation.
>
> A. Right.
>
> Q. Is that you thinking of an answer or is there an emotional response there?
>
> A. I think I'm thinking of the answer because that was an interesting point that you brought up. So I think I'm just thinking through the question and the answer, not necessarily emotional.

Trial defense counsel challenged CMSgt AG for actual and implied bias. Trial defense counsel argued that after CMSgt AG was asked whether "a finding of guilty [would] impact his relationship with his wife," he took "an extremely long pause to answer that question." Trial defense counsel disputed that CMSgt AG was "simply . . . thinking about the answer to the question, it genuinely seemed like a concerned hesitation." Trial defense counsel continued, CMSgt AG was "unable to answer for his wife, he didn't know how she was going to react if she found out about a finding of not guilty in this particular case."

The military judge considered the defense challenge for cause "based on [CMSgt AG's] wife having been a victim of sexual assault or rape under both the actual bias and implied bias standards," considered the liberal grant mandate, and denied the challenge. He did "not find this to be a particularly close call." He stated, *inter alia*:

> Though [CMSgt AG's] demeanor was characterized as drastically long pauses; and, potentially, at least in this Court's interpretation of counsel's argument an indication that he was somehow emotionally impacted or less than truthful in his responses. The Court did not get that impression from his responses. The pauses in his responses to questions to this Court, they were more clearly indicative of his thoughtfulness of the questions asked, his desire to answer them as candidly as possible. The Court found him and his body language and his demeanor and his responses to the questions posed to be candid and credible; and to have clearly articulated, he had no actual bias in this case.
>
> . . . .
>
> When asked about the way it impacted him personally, [CMSgt AG's] responses, what I'd imagine any of our responses would be, and that is that he had feelings for his wife and what she went through, but it didn't affect him personally, he just felt bad for her and trying to understand and be supportive for her. Not an unnatural human reaction and not one that would demonstrate a bias on the part of an individual such that their continued participation would cause damage to the perception of fairness in these proceedings.

CMSgt AG remained on the panel after the Rule for Courts-Martial (R.C.M.) 912(f)(5) random assignment. The Defense exercised its preemptory challenge on a court member whom it had not challenged for cause. CMSgt AG remained on the panel throughout Appellant's court-martial.[6]

**2. Law**

An accused has "the right to an impartial and unbiased panel." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012) (citation omitted). A person

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[6] Before cross-examination of SF, CMSgt AG informed the military judge he thought Appellant looked familiar. The military judge questioned CMSgt AG, who could not place how or when he might have interacted with Appellant. CMSgt AG had no negative memory of Appellant, and thought it was a positive experience. Thereafter, neither party desired to question or challenge CMSgt AG.

detailed to a court-martial shall be excused whenever it appears he or she "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "'Substantial doubt' exists where the presence of a member on the panel would cause the public to think 'that the accused received something less than a court of fair, impartial members,' injuring the public's perception of the fairness of the military justice system." *United States v. Commisso*, 76 M.J. 315, 323 (C.A.A.F. 2017) (citation omitted). "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." R.C.M. 912(f)(3).

Potential court-martial members are subject to challenges for cause under actual bias and implied bias theories. *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020). Under the former, the question is whether the member personally holds a bias "which will not yield to the military judge's instructions and the evidence presented at trial." *Nash*, 71 M.J. at 88 (citation omitted). Claims that a military judge erred with respect to challenges alleging actual bias are reviewed for an abuse of discretion. *Hennis*, 79 M.J. at 384.

Implied bias is measured by an objective standard. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citation omitted). "Implied bias exists when, 'regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [that is, biased].'" *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (alteration in original) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)). We assess implied bias based on the "totality of the factual circumstances," assuming the "hypothetical 'public'" is familiar with the military justice system. *Bagstad*, 68 M.J. at 462 (citations omitted).

We review the military judge's ruling on a claim of implied bias "pursuant to a standard that is 'less deferential than abuse of discretion, but more deferential than de novo review.'" *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (quoting *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)). This standard is appropriate "in light of the fact that resolving claims of implied bias involves questions of fact and demeanor, not just law." *United States v. Woods*, 74 M.J. 238, 243 n.1 (C.A.A.F. 2015). Appellate courts afford greater deference to a military judge's ruling on a challenge for implied bias where the military judge puts his analysis on the record and provides a "clear signal" he applied the correct law. *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016) (citations omitted). "In cases where less deference is accorded, the analysis logically moves more towards a de novo standard of review." *Id.*

"The military judge is [ ] mandated to err on the side of granting a challenge[; t]his is what is meant by the liberal grant mandate." *Peters*, 74 M.J. at 34 (citation omitted). That is, "if after weighing the arguments for the implied

bias challenge the military judge finds it a close question, the challenge should be granted." *Id*. Military judges who squarely address the liberal grant mandate on the record are given greater deference on appeal than those who do not. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

"[A] prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service." *United States v. Terry*, 64 M.J. 295, 297 (C.A.A.F. 2007) (upholding military judge's determination of no actual or implied bias where court member's wife had been sexually abused before they met, and rarely discussed it).

**3. Analysis**

Appellant first faults the military judge by claiming "his *voir dire* was insufficient." He lists numerous questions that went unasked, the answer to which "would have provided valuable information for [d]efense [c]ounsel to make a challenge and for the [m]ilitary [j]udge to rule on the decision." Appellant concedes that the military judge "permitted counsel to ask additional questions when he was finished." We reject Appellant's claim of error. As this court has stated, "Appellant had the burden of establishing the basis for his challenge, not the military judge," and "it is up to the parties to obtain the information from the members to support their respective positions." *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *36 (A.F. Ct. Crim. App. 30 Sep. 2022) (unpub. op.) (first citing R.C.M. 912(f)(3); then citing *United States v. Wiesen*, 57 M.J. 48, 49 (C.A.A.F. 2002) (per curiam); and then citing *United States v. Mayo*, No. ARMY 20140901, 2017 CCA LEXIS 239, at *7–8 (A. Ct. Crim. App. 7 Apr. 2017) (mem.)).

Appellant asserts the "perhaps most glaring deficiency that the [m]ilitary [j]udge let stand" is CMSgt AG's pauses and answers caveated with the word "think." We give deference to the military judge's conclusions from CMSgt AG's demeanor, which he attributed to "thoughtfulness" and "his desire to answer [questions] as candidly as possible." We do not read CMSgt AG's answers—as Appellant implies—to signal that he would be influenced in his duty as a court member because his wife was a rape victim. Regarding word choice, it was the military judge who asked CMSgt AG multiple questions about what he "thinks;" CMSgt AG simply answered the questions asked. Later when confronted with his answers, CMSgt AG did not know why he used the word "think," probably because he did not remember that was how the questions were posed to him.

Regarding implied bias, Appellant asserts:

> Most members of the public in [CMSgt AG's] position would not want to go home to their rape-victim-wife and tell them, "we acquitted the accused for sexual assault charges today." While not

> wanting to overgeneralize or stereotype, it is not difficult to imagine that most women who had been forcibly raped would not appreciate hearing that from their husband.

We think it much more likely that a member of the public, including one who had been forcibly raped, would want a court-martial to convict the guilty and acquit the innocent, regardless of the crime alleged. We agree with the military judge's conclusions that CMSgt AG's understanding and support for his wife was "[n]ot an unnatural human reaction and not one that would demonstrate a bias on the part of an individual such that their continued participation would cause damage to the perception of fairness in these proceedings."

The military judge did not abuse his discretion in denying the challenge for actual bias or implied bias. CMSgt AG's continued presence as a court member would not have caused the public to perceive Appellant's panel as less than fair and impartial.

**B. Objection to Witness Testimony**

**1. Additional Background**

After the sexual assault, SF texted HC, stating "Your friend is not a good guy." HC saw the text later in the morning, and contacted SF. HC then met up with SF and ES at the latter's house.

During its direct examination of SF, the Government tried to elicit from her the substance of her text to HC. The Defense objected to it on hearsay grounds. The military judge held a session outside the presence of the members to consider the matter. The Government argued the text showed SF's state of mind, or present-sense impression, or was an exited utterance, and thus was an exception to the hearsay rule. The Defense stated it was just SF's opinion of Appellant. The military judge sustained the Defense's hearsay objection.

The Government then asserted it wanted to elicit the statement as "effect on the listener." The Government averred that it expected HC to testify that this text "played into her" meeting with SF that morning. The Defense objected, asserting SF could not attest to the effect on the listener. The Government questioned SF on this point:

> Q. [SF], did you receive a phone call from [HC] after that text message at some point that morning?
>
> A. Yes, sir.
>
> Q. And did that phone call—the substance of that phone call, the nature of that phone call relate to the message, as you understand, relate to the message you sent?
>
> A. Yes, sir.

As the military judge overruled Defense's objection to SF testifying about the text she sent HC, he informed the parties of the limiting instruction he planned to give the members about the substance of the text. Neither party objected.

SF continued her testimony before the members. She testified she communicated in the text message to HC, "That [Appellant] wasn't a good person." Immediately following, the military judge instructed the members substantially as he had told the parties, stating, "The statement the witness just testified to is being offered [ ] not for the truth of the matters contained in the prior statement. In other words, you can only consider it for its effect on any listener of that statement, not for the truth of the contents of the statement." Each member affirmed they understood the instruction.

HC testified that one message from SF "said that my friend was not a good guy." HC replied to this message about 10–15 minutes later, asking SF what happened. HC received another message from SF, and in response, went to ES's house, where SF had gone that morning.

**2. Law**

Appellate courts review "a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009) (citing *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005)). We will find an abuse of discretion when a military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Ayala*, 81 M.J. 25, 27–28 (C.A.A.F. 2021) (quoting *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)).

"As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts-martial." *Ayala*, 81 M.J. at 28 (first citing Mil. R. Evid. 801(c); and then citing Mil. R. Evid. 802). "[O]ut-of-court statements offered for other purposes, such as their effect on the listener to provide context, may be admitted as non-hearsay statements." *United States v. Leach*, No. ACM 39805 (f rev), 2022 CCA LEXIS 76, at *15–16 (A.F. Ct. Crim. App. 3 Feb. 2022) (unpub. op.) (citing *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) (interpreting Fed. R. Evid. 801(c)(2), a provision identical to Mil. R. Evid. 801(c)(2)) (additional citation omitted), *rev. denied*, 82 M.J. 355 (C.A.A.F. 2022). After allowing an out-of-court statement offered for another purpose, the military judge should instruct the members accordingly so that the evidence "is not transformed from evidence introduced for the limited purpose . . . into substantive evidence introduced for the purpose of establishing a truth of the matter." *United States v. Lusk*, 70 M.J. 278, 281–82 (C.A.A.F. 2011) (citations omitted). Court

members are presumed to follow the limiting instructions of the military judge absent evidence to the contrary. *United States v. Taylor*, 53 M.J. 195, 198–200 (C.A.A.F. 2000) (citations omitted).

"Evidence is relevant if (a) it has any tendency to make a fact more or less probable that it would be without the evidence; and (b) the fact is of consequence in determining the issue." Mil. R. Evid. 401. "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403.

"Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Mil. R. Evid. 404(a)(1).

**3. Analysis**

Appellant asserts the military judge abused his discretion by allowing SF to repeat the words of a message she sent HC: "Your friend is not a good guy." In his assignment of error, Appellant claims the military judge abused his discretion when (a) "he ruled that the declarant-witness [SF] can state what the effect on the listener was, instead of the listener [HC] themselves;" (b) he allowed the statement which "was character evidence that [Appellant] 'wasn't a good person;'" and (c) he "did not conduct a Mil. R. Evid. 403 balancing test."

First, we cannot agree with Appellant's characterization of assertion (a). The military judge did not rule that SF could testify to the effect on the listener *instead* of HC. He allowed SF to testify that she sent those words about Appellant to HC, and to testify that HC contacted her afterwards regarding SF's interactions with Appellant. After an overruled defense objection on the grounds of "asked and answered," HC testified about the contents of this message. She also testified about her actions with respect to SF and Appellant that morning. We decline Appellant's suggestion to adopt a rule that someone other than the listener cannot provide relevant testimony about the effect the words had on the listener. *Cf. United States v. Roberson*, 65 M.J. 43, 46–47 (C.A.A.F. 2007) (finding an abuse of discretion where the military judge excluded a witness's opinion of the effect the witness's statement had upon the appellant).

Appellant makes a related claim: SF was speculating about the effect the statement had on HC. We find little support for this claim in the record. SF did not speculate that her message to HC that Appellant "was not a good guy" caused HC to act a certain way. SF testified she made this and other statements to HC about Appellant that morning. Her testimony, and the testimony of HC, showed that these discussions led to HC checking on SF's welfare and learning of her sexual assault allegation.

The Government did not offer the message as evidence of Appellant's character, the Defense did not object on those grounds, and the military judge did not allow it to be considered for that purpose. The military judge specifically limited its use "not for the truth of the matters contained in the prior statement" but "for its effect on any listener of that statement." The members each affirmed they could follow the military judge's instruction.

HC's interactions with SF before and after the offense, especially as they related to Appellant, were relevant to the charge of sexual assault; indeed, trial defense counsel did not object to the bulk of this testimony. While Appellant is correct that the military judge did not conduct a Mil. R. Evid. 403 balancing test on the record, we disagree with Appellant's implication that such an analysis was required on the record. Mil. R. Evid. 403 was not a basis for the Defense's objection to SF's testimony about this message. In conducting our own Mil. R. Evid. 403 balancing test, we see little danger in a witness who alleged sexual assault repeating a statement she made soon after the sexual assault that the assailant whom she barely knew was "not a good guy." We find the military judge did not abuse his discretion.

**C. Legal and Factual Sufficiency**

**1. Additional Background**

While at ES's house, SF messaged Appellant, then talked to him on the phone. Appellant did not know their phone conversation was recorded, or that others were listening to the conversation. SF confronted Appellant with her memory that she woke up to his penis inside her; Appellant did not deny the act and told SF he ejaculated outside her. Appellant told SF, "[Y]ou were responsive for a little while. And after that you just weren't talking, weren't moving." Appellant told SF he felt "terrible" and was sorry. Appellant also said:

> I drank a lot and I started kissing you on the bed. You were kissing me back. And I just knew that I took it too far. You might have not been completely there, and I might not have been aware. . . . But I just knew—I don't think I—without making sure that you were fully there.

MM, the civilian female, recorded part of a conversation between Appellant and HC:

> [HC]: She was like just tired and you kept tickling her?
>
> [Appellant]: Yeah, she was out of it. I kept f[**]king with her, like I told you.
>
> [HC]: Yeah.

> [Appellant]: I had to wake her a[**] up. But, yeah, she was completely out of it.

During a different recorded conversation, Appellant told HC he was not sure he penetrated SF with his penis.

SF testified that she did not consent to Appellant penetrating her vagina with his penis. MM opined SF was "very truthful." HC testified that SF's reputation in her unit is that she is untruthful.

**2. Law**

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted), *rev. denied*, 82 M.J. 312 (C.A.A.F. 2022).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008) (internal quotation marks and citation omitted). The evidence supporting a conviction can be direct or circumstantial. *See United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (citing R.C.M. 918(c)) (additional citation omitted). "[A] rational factfinder[ ] could use his 'experience with people and events in weighing the probabilities' to infer beyond a reasonable doubt" that an element was proven. *Id.* at 369 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)). The "standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (internal quotation marks and citation omitted).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Rodela*, 82 M.J. at 525 (second alteration in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*,

76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

To convict Appellant of sexual assault, the Government was required to prove the following elements beyond a reasonable doubt that: (1) Appellant committed a sexual act upon SF, specifically by penetrating her vagina with his penis, and (2) Appellant did so without the consent of SF. *See* 10 U.S.C. § 920(b)(2); *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 60.b.(2)(d).

**3. Analysis**

Appellant personally asserts the findings of guilty to the charge and specification are legally insufficient because (1) SF was blacked out, and not passed out, and misinterpreted a consensual interaction as nonconsensual; (2) SF did not remember what happened or she was not testifying truthfully; (3) SF did not want to report the incident; (4) after the incident, SF allowed Appellant to rub her back, and SF did not leave the apartment or call the police; and (5) at least one witness testified that SF had a reputation for being untruthful. We are unpersuaded.

A rational finder of fact easily could have found the Government proved each element of each offense beyond a reasonable doubt. Importantly, corroboration of a witness's testimony is not required for legal sufficiency. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) ("The testimony of only one witness may be enough . . . so long as the members find that the witness's testimony is relevant and is sufficiently credible." (Citations omitted)). SF credibly testified that she woke to Appellant's penis inside her vagina, and that she did not consent to that sexual act. Moreover, when SF confronted Appellant later that day, Appellant admitted to SF that the act occurred, and that at some point during the encounter she was no longer responsive. Appellant did not claim that he got SF's consent for the sexual act. *See United States v. McDonald*, 78 M.J. 376, 381 (C.A.A.F. 2019) ("The burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent.").

We conclude that, viewing the evidence produced at trial in the light most favorable to the Prosecution, a rational trier of fact could have found the essential elements of the convicted offense beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. *See Rodela*, 82 M.J. at 525.

## III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court