IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

S'HUN R. MAYMI
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 24-XXX/AF

Crim. App. Dkt. No. ACM 40332

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**SUPPLEMENT TO THE**
Appellee	)	**PETITION FOR GRANT**
v.	)	**OF REVIEW**
	)	
S'HUN R. MAYMI	)	
Senior Airman (E-4),	)	Crim. App. Dkt. No. ACM 40332
United States Air Force,	)	
Appellant	)	USCA Dkt. No. 24-XXX/AF
	)	

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

ISSUES PRESENTED[1]

I.

AS APPLIED TO SENIOR AIRMAN MAYMI, 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" [2] WHEN SENIOR AIRMAN MAYMI 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.

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Senior Airman Maymi personally raises three issues contained in Appendix A.
[2] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

§ 866(d).[3] 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 April 21, 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Senior Airman (SrA) S'Hun R. Maymi of one charge, one specification of sexual assault, in violation of Article 120 UCMJ, 10 U.S.C. § 920, and one charge, one specification of unlawful entry, in violation of Article 129, UCMJ, 10 U.S.C. § 929. R. at 541. The Military Judge sentenced SrA Maymi to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. *Convening Authority Decision on Action*. The Convening Authority deferred SrA Maymi's reduction in grade, denied a request for deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id*. On October 5, 2023, the Air Force Court affirmed the findings and sentence. *United States v. Maymi*, No. ACM 40332, 2023 CCA LEXIS 491, at 2 (A.F. Ct. Crim. App. Oct. 5, 2023) [hereinafter App. B].

[3] 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.

STATEMENT OF FACTS

After a "friends-giving" celebration at the victim's (A.T.) dorm room, SrA Maymi returned to look for his cellphone. App. B at 3. A.T. let SrA Maymi look in her room for the phone, but he could not find it so he left. *Id.* A.T. then fell asleep. *Id.* She awoke to SrA Maymi digitally penetrating her. *Id.* She ordered him to stop and to leave, which he did. *Id.* A.T. noticed that the window next to the door was cracked and she believed this was how SrA Maymi entered her dorm room. *Id.* Security cameras filmed SrA Maymi outside of A.T.'s dorm room. *Id.*

After his conviction, the Government determined that SrA Maymi met the firearms prohibition in 18 U.S.C. § 922. *Entry of Judgment*. The Government did not specify which subdivision of § 922 SrA Maymi met. *Id.* The Air Force Court did not discuss this issue in depth; rather, it only said that it "lacks authority to direct modification of the 18 U.S.C. § 922 prohibition noted on the staff judge advocate's indorsement." App. B at 2.

REASONS TO GRANT REVIEW

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 SrA Maymi 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).

SrA Maymi faces a *lifetime* firearms ban for touching a female when no firearm was involved and when the Government did not charge him with using force. 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.

AS APPLIED TO SRA MAYMI, 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" [4] WHEN SRA MAYMI 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 said documents included erroneous collateral consequences. Fourth, SrA Maymi faces undue prejudice: A lifetime firearms ban for touching a female when no

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

firearm was involved and when the Government did not charge him with using force or violence.

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 § 922. *United States v. Rahimi,* 61 F.4th 443 (5th Cir. 2023), *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 SrA Maymi's case raises similarly constitutionally weighty issues unique to the military justice process, and SrA Maymi 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 six cases where he has raised this issue with the Air Force Court or tried to raise the issue with the Air

Force Court.[5] Other counsel have raised this issue, too.[6] Counsel has one case pending a decision with this Court whether to grant review on this very issue.[7]

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 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

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[5] *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. Jackson*, No. ACM 40310, *brief filed* (A.F. Ct. Crim. App. Mar. 23, 2023); *United States v. Fernandez*, No. ACM 40290 (f rev), *brief filed* (A.F. Ct. Crim. App. Apr. 3, 2023); *United States v. Casillas*, No. ACM 40302, *brief filed* (A.F. Ct. Crim. App. Jul. 5, 2023); *United States v. Saul*, No. ACM 40341, *brief filed* (A.F. Ct. Crim. App. Aug. 16, 2023).

[6] *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).

[7] *United States v. Johnson*, No. 24-0004/AF, *petition filed*, 2023 CAAF LEXIS 689 (C.A.A.F. Oct. 3, 2023)

years preceding the passage of 28 U.S.C. § 1259 to an average of 44 per year between 2018-2021.[8] 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.

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 on by the lower court to dispose of this issue without further discussion is outdated, this Court should grant review to clarify

[8] 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.

whether Courts of Criminal Appeals (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). The new 2019 rules, however, contain language 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 required the Statement of Trial results to include "whether the following criteria are met . . . firearm prohibitions." [hereinafter DAFI 51-201]. 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. SrA S'hun R. Maymi*

1st Ind., Entry of Judgment, SrA S'hun R. Maymi, dated 9 May 2022

FROM: [redacted]/JA 9 May 2022

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: Yes

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.).[9] 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 § 922 applies.

[9] 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. SrA Maymi Faces Unjustified Prejudice for a Nonviolent Offense

SrA Maymi faces a lifetime firearms ban—despite a constitutional right to keep and bear arms—for a nonviolent touch without a firearm. 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 SrA Maymi, but the Government did not specify that in the Entry of Judgment.

Under *Bruen*, subsection (g)(1) cannot constitutionally apply to SrA Maymi, who stands convicted of an offense that the Government could have charged as one of force. 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.[10] 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:

[10] 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. 18 Oct. 2023.)

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

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 were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

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 SrA Maymi 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. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts

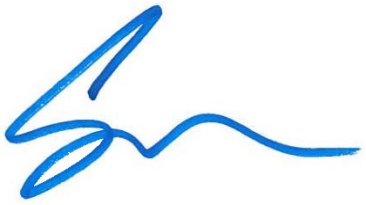
in his ashtray. *Id.* at 340. He was later charged and convicted of a violation of § 922(g)(3). *Id*. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [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 SrA Maymi through the Entry of Judgment.

WHEREFORE, SrA Maymi 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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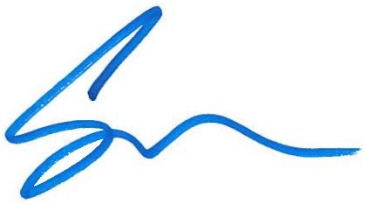
CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on December 1, 2023 and that a copy was also electronically served on the Government Trial and Appellate Operations Division on the same date.



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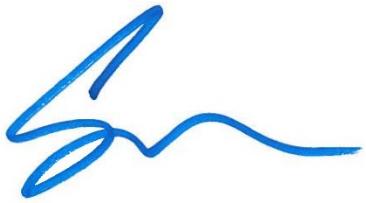
CERTIFICATE OF COMPLIANCE WITH RULES 21(b), 24(b) & 37

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 3,912 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 A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Senior Airman (SrA) S'Hun Maymi, through appellate defense counsel, personally requests that this Court consider the following matters:

I.

WHETHER *UNITED STATES V. TYLER* ALLOWS DEFENSE COUNSEL TO ARGUE THAT SEX OFFENDER REGISTRATION IS A MITIGATING FACTOR THAT MILITARY JUDGE SHOULD CONSIDER?

In his sentencing argument, Defense Counsel argued that the Military Judge should consider that SrA Maymi will have to register as a sex offender. R. at 583. The Government objected. *Id.* The Defense Counsel explained that the Court of Appeals for the Armed Forces held that counsel could comment on victim impact statements during sentencing arguments. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021) ("If unsworn victim statements are part of the evidence of record, they can be commented on by counsel in presentencing argument."). The Defense Counsel further argued that "[w]here *Tyler* allows for proper comment on the victim statement, we have now created an equity issue as to what is proper comment on the accused's statement." R. at 585. Meaning, since SrA Maymi spoke about sex offender registration in his unsworn statement, his Defense Counsel should have

been allowed to argue that fact to the Military Judge. The Military Judge sustained the Government's objection. *Id.*

WHEREFORE, SrA Maymi respectfully requests that this Honorable Court grant his petition for review.

II.

WHETHER SRA MAYMI'S CONVICTION IS LEGALLY SUFFICIENT?

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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

There are two issues that call into question the legal sufficiency of this case. First, A.T.'s credibility is questionable. As Defense Counsel pointed out multiple times, A.T. had lied to law enforcement previously. R. at 179. Given that she was the only witness to the misconduct, this is a fact that casts doubt on SrA Maymi's conviction.

Second, and related to the first point, A.T.'s version of what happened grew substantially with each telling. For example, when she first recounted what happened, she did not mention her underwear being pulled down or SrA Maymi

touching her vagina. R. at 151. She failed to provide these details to another witness. R. at 159. Additionally, she did not tell her sister all of the details even though she represented to OSI that her sister "knows everything." R. at 164, 166. When she first reported the incident to Security Forces, it was substantially different from what she previously told others. R. at 168-72. Likewise, when she finally told the Office of Special Investigations about what happened, the story transformed again. R. at 172-77.

WHEREFORE, SrA Maymi respectfully requests that this Honorable Court grant his petition for review.

III.

WHETHER THE THIRD AIR FORCE STAFF JUDGE ADVOCATE COMMITTED UNLAWFUL COMMAND INFLUENCE?

Staff Judge Advocates can commit unlawful command influence. *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018). At first, A.T. considered not participating in this court-martial. R. at 178. However, she met with the Convening Authority's Staff Judge Advocate before the case was referred to trial. *Id.* She received some degree of emotional support and encouragement to continue in the proceedings from the Staff Judge Advocate. R. at 178-79. After that meeting, she "took a minute" to think about the case and decided to participate. R. at 179. While it may not be unheard of for a prosecuting attorney to meet with an alleged victim,

it is unusual that the Convening Authority's attorney would meet with an alleged victim. This raises the specter of unlawful command influence.

WHEREFORE, SrA Maymi respectfully requests that this Honorable Court grant his petition for review

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40332

UNITED STATES
Appellee

v.

S'hun R. MAYMI
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 5 October 2023

Military Judge: Lance R. Smith.

Sentence: Sentence adjudged 21 April 2022 by GCM convened at Royal Air Force Lakenheath, United Kingdom. Sentence entered by military judge on 9 May 2022: Dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Spencer R. Nelson, USAF; Major Eshawn R. Rawley, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Captain Olivia B. Hoff, USAF; Captain Tyler L. Washburn, 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.

MASON, Judge:

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one charge with one specification of sexual assault and one charge with one specification of unlawful entry, in violation of Articles 120 and 129, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 929.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority took no action on the findings; he deferred the reduction in grade until the date of his action and waived all automatic forfeitures for a period of six months for the benefit of Appellant's wife and child.

Appellant's counsel submitted this case for review on its merits. Appellant personally raises five issues: (1) whether the findings are legally and factually sufficient; (2) whether the Third Air Force Staff Judge Advocate committed unlawful command influence; (3) whether trial defense counsel are allowed to argue sex offender registration as a mitigating factor for consideration in sentencing; (4) whether the sentence adjudged by the court-martial was unduly severe; and (5) whether the "Firearm Prohibition Triggered Under 18 U.S.C. § 922" note on the staff judge advocate's indorsement to the entry of judgment is constitutional and whether this court can decide that question.[3] We have carefully considered issue (5). As recognized in *United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to direct modification of the 18 U.S.C. § 922 prohibition noted on the staff judge advocate's indorsement.

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

I. BACKGROUND

In November 2020, AT was stationed at Royal Air Force (RAF) Mildenhall. AT had friends at RAF Mildenhall and at RAF Lakenheath. One of AT's friends from RAF Lakenheath was AR. On 26 November 2020, AR hosted a

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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 charged with burglary. He was acquitted of burglary but convicted of the lesser-included offense of unlawful entry.

[3] Appellant raises all these issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The language of the issues raised have been paraphrased and the issues reordered.

"Friendsgiving" dinner in her dorm room. Several Airmen attended the dinner, including Appellant.

AT arrived for the dinner later in the evening. Upon her arrival, she saw people sitting around, eating, drinking, listening to music, and socializing. After dinner, the group played different games, including drinking games. At some point, one of the attendees invited Appellant to join the group at the party. AT had never met Appellant before this evening.

Later in the evening, the dinner wound down and people began to leave. AR had told AT before the party that if AT was going to be drinking alcohol, she could stay in AR's dormitory room for the night so she did not have to drive back to RAF Mildenhall. AT did drink that night so she decided to stay in AR's room. AR left and went to another friend's room for the night. AR told AT that AT could tell everyone to leave..

After AR and others left, AT was left in AR's room with three male Airmen, including Appellant. They continued to play games, drink, and talk. Appellant made a couple of sexually charged comments and AT became uncomfortable. When the two other male Airmen decided to leave in the early hours of the morning, AT made sure that Appellant left as well.

AT laid down to go to sleep but was interrupted by Appellant knocking on the dorm room window. She went to the front door where Appellant stated that he left his cell phone in the room, so she let him in to look around. When Appellant asked if she had seen his phone, she stated she was unsure, she was tired, and she would let him know if she found it. Appellant then left the room. AT laid back down and soon fell asleep. The next thing AT remembered was waking up with someone touching her. Specifically, AT felt pain in her vagina and realized that someone's fingers were penetrating her in a back-and-forth motion. AT got out of the bed and moved to the other side of the room where she saw that the other person in the room was Appellant. AT very firmly yelled at Appellant to get out. Appellant responded, "my bad," he needed a place to sleep, and asked to sleep there. AT said "No" and Appellant eventually left. AT noticed that when she shut the door, the window next to the door was cracked open a little. She presumed the cracked window was how Appellant got into the room, so she closed it.

A few minutes later as she was in bed trying to fall back asleep, AT saw the door handle moving and heard something at the window. This happened a few times before she yelled out that she was going to call the police. Appellant can be seen on the surveillance camera outside the dormitory room and then running away from the room. AT sent a message to one of her friends telling them what had happened and was eventually able to fall asleep.

The next morning, AR and a few others returned to the room. They all cleaned up the room and AT talked to them about what Appellant did. Later, AT went back to RAF Mildenhall and eventually reported the incident to law enforcement.

In April 2021, AT had a meeting over "Zoom"[4] with the Third Air Force staff judge advocate (SJA).[5] AT discussed with the SJA the case moving forward. The SJA talked about the possible toll that these cases going forward can take on people and asked AT if that was okay. The SJA told AT that he would "have her back" regardless of whether AT decided to go forward with the trial or not. He further stated that they would make sure that nothing like this would happen again at their base. AT took some time to think after the meeting and later decided that she would participate in a court-martial.

During the presentencing proceedings, trial defense counsel presented argument where he stated, "You also have to consider that he will be – that he's been convicted of a sexual offense and a sex offender the rest of his life." Trial counsel objected asserting that this was improper argument. Trial defense counsel asserted that *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021), permitted the argument. The military judge heard the positions of the parties and sustained the objection. He ruled that he would not allow argument on the collateral consequence of sex offender registration but would consider the unsworn statement reference.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant challenges the legal and factual sufficiency of his sexual assault conviction.

1. 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).

"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,

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[4] "Zoom" is an online application commonly used for conducting remote meetings.

[5] It is clear from a review of the charge sheet, convening order, and post-trial documents that the Third Air Force staff judge advocate (SJA) was the convening authority's SJA.

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) (citation omitted). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)).

"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,' [this] court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (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.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399). This court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *See United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted); *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).

Appellant was convicted of sexual assault in violation of Article 120, UCMJ, which required the Government to prove the following two elements beyond a reasonable doubt: (1) that Appellant committed a sexual act upon AT, to wit: penetrating her vulva with his finger, with an intent to gratify his sexual desire; and (2) that Appellant did so without AT's consent. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(2)(d).

Appellant was also convicted of unlawful entry in violation of Article 129, UCMJ, which required the Government to prove the following two elements beyond a reasonable doubt: (1) that Appellant entered the applicable dormitory room assigned to AR; and (2) that the entry was unlawful. *See MCM*, pt. IV, ¶ 79.b.(2)(a)–(b).

2. Analysis

a. Sexual Assault

Appellant asserts that his conviction for sexual assault is both legally and factually insufficient. He argues that AT was the only witness to the alleged misconduct and that her version of what happened "grew over time," thus casting doubt on the conviction.

A careful review of AT's testimony as well as all the evidence presented in the findings portion of the trial demonstrates that the military judge as the trier of fact rationally found the essential elements of this crime beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. AT's testimony is corroborated by numerous accounts of other witnesses present in AR's room that night. Further, the surveillance footage of the dorms showing the actions of the attendees of the "Friendsgiving dinner" just outside the room, including Appellant's, provides compelling corroborative evidence to AT's description of the evening. After weighing the evidence and making allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41.

b. Unlawful Entry

Appellant asserts that his conviction for unlawful entry is both legally and factually insufficient. Appellant again argues here that AT was the only witness to the alleged misconduct and that her version of what happened "grew over time," thus casting doubt on the conviction.

Here, these arguments can only undercut whether Appellant's entry into the dorm room was unlawful; there is no question that Appellant entered the room. Surveillance video shows Appellant standing outside of the dorm room for several minutes. He smoked something and paced along the walkway. He walked towards the surveillance camera staring up at it for several seconds and he tried to reach it but was unable to do so. He then walked back towards the dorm room door. Appellant is seen reaching his right arm inside the window beside the door. A few seconds later—he removed his arm, looked into the room through the window, slowly proceeded to open the door, and slowly stepped inside the room. This footage significantly corroborates AT's description of the evening's events and removes any doubt that Appellant's entry into the room at that time was unlawful. Viewing the evidence in the light most favorable to the Government, the military judge rationally found the essential elements of unlawful entry 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 Reed*, 54 M.J. at 41.

B. Unlawful Influence

Appellant argues that the interaction between AT and the Third Air Force SJA was "unusual" and therefore "raises the specter of unlawful command influence."

1. Law

Article 37, UCMJ, states in relevant part:

> No person subject to this chapter [10 U.S.C. §§ 801 et seq.] may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter [10 U.S.C. §§ 801 et seq.] as prescribed by the President.

National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532(a)(2), 133 Stat. 1198, 1359–60 (2019) (amending Article 37, UCMJ, 10 U.S.C. § 837).

We review allegations of unlawful command influence de novo. *United States v. Horne*, 82 M.J. 283, 286 (C.A.A.F. 2022). The Defense has the initial burden of raising the issue of unlawful command influence by presenting "some evidence" of unlawful command influence, meaning the Defense "must show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citation omitted). This "burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citation omitted). If raised on appeal, an appellant must show: (1) facts which, if true, constitute unlawful command influence; (2) the proceedings were unfair; and (3) the unlawful command influence was the cause of that unfairness. *Id.*; *Biagase*, 50 M.J. at 150. If that burden is met, the burden then shifts to the Government to show beyond a reasonable doubt: (1) the predicate facts do not exist; or (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings and sentence. *Biagase*, 50 M.J. at 151.

2. Analysis

Appellant fails to meet his initial burden of showing "some evidence" of unlawful influence. Appellant claims the discussion between the Third Air Force SJA and AT was "unusual," but does not articulate how that rises to unlawful influence.

Whether these conversations are unusual was not litigated at trial; Appellant did not file a motion or present additional evidence, and points only to AT's brief testimony on this issue. Recognizing that the initial burden is low, these facts still do not justify a conclusion that unlawful command influence occurred. Appellant has not demonstrated "some evidence" of unlawful command influence and is not entitled to relief.

C. Sex Offender Registration as an Arguable Mitigating Factor

Appellant argues that trial defense counsel should have been able to argue that because Appellant would have to register as a sex offender, that is a mitigating factor for the sentencing authority's consideration.

1. Law

We review a military judge's ruling on an objection to sentencing argument for an abuse of discretion. *United States v. Briggs*, 69 M.J. 648, 650 (A.F. Ct. Crim. App. 2010).

Sentencing arguments by counsel must be based upon evidence adduced at trial and any fair inferences as may be drawn therefrom. *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993). "Further, sentencing arguments 'cannot include a matter not supported by the facts'" or reasonable inferences drawn therefrom. *Briggs*, 69 M.J. at 650 (quoting *United States v. Beneke*, 22 C.M.R. 919, 922 (A.F.B.R. 1956)).

"A collateral consequence is '[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence.'" *United States v. Cueto***,** 82 M.J. 323, 327 (C.A.A.F. 2022) (citing *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006) (quoting *Collateral Consequence*, BLACK'S LAW DICTIONARY (8th ed. 2004)). "The general rule concerning collateral consequences is that courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Talkington*, 73 M.J. 212, 215 (C.A.A.F. 2014) (alteration in original) (citation omitted).

Sex offender registration is a collateral consequence of the conviction alone, not the sentence. *Cueto*, 82 M.J. at 327 (citing *Talkington,* 73 M.J. at 213).

2. Analysis

Trial defense counsel argued, "You also have to consider that he will be – that he's been convicted of a sexual offense and a sex offender the rest of his life." Trial counsel objected and the military judge sustained the objection after hearing the position of the parties. It is well settled that collateral consequences are not appropriate matter for argument in sentencing. Our superior

court made clear in *Talkington* that sex offender registration is a collateral consequence. *Id*. Hence, argument on sex offender registration is improper.

Appellant argues, as his trial defense counsel did at trial, that *Tyler* changed the analysis with regards to this issue. 81 M.J. at 108. In *Tyler*, the United States Court of Appeals for the Armed Forces held that "[i]n the absence of explicit statutory limitation, or other clear evidence of Congress's or the President's intent to limit comment on unsworn victim statements in presentencing argument, we hold either party may comment on properly admitted unsworn victim statements." *Id*. at 113 (footnote omitted). The court recognized that procedurally, the victim's right to make a statement was akin to an accused's right of allocution and presumed that Congress and the President intended unsworn victim statements to be treated similarly to an accused's unsworn statement. *Id*. at 112. Notably though, the court did not hold that counsel may comment on collateral consequences contained in the unsworn victim statements. Therefore, while *Tyler* provided guidance with regards to unsworn victim statements, it did nothing to change the law regarding the prohibition on counsel arguing collateral consequences.

As trial defense counsel's argument was improper when he referenced a collateral consequence, sex offender registration, the military judge did not err, let alone abuse his discretion, by sustaining the objection to such reference.

D. Sentence Appropriateness

Appellant argues that his sentence, which included a dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to the grade of E-1, is unduly severe.

1. Law

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved based on 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 offenses, the appellant's record of service, and all matters contained in the record. *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015). While we have significant discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *Id*.

2. Analysis

Appellant personally asserts that his sentence is unduly severe considering his alcoholism and the positive comments in his character letters. During presentencing, Appellant introduced an unsworn statement, seven character

letters, a summation of awards and decorations received, and an assortment of photographs, mostly of him with his family.

Appellant's crimes were particularly aggravating. On a military installation in a foreign country, he unlawfully entered the dorm room of another Airman in the early hours of the morning and proceeded to sexually penetrate her while she slept. For his crimes, he faced a mandatory dishonorable discharge and maximum confinement in excess of 30 years.

After carefully considering Appellant, the nature and seriousness of the offenses, the particularized extenuating and mitigating evidence, and all the other matters in the record of trial, we conclude Appellant's sentence is not inappropriately severe.

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).[6] Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

[6] We note that in his clemency request, Appellant requested that the convening authority waive automatic forfeitures. The convening authority purported to grant waiver of the automatic forfeitures commencing 14 days after the sentence was adjudged for six months, or until release from confinement or the expiration of Appellant's term of service, whichever was sooner. However, he did not grant any clemency with regards to the adjudged total forfeitures. Appellant does not raise any issues with regards to these actions or assert any prejudice. The record does not demonstrate any prejudice and we find none.

APPENDIX C

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

No. ACM 40135 (f rev)

UNITED STATES
Appellee

v.

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

Appeal from the United States Air Force Trial Judiciary

Upon Further Review

Decided 2 November 2023

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.

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