IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
KAYE P. DONLEY, Technical Sergeant (E-6) United States Air Force *Appellant*	)	No. ACM 40350 21 November 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **27 January 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully Submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 November 2022.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

22 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 November 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **KAYE P. DONLEY,** Technical Sergeant (E-6) United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40350 17 January 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **26 February 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the members found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the members found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the members sentenced Appellant to be reprimanded, reduced in grade to E-3,

confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. On 21 July 2022, the military judge entered the findings and sentence as announced by the members, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 17 January 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

18 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 January 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
KAYE P. DONLEY, Technical Sergeant (E-6) United States Air Force *Appellant*	)	No. ACM 40350 10 February 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **28 March 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 134 days have elapsed. On the date requested, 180 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the members found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the members found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the members sentenced Appellant to be reprimanded, reduced in grade to E-3,

confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. On 21 July 2022, the military judge entered the findings and sentence as announced by the members, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 10 February 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

13 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 February 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **KAYE P. DONLEY,** Technical Sergeant (E-6) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40350 20 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **27 April 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the panel found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the panel found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the panel sentenced Appellant to be reprimanded, reduced in grade to E-3,

confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 14 clients and is presently assigned 12 cases pending brief before this Court. Nine cases pending brief before this Court currently have priority over the present case:

a. *United States v. Johnson*, No. ACM 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is confined. Counsel is currently reviewing this record of trial and beginning to draft the Appellant's Assignments of Error.

b. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel is currently reviewing this record of trial.

c. *United States v. Hernandez*, No. ACM 40287 – The record of trial consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The

transcript is 226 pages. Appellant is confined. Maj David Bosner also represents this Appellant and has begun drafting this Appellant's Assignments of Error.

d. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined. Undersigned counsel has begun review of this record of trial and is supervising the review of this record by Mr. Jacob Frankson, a law student extern assigned to the Air Force Appellate Defense Division.

e. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined.

f. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

g. *United States v. Manzano-Tarin*, No. ACM S32734 – The record of trial consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is 75 pages. Appellant is not confined. Undersigned counsel has begun review of this record of trial and is supervising the review of this record by Mr. Jacob Frankson, a law student extern assigned to the Air Force Appellate Defense Division.

h. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined.

i. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined.

(2) In addition, before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending petition for grant of review and supplement to the petition for grant of review, *United States v. Lopez*, No. ACM 40161.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 20 March 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

21 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 March 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
KAYE P. DONLEY, Technical Sergeant (E-6) United States Air Force *Appellant*	)	No. ACM 40350 19 April 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **27 May 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the panel found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the panel found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the panel sentenced Appellant to be reprimanded, reduced in grade to E-3,

confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents thirteen clients and is presently assigned eight cases pending brief before this Court. Five cases pending brief before this Court currently have priority over the present case:

a. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined. Undersigned counsel is currently reviewing this record of trial.

b. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

c. *United States v. Manzano-Tarin*, No. ACM S32734 – The record of trial consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is 75 pages. Appellant is not confined. Undersigned counsel has begun review of this record of trial.

d. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined.

e. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined.

f. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

(2) In addition, before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending petition for grant of review and supplement to the petition for grant of review, *United States v. Lopez*, No. ACM 40161.

(3) Lastly, undersigned counsel will be on temporary duty at Maxwell AFB, Alabama, to teach at a Defense Orientation Course from , and will be attending the United States Court of Appeals for the Armed Forces' 2023 Continuing Legal Education and Training Program on .

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 19 April 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

20 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 April 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40350**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Kaye P. DONLEY	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 19 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 21st day of April, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **27 May 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
KAYE P. DONLEY, Technical Sergeant (E-6) United States Air Force *Appellant*	)	No. ACM 40350 12 May 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **26 June 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 225 days have elapsed. On the date requested, 270 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the panel found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the panel found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the panel sentenced Appellant to be reprimanded, reduced in grade to E-3,

confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents fifteen clients and is presently assigned eight cases pending brief before this Court. Four cases pending brief before this Court currently have priority over the present case:

a. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined and undersigned counsel is currently reviewing this record of trial.

b. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined.

c. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined.

d. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is confined.

(2) In addition to the above priorities, undersigned counsel is awaiting the Government's answer brief in *United States v. Portillos*, No. ACM 40305, *United States v. Gammage,* No. ACM S32731, and *United States v. Manzano Tarin*, No. ACM S32734, and may file reply briefs. Before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending supplement to the petition for grant of review, *United States v. Lopez*, USCA Dkt. No. 23-0164/AF, No. ACM 40161, which is due no later than 22 May 2023.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 12 May 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

12 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 May 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **KAYE P. DONLEY,** Technical Sergeant (E-6) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 No. ACM 40350 14 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **26 July 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the panel found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the panel found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*.

On 24 May 2022, the panel sentenced Appellant to be reprimanded, reduced in grade to E-3, confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents twenty clients and is presently assigned seven cases pending brief before this Court. Three cases pending brief before this Court currently have priority over the present case:

a. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined. Undersigned counsel has reviewed all pre-trial, post-trial, and allied papers included in the record of trial, as well as all sealed materials and is reviewing the transcript.

b. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined.

c. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit.

The transcript is 1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, is completing his review of Appellant's record of trial.

(2) Since moving for a sixth enlargement of time in this case, undersigned counsel has filed one reply brief before this Court in *United States v. Manzano Tarin*, No. ACM S32734. She has also filed one answer brief before the United States Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Rocha* (Dkt. No. 23-0134/AF, No. ACM 40134) and two supplements to petitions for grant of review in *United States v. Lopez* (USCA Dkt. No. 23-0164/AF, No. ACM 40161) and *United States v. Rodriguez* (USCA Dkt. No. 23-0166/AF, No. ACM 40218).

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 14 June 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

15 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 June 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **KAYE P. DONLEY,** Technical Sergeant (E-6) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 2 No. ACM 40350 14 July 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a eighth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **25 August 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 288 days have elapsed. On the date requested, 330 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the panel found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the panel found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*.

On 24 May 2022, the panel sentenced Appellant to be reprimanded, reduced in grade to E-3, confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Kaye P. Donley*, dated 21 June 2022. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents twenty-three clients and is presently assigned cases pending brief before this Court. Two cases pending brief before this Court currently have priority over the present case:

1. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel is completing her review of the record of trial.
2. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, is completing his review of Appellant's record of trial.

In addition to the above priority, undersigned counsel was detailed to represent the Appellant in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, a matter in which the United States Court of

Appeals for the Armed Forces (C.A.A.F) has granted review. Appellant's brief and the joint appendix are due in accordance with C.A.A.F.'s order on 26 July 2023. Undersigned counsel did not represent this Appellant before this Court or for his petition to C.A.A.F. and is familiarizing herself with the record and granted issue, and drafting Appellant's brief.

Since moving for a seventh enlargement of time in this case, undersigned counsel has filed a brief on behalf of the appellant in *United States v. Bickford*, No. ACM 40326, and a motion for reconsideration in *United States v. Hernandez*, No. ACM 40287. She has also reviewed five records of trial and advised the members regarding their opportunity to appeal directly to the Air Force Court of Criminal Appeals.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 14 July 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

17 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other similar extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's latest request is granted, the delay in this case will be 330 days. This nearly year-long delay practically ensures this Court will not be able to issue a decision which complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, leaving approximately 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 July 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40349**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Kaye P. DONLEY	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40350**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Kaye P. DONLEY	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

On 8 August 2023, this court issued a Notice of Panel Change order in the above-styled matter under No. ACM 40349, when it should have been No. ACM 40350.

It is by the court on this 9th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 3
KAYE P. DONLEY, Technical Sergeant (E-6) United States Air Force *Appellant*	)	No. ACM 40350 18 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 September 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the panel found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the panel found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*.

On 24 May 2022, the panel sentenced Appellant to be reprimanded, reduced in grade to E-3, confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Kaye P. Donley*, dated 21 June 2022. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 25 clients and is presently assigned 18 cases pending brief before this Court. Five cases pending before this Court, two cases pending before the Court of Appeals for the Armed Forces (C.A.A.F.), and two cases pending before the U.S. Supreme Court currently have priority over the present case:

1. *United States v. Blackburn*, No. ACM 40303 – Appellant's reply brief is due to this Court on 21 August 2023. Undersigned counsel replaced Appellant's appellate defense counsel who drafted Appellant's AOE. As such, undersigned counsel familiarized herself with the record, the ten issues raised, and the Government's Answer which totals 52 pages, and drafted Appellant's reply brief. Undersigned counsel is awaiting leadership review of Appellant's reply brief which will be filed on 21 August 2023.
2. *United States v. Bickford*, No. ACM 40326 – Appellant's reply brief is due to this Court on 21 August 2023. Undersigned counsel is reviewing the Government's answer and may file a reply brief.

3. *United States v. Gammage*, No. ACM S32731 (f rev) – Appellant's AOE is due to this Court on 22 August 2023. Undersigned counsel previously represented Appellant before this Court and upon further review, drafted Appellant's AOE. Undersigned counsel is incorporating edits from her leadership and will file Appellant's AOE on or before 22 August 2023.
4. *United States v. Hernandez*, No. ACM 40287 – Appellant's petition and supplement are due to C.A.A.F. on 14 September 2023.
5. *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189– The Government's answer brief is due to C.A.A.F. on 5 September 2023. Undersigned counsel anticipates she will need to reply and Appellant's reply brief will be due on 15 September 2023.
6. *United States v. Anderson*, No. ACM 39969 – Undersigned counsel has been detailed as Appellant's military defense counsel and is assisting in his petition for writ of certiorari to the U.S. Supreme Court, due 27 September 2023.
7. *United States v. Lopez*, No. ACM 40161 – Undersigned counsel is assisting in the drafting of a joint petition for writ of certiorari before the U.S. Supreme Court, which is due 15 October 2023.
8. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel is completing her review of the record of trial.
9. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is

1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, is completing his review of Appellant's record of trial.

In addition to the above priorities, undersigned counsel has been co-chairing the planning for the 2023 Joint Appellate Advocacy Training, hosted by the Air Force Appellate Defense Division, and undersigned counsel is required to attend this training on . Additionally, she will be on preauthorized leave

Since moving for an eighth enlargement of time in this case, as new lead counsel in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, undersigned counsel drafted and filed Appellant's brief and the joint appendix on 4 August 2023. Undersigned counsel also taught incoming appellate defense counsel during a mandatory newcomer's training on , was on leave , and drafted briefs for the cases detailed above in ¶ 1-3.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 18 August 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

21 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other similar extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's latest request is granted, the delay in this case will be 360 days. This nearly year-long delay practically ensures this Court will not be able to issue a decision which complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, leaving approximately 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40350**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Kaye P. DONLEY	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 18 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 23d day of August 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **24 September 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **KAYE P. DONLEY,** Technical Sergeant (E-6), United States Air Force, *Appellant.*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Panel No. 3 No. ACM 40350 15 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 October 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to Appellant's pleas, the panel found Appellant guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. *Id*.; Record (R.) at 1161. Consistent with Appellant's pleas, the panel found Appellant not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting Appellant of alleged violations of Articles 120 and 128, UCMJ. *Id*.

On 24 May 2022, the panel sentenced Appellant to be reprimanded, reduced in grade to E-3, confined for three years, and dishonorably discharged. ROT, Vol. 1, Statement of Trial Results - Second Corrected Copy at 2; R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action – *United States v. Technical Sergeant Kaye P. Donley*, dated 21 June 2022. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for Appellant. ROT, Vol. 1, EOJ at 1-3. The record of trial consists of seven prosecution exhibits, four defense exhibits, sixty-six appellate exhibits, and one court exhibit. The transcript is 1233 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 29 clients and is presently assigned 15 cases pending brief before this Court. Two cases pending before this Court currently have priority over the present case:

1. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel has reviewed approximately 20% of Appellant's transcript and will continue reviewing Appellant's record of trial at every opportunity.
2. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, has reviewed Appellant's record of trial and started researching and drafting an Assignments of Error brief.

For the Court's awareness, undersigned counsel will be using use or lose leave

Additionally, she will be assisting in the preparation of a petition for writ of certiorari before the U.S. Supreme Court in *United States v. Anderson*, USCA Dkt. No. 22-0193/AF, No. ACM 39969, which is currently due on 30 October 2023.

Since moving for a ninth enlargement of time in this case, undersigned counsel filed a reply brief in *United States v. Blackburn*, No. ACM 40303; initial brief (on further review) in *United States v. Gammage*, No. ACM S32731 (f rev); filed a petition and supplement before the Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Hernandez*, No. ACM 40287; filed a reply brief before C.A.A.F. in *United States v. Cole*, USCA Dkt. No. 23-0162/AF; and assisted in the drafting of the petition for a writ of certiorari in *Martinez, et. al., v. United States*[1] in the U.S. Supreme Court.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

[1] Petitioners include, *inter alia*, *Martinez*, *McCameron*, *Tarnowski*, *Veerathanongdech*, and *Lopez* (No. ACMs 39973, 40005, 40089, 40110, 40161).

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

18 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other similar extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's latest request is granted, the delay in this case will be 390 days. This nearly year-long delay practically ensures this Court will not be able to issue a decision which complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, leaving approximately 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 September 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40350**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Kaye P. DONLEY	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 17 October 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 19th day of October 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **23 November 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time likely will necessitate a status conference.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **KAYE P. DONLEY,** United States Air Force, *Appellant*.	)	No. ACM 40350
	)	1 November 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1(c)(2), 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for Technical Sergeant (TSgt) Kaye P. Donley, Appellant, and the Government to examine the portion of the hearing recorded in transcript pages 72-111, 177-288, 629-646, 662-674, and Appellate Exhibits VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII, XXIV, XXV, XXXI, XXXII, XXXIII, XXXIV, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVI, XLVIII, and XLIX.

Facts

TSgt Donley was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Entry of Judgment (EOJ), 21 July 2022. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to TSgt Donley's pleas, the panel found TSgt Donley guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. R. at 1161. Consistent with TSgt Donley's pleas, the panel found TSgt Donley not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting TSgt Donley of

alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the panel sentenced TSgt Donley to a reprimand, reduction in grade to E-3, three years' confinement, and a dishonorable discharge. R. at 1232.

During the proceedings, the military judge sealed the portion of the hearing recorded in transcript pages 72-111, 177-288, 629-646. R. at 112, 289, 647. The portion of the hearing recorded in transcript pages 662-674 is sealed in the record of trial, however, it does not appear the military judge ordered that it be sealed. Record of Trial (ROT), Vol. 11. Nevertheless, in context, it appears the closed session related to Mil. R. Evid. 412. *See* R. at 660, 675. The military judge also sealed Appellate Exhibits VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII, XXXI, XXXII, XXXIII, XXXIV, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVI, XLVIII, and XLIX. R. at 25-33, 159 (explaining App. Ex. XXVI), 163-65, 167-72, 174, 295-96; App. Ex. XXVI. Appellate Exhibits XXIV and XXV are sealed in the record but it does not appear the military judge ordered that they be sealed. ROT, Vol. 4-5; *see* R. at 32-33; App. Ex. XXVI.

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the [*Manual for Courts-Martial, United States*], governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense

counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[1] perform "reasonable diligence,"[2] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[3] These requirements are consistent with those imposed by the state bar to which counsel belongs.[4]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Analysis

Each of the sealed exhibits is an appellate exhibit which was "presented" or "reviewed" by the parties at trial. The trial parties were present during the closed sessions and later reviewed the sealed transcript pages which record the closed sessions. It is reasonably necessary for undersigned counsel to review these sealed materials to competently conduct a professional evaluation of TSgt Donley's case and to uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of

[1] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[2] *Id*. at Rule 1.3.
[3] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[4] Counsel of record is licensed to practice law in California.

undersigned counsel's Article 70, UCMJ, duties, and because the materials were made available to the parties at trial, TSgt Donley has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of these sealed materials and has shown good cause to grant this motion.

The Government consents to both parties viewing the sealed materials detailed above.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit examination of the aforementioned sealed materials contained within the original record of trial.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 November 2023.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40350**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Kaye P. DONLEY	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 1 November 2023, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting that she and the Government be permitted to examine sealed materials in the record of trial including, transcript pages 72–111, 177–288, 629–646, and 662–674[1] as well as Appellate Exhibits VI–XIX, XXI–XXV, XXXI–XXXIV, XXXVII–XXXIX, XL–XLVI, XLVIII, and XLIX. Appellant's counsel asserts that the Government consents to this motion.

Notably, Appellate Exhibit XXI was not sealed in the record of trial, is not requested to be sealed by either party, and upon review, does not appear to require this court to order it sealed. The remainder of the portions of the transcript and the referenced exhibits were available to the parties at trial as they are filings, attachments and rulings related to motions practice. Additionally, Appellant's counsel notes that Appellate Exhibits XXIV and XXV are sealed in the record but were not ordered sealed by the military judge. We resolve this inconsistency in the decretal paragraph below.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court finds Appellant's counsel has made a colorable showing that review of the requested portions of the transcript and the referenced exhibits is necessary to fulfill counsel's duties of representation to their respective clients.

---

[1] Appellant's counsel asserts that pages 662–674 were not specifically ordered sealed. As these pages contain transcription of a closed session, they are already appropriately sealed in the record of trial without further order. *See* Rule for Courts-Martial 1112(e)(3)(B)(ii).

Accordingly, it is by the court on this 6th day of November 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view transcript pages **72–111, 177–288, 629–646,** and **662–674** as well as Appellate Exhibits **VI–XIX, XXI–XXV, XXXI–XXXIV, XXXVII–XXXIX, XL–XLVI, XLVIII,** and **XLIX**, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

It is further ordered:

Appellate Exhibits XXIV and XXV are sealed.

The Appellee shall take all steps necessary to ensure all copies of Appellate Exhibits XXIV and XXV are in fact, sealed.[2]

However, if appellate defense counsel and appellate government counsel currently possess Appellate Exhibits XXIV and XXV, counsel are authorized to retain copies of the materials in their possession until completion of our Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with Rule 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. After this period, appellate defense and appellate government counsel shall destroy any retained copies in their possession.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. **KAYE P. DONLEY,** Technical Sergeant (E-6), United States Air Force, *Appellant.*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELTH)** Before Panel No. 3 No. ACM 40350 15 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Kaye P. Donley, Appellant, hereby moves for a twelfth enlargement of time (EOT) to file Assignments of Error (AOE). TSgt Donley requests an enlargement for a period of 30 days, which will end on **23 December 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 412 days have elapsed. On the date requested, 450 days will have elapsed.

TSgt Donley was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Entry of Judgment (EOJ), 21 July 2022. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to TSgt Donley's pleas, the panel found TSgt Donley guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. R. at 1161. Consistent with TSgt Donley's pleas, the panel found TSgt Donley not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting TSgt Donley of alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the panel sentenced

TSgt Donley to a reprimand, reduction in grade to E-3, three years' confinement, and a dishonorable discharge. R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. Convening Authority Decision on Action, 21 June 2022. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for TSgt Donley. EOJ at 1-3. The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 66 appellate exhibits, and 1 court exhibit. The transcript is 1233 pages. TSgt Donley is currently in confinement.

Through no fault of TSgt Donley, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. On 14 November 2023, TSgt Donley was again informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 28 clients and is presently assigned 13 cases pending brief before this Court. Two cases have priority over the present case:

1. *United States v. Kight*, No. ACM 40337 (pending before this Court) – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Senior Airman Kight is confined. Undersigned counsel completed her review of Senior Airman Kight's record of trial on 15 November 2023 and is discussing potential issues with Senior Airman Kight and Mr. Scott Hockenberry, civilian appellate counsel.
2. *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189 (pending before the United States Court of Appeals for the Armed Forces) – Oral argument is scheduled

on 6 December 2023. As lead counsel, undersigned counsel, will be preparing to give at least two moot arguments prior to 6 December 2023.

Since moving for an eleventh enlargement of time, undersigned counsel filed (1) a brief before this Court in *United States v. Stanford*, No. ACM 40327[1], (2) a motion to cite supplemental authorities and a merits brief on further review in *United States v. Blackburn*, No. ACM 40303 (f rev), and (3) a merits brief on further review in *United States v. Gammage*, No. ACM S32731 (f rev). She also reviewed the entire record in *United States v. Kight*, No. ACM 40337, and prepared for and participated in five moot practices between 19 October 2023 and 9 November 2023, in addition to preparing for and sitting as second chair for *United States v. Rocha*, USCA Dkt. No. 23-0134/AF, No. ACM 40134, on 25 October 2023. Undersigned counsel anticipates that she will turn her full attention to reviewing TSgt Donley's case on 7 December 2023 and will endeavor to complete TSgt Donley's brief within the requested enlargement of time.

WHEREFORE, TSgt Donley respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

[1] The Government's answer in *United States v. Stanford* is due on 9 December 2023 and the content of its answer may necessitate that undersigned counsel file a reply brief during this requested enlargement of time.

CERTIFICATE OF FILING AND SERVICE

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

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

16 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) KAYE P. DONLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40350 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other similar extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's latest request is granted, the delay in this case will be 450 days. This year-long delay practically ensures this Court will not be able to issue a decision which complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, leaving approximately 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 November 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40350**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Kaye P. DONLEY	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

On 20 November 2023, the court held a status conference to discuss the progress of this case in relation to this motion. Moving counsel, Major (Maj) Samantha Golseth and Ms. Megan Marinos represented Appellant. Ms. Mary Ellen Payne represented Appellee. Maj Golseth explained her workload and anticipated case progression going forward. She is hopeful that a brief would be filed in this case within the requested enlargement of time.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 21st day of November 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Twelfth) is **GRANTED**. Appellant shall file any assignments of error not later than **23 December 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate additional status conferences.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. **KAYE P. DONLEY,** Technical Sergeant (E-6), United States Air Force, *Appellant.*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)** Before Panel No. 3 No. ACM 40350 15 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Kaye P. Donley, Appellant, hereby moves for a thirteenth and final enlargement of time (EOT) to file assignments of error. TSgt Donley requests an enlargement for a period of 30 days, which will end on **22 January 2024**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 442 days have elapsed. On the date requested, 480 days will have elapsed.

TSgt Donley was tried by a general court-martial composed of officer and enlisted members at Fairchild AFB, Washington. Entry of Judgment (EOJ), 21 July 2022. Nine specifications were litigated, alleging violations of Articles 120 and 128, Uniform Code of Military Justice (UCMJ). *Id*. at 1-2. On 24 May 2022, contrary to TSgt Donley's pleas, the panel found TSgt Donley guilty of Specification 3 of Charge I and Charge I, and Specification 4 of Charge II and Charge II, in violation of Articles 120 and 128, UCMJ. R. at 1161. Consistent with TSgt Donley's pleas, the panel found TSgt Donley not guilty of Specifications 1 and 2 of Charge I; Specifications 1, 2, 3, and 5 of Charge II; and the specification of the Additional Charge and Additional Charge, acquitting TSgt Donley of alleged violations of Articles 120 and 128, UCMJ. *Id*. On 24 May 2022, the panel sentenced

TSgt Donley to a reprimand, reduction in grade to E-3, three years' confinement, and a dishonorable discharge. R. at 1232. On 21 June 2022, the convening authority took no action on the findings and sentence. Convening Authority Decision on Action, 21 June 2022. On 21 July 2022, the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand for TSgt Donley. EOJ at 1-3. The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 66 appellate exhibits, and 1 court exhibit. The transcript is 1233 pages. TSgt Donley is currently in confinement.

Through no fault of TSgt Donley, undersigned counsel needs a final enlargement of error to complete her review of his case and draft his assignments of error. Undersigned counsel's mother is hospitalized and undersigned counsel will be on leave

Undersigned counsel is reviewing the record, will be taking TSgt Donley's record with her to continue her review, has reviewed portions of the sealed materials, and has identified assignments of error. During the twelfth enlargement of time while reviewing TSgt Donley's case, undersigned counsel prepared for and participated in six moot arguments, prepared for and gave two moot arguments, and argued before the Court of Appeals for the Armed Forces in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189. She also drafted assignments of error in *United States v. Kight*, No. ACM 40337. TSgt Donley was informed of his right to a timely appeal and this request for an enlargement of time, and he agrees with this request for an enlargement of time.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 27 clients and is presently assigned 13 cases pending brief before this Court. One case has priority over the present case:

1. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Senior Airman Kight is confined. Undersigned counsel completed drafting the appellant's assignments of error and is finalizing the appellant's brief for filing.

WHEREFORE, TSgt Donley respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

KAYE P. DONLEY,
Technical Sergeant (E-6),
United States Air Force
Appellant.

No. ACM 40350

BRIEF ON BEHALF OF APPELLANT

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **KAYE P. DONLEY,** United States Air Force, *Appellant.*	)	No. ACM 40350
	)	22 January 2024

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

Assignments of Error

I.

WHETHER THE VERDICT IS AMBIGUOUS WHEN THE GOVERNMENT INTRODUCED TWO ACTS THAT COULD SATISFY THE ELEMENTS OF SPECIFICATION 4 OF CHARGE II WHEN ONLY ONE ACT WAS CHARGED; THE PANEL RECEIVED NO INSTRUCTION ON WHICH OF THE TWO ACTS WAS THE CHARGED ACT; AND THERE IS NO WAY TO KNOW WHICH ACT THE MEMBERS VOTED ON, OR WHETHER THEY AGREED ON THE SAME ACT.

II.

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY DIRECTING THE MEMBERS, WITHOUT PROPER INSTRUCTION, TO REVIEW THEIR COMPLETED FINDINGS WORKSHEET AND DISCUSS WHETHER SIX OF THE SEVEN REMAINING MEMBERS AGREED ON THEIR FINDINGS WHEN THE PANEL PRESIDENT WAS EXCUSED BEFORE ANNOUNCEMENT OF THE FINDINGS.

III.

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

IV.

WHETHER APPELLANT'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE BECAUSE IT OMITS THE MILITARY JUDGE'S RULING ON THE DEFENSE MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT PURSUANT TO MIL. R. EVID. 404(b), WHICH SHOULD HAVE BEEN CAPTURED IN APPELLATE EXHIBIT XXX.

V.

WHETHER THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN THE GOVERNMENT'S SUBMISSION TO THIS COURT IS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(b).

VI.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO COMPEL PRODUCTION OF MENTAL HEALTH RECORDS FOR IN CAMERA REVIEW.[1]

[1] Filed Under Seal with TSgt Donley's Motion to File Under Seal, dated 22 January 2024.

Statement of the Case

On 24 May 2022, at Fairchild Air Force Base (AFB), Washington, a general court-martial composed of officer and enlisted members convicted Technical Sergeant (TSgt) Kaye P. Donley, contrary to his pleas, of one specification of sexual assault without consent and one specification of assault consummated by a battery upon a spouse in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928, *Manual for Courts-Martial, United States* (2019 ed.).[2] R. at 1161.

The members sentenced TSgt Donley to a reprimand, reduction in grade to E-3, three years' confinement, and a dishonorable discharge. R. at 1232. The convening authority took no action on the findings and sentence and the military judge entered the findings and sentence as announced by the panel, incorporating the convening authority's reprimand.[3]

Statement of Facts

TSgt Donley and MED met through mutual friends in March 2004 when they were both active duty and assigned to Aviano Air Base (AB), Italy. R. at 506. MED described TSgt Donley as incredibly charming and charismatic. *Id*. MED said this changed, however, four months before they got married when they had not yet been planning to get married. R. at 507. According to MED, she fell asleep clothed on a full-size air mattress in his dorm room and woke up on the same air mattress with her clothing removed, her legs spread, and him on top of her. R. at 507-08, 572, 574. He then allegedly raped her by slamming his penis into her vagina for twenty minutes while she continuously tried to get out from underneath him. R. at 509, 575. On cross-examination, she stated he never went slower, it was always forceful, and for twenty to thirty minutes, it was nothing

[2] References to the punitive articles are identified by year. References to the Rules for Courts-Martial and Military Rules of Evidence are to the 2019 *Manual for Courts-Martial, United States* unless otherwise stated.

[3] Convening Authority Decision on Action, 21 June 2022; Entry of Judgment, 21 July 2022.

but pounding and slamming. R. at 577-78. This act was charged in the Additional Charge and its Specification and TSgt Donley was acquitted. Charge Sheet, 17 August 2021; R. at 1161.

The couple flew back from Italy to the United States to get married. They got married on 5 April 2005, in Huntsville, Alabama, at TSgt Donley's family home with both of their families present. R. at 510-11. The couple stayed in a rustic cabin on the night of their wedding, then spent a few more days in a guesthouse behind TSgt Donley's family's home before traveling to see MED's family and returning to Aviano AB. R. at 512, 517. MED alleged that TSgt Donley raped her twice in the family guesthouse. R. at 513, 515-16. MED stated he forcefully pulled her jeans off and her legs were bruised as a result of this struggle. R. at 513, 517. TSgt Donley then "slammed his penis into [her] for '20 plus, 30 minutes,' and never slowed down, never got softer, and never went easier." R. at 514, 595. Afterwards, he laid at the head of the bed for a while before he told her to come up to the top of the bed, where he again raped her. R. at 515. This time, she alleged that while he was still laying on his back, he pulled her leg over him and in one swift movement he picked her up by grabbing her on her hips and "slam[med] her onto his penis." R. at 515-16, 598. In the same one swift movement where she was now straddling him, he also managed to pin her calves and feet under his legs, while his legs were closed and he did this without using his hands to assist in pinning her legs. *Id*. Once she was on top of him, he then trapped her arms "in some kind of bear like hug thing." R. at 515-16, 598-600. TSgt Donley "rammed into [her] for '20 plus minutes' before shoving her to the side." R. at 516. During this time, according to MED, he never let go of her, never unpinned her legs, and she never participated in anyway. R. at 600. His hips were thrusting her up and down for twenty to thirty minutes, while she was a deadweight on top of him, and he never tired or slowed down. R. at 600-01. MED stated she received a light blue bruise on her forehead from hitting her head on the wall, but the photograph in Defense Exhibit A was taken the next day and shows no bruise. R. at 601-02; Def. Ex. A.

According to MED, for the rest of the trip—which included staying almost an entire week with her family in Mississippi—there was no love, compassion, charm or charisma. R. at 517. She "flew to the [S]tates with a loving kind man and flew back home with a monster." R. at 607. The first act described was charged in Specification 1 of Charge I and TSgt Donley was again acquitted. Charge Sheet, 24 June 2021; R. at 1004, 1161, App. Ex. LVIII at 1-2 (instruction to the panel that the charged act was the first act of sexual intercourse at TSgt Donley's parent's property).

Weeks after the couple got married, TSgt Donley deployed for 120 days. R. at 518. When he returned from his deployment, MED picked him up from the hangar wearing a little sundress and no underwear. *Id*. MED talked to TSgt Donley about having sex on the way home and told him that she wanted to have sex with him. R. at 608-09. When they got home, MED alleged that TSgt Donley pulled her by the wrist to their bedroom so hard that her feet were dragging. R. at 519. She had "no warning" and he again "slammed his penis into [her] vagina," for "20 minutes half-an-hour." *Id*. The act was charged in Specification 2 of Charge I and TSgt Donley was acquitted. Charge Sheet, 24 June 2021; R. at 1161.

The couple next moved to Luke AFB, Arizona, and had their first child there in August 2008, followed by their second in 2011. R. at 520-21. MED was still active duty and continued on active duty as the couple again moved to MacDill AFB, Florida. R. at 521-22.

MED separated from active duty in May 2016 and the family moved to Spokane, Washington, in November 2017 when TSgt Donley received orders to Fairchild AFB. R. at 505-506, 523. MED claimed she never reported the alleged rapes while she was active duty because when she attended the First Term Airmen's Course (FTAC), a Senior Master Sergeant pulled all the females aside and told them if they "were sexually harassed, sexually assaulted, it would be in [their] best interest of [their] careers to keep [their] mouths shut." R. at 619. Yet in 2014, MED made an allegation against one of her supervisors, alleging, in part, that he had threatened the

health, welfare, and safety of her children. R. at 650. According to MED, the investigators told her it was going to be "his word versus yours," and "there was probably not much they were going to be able to do." R. at 651. Comparatively, when MED went to the Office of Special Investigations (OSI) to report TSgt Donley, she told them she didn't have any text messages but she had a recording of an argument with TSgt Donley. R. at 652; Pros. Ex. 1. According to MED, this recording was made in August 2019. R. at 538. This recording was seemingly the evidence the panel relied on to convict him of the two specifications discussed in the recording. Pros. Ex. 1; Charge Sheet, 24 June 2021; R. at 1161.

TSgt Donley was convicted of sexually assaulting MED in May 2019. Charge Sheet, 24 June 2021 (Specification 3 of Charge I); R. at 1161. According to MED, TSgt Donley told MED he wanted to have sex with her and told her it could be "the easy way or the hard way." R. at 524-25. MED decided to do it the "easy way." R. at 525. She went to the edge of the bed but protested. R. at 525. MED stated TSgt Donley held both her arms above her head so that she couldn't move them, and he did this before penetrating her vagina. R. at 526, 708. When he penetrated her, he didn't use his hands to insert his penis because according to her, "[h]e had already positioned it at the entrance to [her] vagina. R. at 708. He then "slammed" into her over and over, getting rougher and without ever looking at her, for "half an hour, more than 20 minutes." R. at 526.

When MED confronted TSgt Donley about this during the recorded argument, neither the beginning nor end of the argument are captured. Pros. Ex. 1. TSgt Donley and MED were both audibly emotional and MED continued to press TSgt Donley for an answer. *Id*. TSgt Donley protested that they keep going back to this and it never goes anywhere. *Id*. In response to her repeated questioning, however, TSgt Donley said he knew she didn't enjoy it, she looked at him with hate in her eyes, and he had sex with her, she did not have sex with him. *Id*. MED told him

that prior to her getting on the bed, she had told him she didn't "want to do this," and TSgt Donley disagreed: "No, you didn't." *Id*.

MED alleged that throughout their relationship from April 2005 to June 2019, she never had fully consensual sex with TSgt Donley and from 2015 on, he strangled her every time they had sex. R. at 660, 700. Defense counsel confronted MED with numerous text messages between MED and TSgt Donley in which, *inter alia*, she told TSgt Donley she was thankful to have him as a husband and she wanted to have sex with him. *See e.g*., R. at 653, 656, 678, 684-85. MED asserted she only ever sent the messages, however, to receive better treatment from him. *See e.g.,* R. at 653, 656-57, 678, 681, 687, 695. MED admitted she agreed to a bondage, discipline, and sadomasochistic or BDSM relationship and that even after their BDSM lifestyle had ended, "some kinky parts continued." R. at 682, 684. MED read books on BDSM and even talked in public with a piercer about piercing he had done for BDSM. R. at 692-93. While MED stated their BDSM relationship had ended, MED also had bedroom collars and wore a collar while on a girls' trip away from TSgt Donley in February 2019. R. at 696-98; Def. Ex. B.

TSgt Donley was also convicted of MED's allegation charged in Specification 4 of Charge II. Charge Sheet, 24 June 2021; R. at 1161. MED testified to two separate acts of TSgt Donley using his hand or hands to throw her to the ground on 30 June 2019. R. at 530-33.; *see* additional facts in the first assignment of error. According to MED, lifting her by her throat and body slamming her "was his favorite" and it occurred "100 plus times, plus more." R. at 700.

MED alleged TSgt Donley left her with red marks and welts, and she never took a single picture. R. at 700-01.

MED and TSgt Donley had an ongoing child custody case even as his court-martial proceeded and MED admitted during the court-martial, she needed something from this case to take to civilian court. R. at 563, 566.

Argument

I.

THIS COURT CANNOT CONDUCT ITS ARTICLE 66, UCMJ, REVIEW BECAUSE THE VERDICT IS AMBIGUOUS. THE GOVERNMENT INTRODUCED TWO ACTS THAT COULD SATISFY THE ELEMENTS OF SPECIFICATION 4 OF CHARGE II WHEN ONLY ONE ACT WAS CHARGED. THE PANEL RECEIVED NO INSTRUCTION ON WHICH OF THE TWO ACTS WAS THE CHARGED ACT, AND THERE IS NO WAY TO KNOW WHICH ACT THE MEMBERS VOTED ON, OR WHETHER THEY AGREED ON THE SAME ACT.

Additional Facts

In Specification 4 of Charge II, TSgt Donley was charged with unlawfully slamming MED to the ground with his hands. Charge Sheet, 24 June 2021. The military judge instructed the panel that to find TSgt Donley guilty of this offense, the panel must be convinced, in part, "[t]hat on or about 30 June 2019, within the state of Washington, the accused did bodily harm to [MED] by slamming her to the ground with his hands." R. at 1039; App. Ex. LVIII at 6. The military judge did not instruct the members what "slamming" meant, and unlike Specification 1 of Charge I and Specification 3 of Charge II, the military judge did not instruct the members which specific incident was charged within Specification 3, despite MED's testimony that TSgt Donley slammed her to the ground twice on 30 June 2019.[4] R. at 530-33; App. Ex. LVIII.

[4] Regarding Specification 1 of Charge I, the military judge instructed the panel to decide TSgt Donley's guilt based on the specific incident that was charged:

> [MED] testified to the effect that the accused may have engaged in more than one act during the charged time frame that could, if you were convinced by legal competent evidence beyond a reasonable doubt, satisfy the elements as I just read them to you. As charged in Specification 1 of Charge I, only one offense of rape is alleged. The question before the Court on Specification 1 of Charge I is whether you are convinced beyond a reasonable doubt that the accused committed the offense of rape against [MED] in regard to the first act of sexual intercourse that she described as having taken place in the guest house on the property of the accused's parents.

30 June 2019, Downstairs Incident

MED testified that on 30 June 2019, TSgt Donley asked her to come downstairs to the master bedroom so they could lay together and watch a movie. R. at 528. TSgt Donley started kissing her, but she was not aroused by it. *Id*. TSgt Donley and MED began to argue until MED claimed she put her hands over her ears and screamed at the top of her lungs to "stop it". R. at 529. According to MED, TSgt Donley picked her up and held her so tight that "all [she] could use was like little t-rex arms." R. at 530. MED next claimed TSgt Donley threw her across the room, and she landed on a linoleum covered concrete area where she slid and hit the wall. *Id*. TSgt Donley then went upstairs, and MED remained downstairs until it was night. R. at 530-31. While she remained downstairs, TSgt Donley did not come back downstairs. R. at 531.

30 June 2019, Upstairs Incident

After MED heard TSgt Donley put their children to bed that night, she went upstairs and tried to talk to TSgt Donley. *Id*. MED was sitting on an ottoman in the upstairs living room and

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App. Ex. LVIII at 1. This was as opposed to a second act of sexual intercourse that MED described as having occurred soon after the first on the same date and in the same location. *See* R. at 515-16, 598-602.

Regarding Specification 3 of Charge II, the military judge similarly instructed the panel to decide TSgt Donley's guilt based on the specific incident that was charged:

> [ED] testified to the effect that the accused may have engaged in more than one act during the charged time frame that could, if you were convinced by legal competent evidence beyond a reasonable doubt, satisfy the elements as I just read them to you. As charged in Specification 3 of Charge II, only one offense of assault consummated by a battery is alleged. The question before the Court on Specification 3 of Charge II is whether you are convinced beyond a reasonable doubt that, while downstairs in the home of [KG], the accused committed an assault consummated by a battery upon [ED] by grabbing [ED] on his collarbone with both of his hands.

App. Ex. LVIII at 6. This was as opposed to a second act that ED described as having occurred soon after on the same date while upstairs in the home of KG. *See* R. at 840-42.

when he became angry, he rushed at her. R. at 531, 713. According to MED, TSgt Donley grabbed her by the throat and neck and "somehow carried [her] like this and just wham – body slammed [her] down onto the ground hard enough that it knocked the air out of [her] lungs."[5] R. at 531. MED claimed that, when he did this, he picked her up from her seated position by the neck with a single hand, lifted her high enough that only her very tippy toes were touching the ground, and carried her a few feet before slamming her down. R. at 713. On the ground, he then held her by the throat, strangling her. R. at 532-33. MED stated he loosened his hold long enough to undo her jeans and when she cried out "please stop," he got up and went downstairs to go to sleep. R. at 533.

TSgt Donley's Recorded Statements Discuss the Downstairs Incident

In a recorded conversation, MED confronted TSgt Donley about body slamming her on the floor and trying to rape her. Pros. Ex. 1. TSgt Donley told her that he was 100% wrong for it and that he lost control of himself. *Id*. But his description was of an incident downstairs:

> You screamed at me. Completely, blood curdling as loud as you can, screamed at me. And I lost my shit because I've told myself for a long time that I'm not putting up with that anymore. Screamed at me. I said this is your fault and I told you how I felt and I said I believe this is your fault. And instead of talking about it, you abused me with it. And I tried to kick you out of the house. I said get out. . . . I tried to pick you up and throw you out of my house. Because I'm not putting up with it anymore. And in trying to pick you up off the *bed* and throw you out of my house, you punched me like four or five times in the back and in the sides.

Id. (emphasis added).

The Government's Opening Statement and Closing Argument

The Government stated in opening only that TSgt Donley slammed MED on the ground and strangled her. R. at 500. The Government argued in closing only that TSgt Donley "body slams and strangled her." R. at 1058.

[5] If MED demonstrated what "like this" meant, it is not captured in the record. *See* R. at 531-32.

MED Stated the Upstairs Incident was the Charged Conduct

On cross-examination, defense counsel asked MED to describe how TSgt Donley picked her up and threw her to the floor. In response, MED had to ask which incident he was referring to: "[d]ownstairs or upstairs later that evening." R. at 713. Defense counsel asked her to describe "the charged offense" and MED described the upstairs incident. *Id*. MED also clarified the time that TSgt Donley lifted her up from her midsection was the downstairs occurrence. R. at 714.

TSgt Donley was Acquitted of the Upstairs Strangulation Allegation

TSgt Donley was charged with and acquitted of strangling MED on 30 June 2019 in Specification 5 of Charge II. Charge Sheet, 24 June 2021; R. at 1161.

Standard of Review

Whether there is any ambiguity in the findings that prevents factual sufficiency review under Article 66, UCMJ, is a question of law appellate courts review *de novo*. *See United States v. Rodriguez,* 66 M.J. 201, 203 (C.A.A.F. 2008); *United States v. Brown,* 65 M.J. 356, 358–59 (C.A.A.F. 2007). To reliably review a case for factual sufficiency, the reviewing court must know, beyond a reasonable doubt, which conduct formed the basis for each specification. *United States v. Dow*, No. ARMY 20200462, 2022 CCA LEXIS 361, *6-7 (A. Ct. Crim. App. 14 Jun. 2022); *United States v. Ross*, 68 M.J. 415, 418 (C.A.A.F. 2010).

Law and Analysis

An "ambiguous verdict" is one which prevents the reviewing courts from conducting their Article 66, UCMJ, review. *United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003). This occurs when the factfinder clearly returns a finding of guilty, but it is unclear (or ambiguous) what the precise underlying conduct is. *Id.* An ambiguous verdict creates a circumstance where Article 66, UCMJ, review cannot be properly conducted, "because the findings of guilty do not disclose the conduct upon which each of them was based." *Id*. "[T]he remedy for a *Walters* violation is to

set aside the finding of guilty to the affected specification and dismiss it with prejudice." *United States v. Scheurer*, 62 M.J. 100, 112 (C.A.A.F. 2005) (footnote omitted).

Even in situations where reviewing courts might make an educated guess as to the factfinder's intentions, the Court of Appeals for the Armed Forces (CAAF) has held findings ambiguous in the absence of clarity as to what underlying conduct formed the basis for the findings. *Ross*, 68 M.J. at 417-18 (reversing the lower court's conclusion that the factfinder likely excepted "divers occasions" to indicate a continuing course of conduct in the absence of any explanation on the record to that effect). This Court should agree with the Army Court of Criminal Appeals and find that "to reliably review Appellant's case for factual sufficiency, [it] must know, beyond a reasonable doubt, which [conduct] formed the basis for the . . . guilty finding . . . ." *Dow*, 2022 CCA LEXIS at *6-7.

MED believed the charged conduct was the conduct she described in the upstairs incident, however, unlike Specification 1 of Charge I and Specification 3 of Charge II, the Court never oriented the panel to which allegation was the charged conduct. R. at 713; *see* R. at 1039-40; App. Ex. LVIII. It is possible the members held divergent assumptions about which incident was charged or convicted TSgt Donley of the uncharged conduct. There is no way to know whether TSgt Donley was properly convicted. This Court must conduct a factual sufficiency review and must be convinced, beyond a reasonable doubt, of TSgt Donley's guilt; however, it cannot do so because it is unclear what underlying conduct the panel relied on to convict TSgt Donley.

Both Incidents Satisfy the Elements of the Offense and were not a Continuing Course of Conduct.

MED testified that both the upstairs and downstairs incidents occurred on the same date, 30 June 2019, and in the same house. R. at 528, 531. In both instances, MED described TSgt Donley picking her up with his hand or hands and throwing or slamming her onto the floor. R. at 530-31. Therefore, either incident could have fit within the alleged specification: that on or

about 30 June 2019, within the state of Washington, TSgt Donley unlawfully slammed her to the ground with his hands. *See* Charge Sheet, 24 June 2021. This is especially true here because the panel was not given an instruction for the meaning of "slam," and throwing and slamming could be seen as synonymous. *See* R. at 1039-40; App. Ex. LVIII.

Moreover, the Court of Military Appeals in *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987) recognized that "usually where several similar but separate offenses are involved, the judge should require the prosecution to elect which offense is being prosecuted. Otherwise an accused may have difficulty in preparing his defense; may be exposed to double jeopardy; and may be deprived of his right to jury concurrence concerning his commission of the crime." The court explained, however, that "an election has not been required where offenses are so closely connected in time as to constitute a single transaction." *Id*. (citation omitted). In *Vidal*, there was evidence of two acts of penetration: Vidal allegedly penetrated the victim in a car and then allegedly aided and abetted a co-perpetrator to penetrate the same victim while in the same car, however, he was only charged with one offense. *Id*. at 324-325. The court found that the interval between the acts of sexual intercourse was very brief, occurring within the same car and were part of a continuous transaction, and the "only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members." *Id*. at 325.

Similarly, in *United States v. Holt*, 33 M.J. 400, 404 (C.M.A. 1991), the Court of Military Appeals held "there is no requirement for the prosecution to elect which acts served as a basis for indecent acts offense when acts were 'so closely connected in time as to constitute a single transaction.'"

Further, in *United States v. Brown*, 65 M.J. 356, 357-60 (C.A.A.F. 2007), following *Vidal*, the CAAF determined the appellant's three sexual acts which were presented by the Government as continuing course of conduct over a short period of time did not require specification of which

act led to the appellant's conviction, only that an act be done "with the intent to gratify." (Brown penetrated the victim with his finger and penis before leaving her to get a condom. When Brown was leaving, he explained he was leaving to get a condom and that he would be back to have sex with her. When he returned, she acquiesced to sexual intercourse.)

Unlike each of these cases, the upstairs and downstairs incidents in this case were not a continuing course of conduct or a single transaction. Each incident was separated by location in the home and significant time where TSgt Donley and MED remained separated. R. at 530-33. The argument during the first incident had ended, TSgt Donley had not tried to reengage the argument with her, and had put their children to sleep. R. at 531. When the alleged upstairs incident began, it was a new incident which was separate from the alleged incident downstairs.

The Evidence Could Have Led to a Mixed Verdict or Verdict for Uncharged Conduct

As demonstrated by TSgt Donley's acquittals on the remaining allegations by MED, the panel clearly concluded MED's allegations had divergent degrees of merit[6] and when the members were not oriented to which incident was charged, there is no way to tell if the required plurality of members voted guilty or if their votes were based on different conduct or the uncharged conduct.

[6] Appreciating this Court must conduct a factual sufficiency review and must be convinced, beyond a reasonable doubt, of TSgt Donley's guilt, undersigned counsel is unable to do so adequately because she does not know which act was the charged act. Nevertheless, factual sufficiency is intertwined within this assignment of error and the weaknesses in the evidence are discussed throughout the brief. Of note for the incidents at issue here: TSgt Donley was acquitted of strangling MED and that alleged act was part and parcel of the upstairs incident that MED believed was charged where MED alleged he picked her up with one hand, slammed her on the ground, and strangled her. R. at 531-33. In this allegation, MED alleged TSgt Donley used only one hand to lift her from her seated position on the ottoman and hold her up in the air, causing only her tippy toes to touch the ground, before maneuvering the entire weight of her body to slam her to the ground. *Id*. This Hulk-like feat would be an impressive feat for an Olympic weightlifter or wrestler, and is totally implausible for TSgt Donley. The members had the opportunity to observe him during the trial and see that he is not a professional athlete (similar to how this Court can view him in his OSI Recorded Subject Interview, attached as attachment 6 to the 1st Indorsement, DD Form 458, *Charge Sheet*, dated 24 June 2021, contained in Volume 8 of the ROT) and that MED was of average weight (similar to how this Court can view her in Def. Ex. C).

The Supreme Court of Missouri addressed a similar issue in *Hoeber v. State*, where the evidence and instruction "failed to identify any specific incident" and thereby "allowed each individual juror to determine which incident he or she would consider in finding Mr. Hoeber guilty on each count." 488 S.W.3d 648, 655 (Mo. 2016). The Court found that the lack of orienting instructions "created a real risk that the jurors did not unanimously agree on the specific acts of statutory sodomy for which they found Mr. Hoeber guilty." *Id*. Accordingly, the "verdict directors failed to ensure a unanimous jury verdict." *Id.* The court reversed for ineffective assistance of counsel, because defense counsel's "failure to object to the insufficiently specific verdict directors submitted to the jury undermines this Court's confidence in the reliability of the verdicts." *Id.* at 657, 660.

In *State v. Marcum*, the Court of Appeals of Wisconsin reached the same result in a case where the government charged three specifications of sexual misconduct using non-specific language. 480 N.W.2d 545, 548-49 (Wis.App. 1992). Marcum was convicted of one and acquitted of the other two. *Id.* This made it impossible to know if all twelve jurors agreed that Marcum committed the same act as the basis for the guilty specification. *Id.* at 551 ("The standard instruction when applied to unspecific verdicts, as in this case, left the door open to the possibility of a fragmented or patchwork verdict."). The Court of Appeals concluded that "the verdict was so unspecific as to violate Marcum's sixth amendment right to a unanimous verdict and his fifth amendment due process right to verdict specificity." *Id.* at 548. The court reached the issue through finding ineffective assistance of counsel where defense counsel failed to request more specific instructions and/or verdict forms to cure the ambiguity. *Id.* at 550-54.

This Court cannot uphold convictions where the record does not clearly demonstrate conviction by the proper plurality. Such a result would be antithetical to TSgt Donley's due process rights and to the perception of fairness in the military justice system. Given the very real

possibility that the members voted on Specification 4 of Charge II with divergent understandings of what conduct they were voting on or by voting for the uncharged conduct, his conviction is fatally flawed. Moreover, because this Court cannot determine which incident the panel used to convict TSgt Donley of Specification 4 of Charge II, it cannot perform its own Article 66, UCMJ, functions. *See Ross*, 68 M.J. at 418. As the CAAF explained in *United States v. Anderson,* 83 M.J. 291, 299 (C.A.A.F. 2023), one of the unique safeguards of the military justice system which provides for impartiality and fairness without unanimous verdicts is that "Appellants in the military justice system are entitled to factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018)." Where *Hoeber* and *Marcum* did not have the ability to review for factual sufficiency, the courts reached the issue through finding ineffective assistance of counsel. Here, the unique safeguard of factual sufficiency provides this Court a different solution because it cannot complete its duties.

WHEREFORE, TSgt Donley respectfully requests this Honorable Court set aside the findings and the sentence with prejudice.

II.

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY DIRECTING THE MEMBERS, WITHOUT PROPER INSTRUCTION, TO REVIEW THEIR COMPLETED FINDINGS WORKSHEET AND DISCUSS WHETHER SIX OF THE SEVEN REMAINING MEMBERS AGREED ON THEIR FINDINGS WHEN THE PANEL PRESIDENT WAS EXCUSED BEFORE ANNOUNCEMENT OF THE FINDINGS.

Additional Facts

Findings Deliberation Began with Eight Members

TSgt Donley's panel consisted of eight members when findings deliberation began on 21 May 2022. *See* R. at 495, 1115-16. The panel deliberated for almost four hours that day before the court-martial was recessed until 23 May 2022. R. at 1120; *see* R. at 958.

Announcement of the Findings was Delayed Until Trial Counsel Could be Present

On 23 May 2022, the military judge explained the circuit trial counsel was present telephonically and no trial counsel was physically present in the courtroom because over the recess all three trial counsel had tested positive for Coronavirus Disease 2019 (COVID-19). R. at 1125. The military judge gave the members the option to continue deliberating or take a recess to take a COVID-19 test themselves. R. at 1126-27. The members decided to continue with their deliberations, and the court closed for deliberations. R. at 1128. Approximately three and half hours later, the panel president, DC, confirmed the panel had reached findings, and their findings were reflected in the findings worksheet. R. at 1133.

The military judge had the bailiff seal the findings worksheet until a trial counsel could be physically present in the courtroom, explaining to the members: "findings cannot be announced in court without trial counsel being physically present." R. at 1133-34. The military judge instructed the members to not discuss the findings of the court which they were all aware of, until it was announced in open court and released them until a trial counsel could be present. R. at 1135-36.

Before Announcement of the Findings, the Panel President was Excused

A new trial counsel was detailed and present in the courtroom the next morning. R. at 1139. However, during the overnight recess awaiting the trial counsel's arrival, the panel president, DC, also tested positive for COVID and due to local isolation and quarantine requirements could not continue his service as a court member. R. at 1140. Trial counsel requested that DC be excused and the court-martial continue with seven members. R. at 1141. The defense agreed. *Id*.

Instruction to Seven-Member Panel to Review the Findings

The military judge proposed "that since now six of seven members are required for a -- any finding of guilty, . . . that I give them an opportunity to go back into the deliberation room and confirm that no one is requesting reconsideration on the findings keeping in mind that six of seven

are now required for a finding of guilty." R. at 1142-43. Trial counsel agreed that this was appropriate and believed it was appropriate for the military judge to give them an instruction on reconsideration. R. at 1143, 1147. Defense counsel requested that the military judge instruct the members to go back and vote anew for each specification to ensure that for any finding of guilt, there were six votes because the panel may not remember the overall count for each specification. R. at 1144. Defense counsel explained that there could have been a vote for guilt by six out of the eight members and if DC had been the sixth vote, without a revote, they would not know that the vote was now five out of the seven remaining members. R. at 1151. The military judge agreed to instruct the members "that six of seven members [were] required to sustain a verdict of guilty in regard to any specification," and determined the instruction for reconsideration assuaged the concerns raised by the parties. R. at 1145-46.

The military judge informed the panel their findings were still subject to reconsideration because they had not been announced in open court. R. at 1156. The military judge explained:

> Now that the panel has been reduced by one, six of the seven currently detailed members must have concurred in any finding of guilty. As such, I'm going to send you back into the deliberation room with the findings worksheet and instruct you to review your findings. In assessing whether or not reconsideration of the verdict is necessary, the panel should ensure that six of the seven remaining members concurred in a vote of guilty for any specification for which your original votes resulted in a finding of guilty.

R. at 1156. The military judge did not reinstruct the members on the procedures for reconsideration. R. at 1156-57. Instead, the military judge stated:

> If during your discussion for any reason to include the new composition of the panel any member expresses a desire to reconsider any finding as it is currently reflected on that worksheet I will bring you back into the courtroom and provide you with instructions on reconsideration.

R. at 1156-57. The military judge returned the sealed findings worksheet to the panel "with instructions." R. at 1157. The military judge did not explain what instructions were handed to the

panel, however, from the military judge's above statement, it can fairly be assumed that they were not instructions on the procedures for reconsideration. *See id*. In nine minutes, the panel and all parties had returned to the courtroom and the new panel president, JK, announced the findings worksheet still accurately reflected the findings of the panel. R. at 1160.

Standard of Review

Whether a military judge properly instructed court members is a question of law reviewed *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). If there is no objection to the instruction at trial, this Court will provide relief only if it finds plain error. *United States v. Brewer*, 61 M.J. 425, 430 (C.A.A.F. 2005). To meet the test for plain error, the appellant must show there was error, the error was plain or obvious, and the error materially prejudiced his substantial rights. *Id*. (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). For errors of constitutional magnitude, the burden shifts to the Government to show that the error was harmless beyond a reasonable doubt. *Id*. (citation omitted).

Law and Analysis

Secret ballots are "a unique safeguard in the military justice system which protects the impartiality and fairness of courts-martial": "Article 51(a), UCMJ, requires voting by secret ballots, which protects junior panel members from the influence of more senior members. 10 U.S.C. § 851(a) (2018)." *Anderson*, 83 M.J. 291, 299 (C.A.A.F. 2023). The requirement for a secret written ballot also extends to reconsideration on findings. *See United States v. Boland,* 20 U.S.C.M.A. 83, 85 (1970).

In *Boland*, an instruction that the members could vote orally on the question of reconsideration of the finding was erroneous. *Boland,* 20 U.S.C.M.A. at 84. The "requirement for a secret ballot is more than a mere technicality; it is a substantial right." *United States v. Martinez*, 17 M.J. 916, 919 (N-M.C.M.R. 1984) (citing *Boland,* 20 U.S.C.M.A. at 85). "The secret

written ballot permits a member to vote his conscience, even if he agreed to a contrary position during the oral deliberative process. Its paramount importance in the military justice system is not open to doubt." *Id.* (citations omitted).

Straw polls "while not encouraged," do not violate the requirements of Article 51(a), UCMJ. *United States v. Lawson*, 16 M.J. 38, 41-42 (C.M.A. 1983). However, *Lawson* provided that "a judge should not invite members to engage in a 'straw poll'" and that the court members needed to understand in advance that any straw poll would be only "informal and non-binding." *Id.* at 41. Moreover, it recognized if a straw poll is "verbal, rather than written, the danger [of influence from superiority in rank is] enhanced, because each member's position -- albeit, a tentative position -- is clearly revealed to the others; and junior members might be influenced to conform to the expressed positions of their seniors." *Id*. at 41.

Here, the military judge plainly errored when he directed the panel to have a "discussion" to ensure that any guilty finding was supported by six of the remaining seven members. R. at 1156-57. While the military judge's instruction did not explicitly tell the members to vote anew, it implied it because there was no way for the panel to determine this without voting anew. When a panel counts their votes, all that is announced in the deliberation room and all that is documented on the findings worksheet is the guilty or not guilty findings, not the number of votes. *See* App. Ex. LVIII at 12 ("The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members"). Therefore, his instruction led to a de facto reconsideration of the panel's vote, wherein the members of the panel were implicitly invited to discuss their vote orally vice via secret written ballot. Moreover, they were given this new instruction to review and were not instructed to resume with their prior instructions so there is no reason to believe the members would have.

Under these unusual facts, it is possible that two remaining members had disagreed with

the finding of the eight-member panel. These members would have had the opportunity to acquit TSgt Donley by voting for reconsideration and voting not guilty, however, they would have had to out themselves to the panel, in a case where they already knew the majority's decision and the length of the trial had already far exceeded the number of projected days, where the members had navigated rescheduling appointments and each day they learned about more participants testing positive for COVID-19. *See e.g.*, R. at 332, 956, 958, 1125, 1155, 1157, 1161. Moreover, this "discussion" was not akin to a straw poll because its effect was that of a formal vote. "Not being privy to what transpired during the court's deliberations we can, at best, only speculate as to the effect of the erroneous instruction" and this Court should set aside the findings and the sentence with prejudice because the Government cannot prove that this error was harmless beyond a reasonable doubt. *United States v. Jones*, 15 M.J. 967, 969 (A.C.M.R. 1983) (citation omitted).

WHEREFORE, TSgt Donley respectfully requests this Honorable Court set aside the findings and the sentence with prejudice.

III.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

Additional Facts

TSgt Donley elected trial by officer and enlisted members and motioned for a unanimous verdict, which was denied. R. at 298; App. Ex. II, XXVIII. TSgt Donley's panel initially consisted of eight members, and the military judge instructed them that "[t]he concurrence of at least three-fourths of members present when the vote is taken is required for any finding of guilty. Since we have 8 members, that means six members must concur in any finding of guilty." R. at 1105; App. Ex. LVIII at 12. TSgt Donley's panel was reduced to seven members before the

announcement of the verdict. R at 1142. The military judge then instructed the members: "Now that the panel has been reduced by one, six of the seven currently detailed members must have concurred in any finding of guilty." R at 1156. It is unknown whether the members convicted TSgt Donley by a unanimous verdict.

Standard of Review

"An appellant gets 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). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Tovarchavez*, 78 M.J. at 462.

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following *Ramos*, TSgt Donley was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's Equal Protection Clause.

There is no way of knowing whether a nonunanimous verdict secured either or both of TSgt Donley's convictions. But that is a problem for the Government, not TSgt Donley. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. And, because there is no way of knowing the vote count (especially since the Rules for Courts-Martial explicitly preclude the members from being polled), the Government

cannot meet this already onerous burden. *See* R.C.M. 922(e); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . .").

TSgt Donley recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he raises the issue in anticipation of further litigation.[7]

WHEREFORE, TSgt Donley respectfully requests this Honorable Court set aside and dismiss the findings and sentence.

IV.

APPELLANT'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE BECAUSE IT OMITS THE MILITARY JUDGE'S RULING ON THE DEFENSE MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT PURSUANT TO MIL. R. EVID. 404(b), WHICH SHOULD HAVE BEEN CAPTURED IN APPELLATE EXHIBIT XXX.

Additional Facts

The defense filed two motions in limine regarding Mil. R. Evid. 404(b) evidence. R. at 161; App. Ex. XXII (Defense Motion In Limine to Exclude Noticed M.R.E. 304(d), 404(b) Evidence, 25 February 2022), XXXV (Defense Motion In Limine to Exclude Evidence & Argument Pursuant to M.R.E. 404(b), 5 May 2022). The military judge explained Appellate Exhibit XXIX was the court's ruling for the defense's first Mil. R. Evid. 404(b) motion. R. at 161. Appellate Exhibit XXX was "the court's ruling on the second defense motion in limine in regard to [Mil. R. Evid.] 404(b) evidence." R. at 162. Trial counsel explained to the military judge they

[7] Petitions for writ of certiorari are pending before the Supreme Court of the United States on this issue. *United States v. Martinez*, 2023 CAAF LEXIS 494 (C.A.A.F. Jul. 18, 2023), *petition for cert. filed* (U.S. Sep. 8, 2023) (No. 23-242); *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *petition for cert. filed* (U.S. Oct. 23, 2023) (No. 23-437); *Cunningham v. United States*, 83 M.J. 367 (C.A.A.F. 2023), *petition for cert. filed* (U.S. Dec. 15, 2023) (No. 23-666).

had premarked the exhibits and because the military judge was listing the exhibits in another order, it was taking them a moment to state the exhibits for the record. R. at 163. Trial counsel described both Appellate Exhibit XXIX and XXX as a ruling for "the defense motion in limine to exclude noticed [Mil. R. Evid.] 304(d) / 404(b) evidence . . . dated 15 May 2022 and it is a 13-page document." R. at 161, 163. The documents contained within Appellate Exhibit XXIX and XXX in the record of trial are identical. App. Ex. XXIX and XXX.

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

The military judge's ruling on the defense's second motion, which should have been contained within Appellate Exhibit XXX, is not contained in the record and is a substantial omission.

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes a discharge. 10 U.S.C. § 854. A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). A record that is missing exhibits may be substantially incomplete. *See Stoffer*, 53 M.J. at 27 (holding that the record was substantially incomplete for sentencing when all three defense sentencing exhibits were missing). "Insubstantial" omissions from a record of trial do not render the record incomplete. *See Henry*, 53 M.J. at 111 (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included). The threshold question is whether the missing exhibits are substantial, either qualitatively or quantitatively. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014).

Omissions may be quantitatively insubstantial when, considering the entire record, the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (citing *United States v. Nelson*, 3 C.M.A. 482 (C.M.A. 1953)). This Court individually analyzes whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

It appears trial counsel entered a copy of the military judge's ruling for the defense's first motion twice and the military judge's ruling on the defense's second Mil. R. Evid. 404(b) motion is missing from the record. The defense's first Mil. R. Evid. 404(b) motion addressed both Mil. R. Evid. 404(b) and Mil. R. Evid. 304(d) whereas the defense's second Mil. R. Evid. 404(b) motion addressed separate uncharged misconduct under Mil. R. Evid. 404(b). App. Ex. XXII, XXXV. It does not make sense that the military judge would issue identical rulings for the two different motions. The military judge's ruling on the second Mil. R. Evid. 404(b) motion is also not explained on the record or contained elsewhere in the record. *See* R. at 162. The review of this exhibit is substantial because it is necessary to determine, inter alia, whether the military judge errored in ruling on the defense's motion and whether defense counsel performed effectively given the ruling.

Attachments to the appellate record do not complete the record. *See United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. 9 Jun. 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. 26 Oct. 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. 6 Jan. 2022) ("[W]e considered the attachments to trial counsel's

declaration to determine whether the omission of the exhibits from the record of trial was substantial, . . . ; we did not consider the exhibits as a means to complete the record.").

An incomplete record may be returned to the military judge for correction. R.C.M. 1112(d)(2); *e.g.*, *Welsh*, 2022 CCA LEXIS 631, at *2-3 (explaining R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication and returning the ROT for correction after finding the absence of eight attachments to the stipulation of fact substantial); *Mardis*, 2022 CCA LEXIS 10, at *9-10. R.C.M. 1112(d)(2) states, "A superior competent authority may return a [ROT] to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction."

Where a substantial omission exists and the record cannot be completed, a rebuttable presumption of prejudice is raised, and where unrebutted, the appellant may not receive a sentence that includes a punitive discharge. *See Stoffer*, 53 M.J. at 27.

WHEREFORE, TSgt Donley respectfully requests this Honorable Court remand this case pursuant to R.C.M. 1112 and, if the record cannot be completed, disapprove the dishonorable discharge.

V.

THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT DOES NOT TOLL THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN THE GOVERNMENT'S SUBMISSION TO THIS COURT IS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(b).

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal *de novo*. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

"Each general . . . court-martial shall keep a separate record of the proceedings in each case brought before it." R.C.M. 1112(a). The record "shall" include, *inter alia*, "any appellate exhibits." *Id*. at (b)(6). As articulated in TSgt Donley's fourth assignment of error, the record in this case is substantially incomplete because it is missing the military judge's ruling, which should have been contained in Appellate Exhibit XXX.

Courts of Criminal Appeals (CCAs) are expected to exercise "institutional vigilance" for the "disposition of cases docketed" before them. *Moreno*, 63 M.J. at 137. One reason for this expectation is that "[d]ue process entitles convicted service members to a timely review and appeal of court-martial convictions." *Id.* at 123 (citation omitted). An appeal that is "inordinately delayed is as much a meaningless ritual as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." *Id.* at 135 (quotations and citations omitted). This Court's intervention here would safeguard appellants' right to timely appellate review, reaffirm the Government's statutory and regulatory obligations to compile complete ROTs, and allow this Court to complete its duties under Article 66, UCMJ, and allow appellate defense

counsel to complete her duties under Article 70, UCMJ. *See* 10 U.S.C. §§ 866, 870; *Cf. United States v. Tate*, 82 M.J. 291, 298 (C.A.A.F. 2022) (holding that the Army CCA could not perform its Article 66, UCMJ, function without knowing exactly what aggravating evidence the military judge considered, where the military judge relied upon unrecorded testimony).

This Court should view these directives alongside *Moreno*'s mandate, which compelled the Government to docket the ROT at a CCA within 30 days of action to avoid a presumption of facially unreasonable delay. *Moreno*, 63 M.J. at 142. Because of changes to the *Manual for Courts-Martial*, this Court updated that standard in *United States v. Livak*, finding a "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*." 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

The Government's failure to meet *Livak's* deadline of 150 days triggers an analysis of the four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The *Barker* factors are: "(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*, 80 M.J. at 135 (citation omitted). When examining the reason 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…." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors").

In *United States v. Gammage*, this Court remanded the appellant's ROT twice for correction, however, in resolving whether the incomplete ROT tolled the presumption of post-trial delay, "decline[d] to create a new requirement for cases that are docketed, remanded, and later re-docketed with this court," finding "the original standards announced in *Moreno,* and its progeny, adequately protect an appellant's due process right to timely post-trial and appellate review." No. ACM S32731 (f rev), 2023 CCA LEXIS 528, at *6 (A.F. Ct. Crim. App. 15 Dec. 2023) (quotations

and citations omitted). This finding incentivizes the Government to docket incomplete records within the required 150 days to toll the presumption of unreasonable delay and merely meet processing deadlines, when all the while the Appellants' review cannot be effectively accomplished until corrected, and that review is unreasonably delayed as a result.

This Court should instead find that the docketing of an incomplete record does not toll the presumption of unreasonable delay, incentivizing the Government to exercise due care in ensuring it compiles a complete and accurate record when it has consistently failed to docket complete ROTs before this Court.[8] The Government has approximately five levels of review to ensure the ROT is compiled correctly: the base legal office, the court reporter, the numbered Air Force, the Military Justice Law & Policy Division (JAJM), and the Government Trial and Appellate Operations Division (JAJG). The CAAF was mindful in *Moreno* "of the importance of providing a deterrent to improper Government action, including actions that delay post-trial and appellate processing," and this Court should be here as well. 80 M.J. at 142, n. 22. Finding that the docketing of an incomplete ROT does not toll the presumption of unreasonable delay is in line with *Moreno*, would comport with judicial minimalism given that the omission must be a required item under R.C.M. 1112(b), and requires no process change – only more attention to detail to

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[8] *See e.g.*, *Gammage*, 2023 CCA LEXIS 528 (requiring a second remand for noncompliance with initial remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. 5 Dec. 2023) (remand order); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Gonzalez*, No. ACM 40375, 2023 CCA LEXIS 378 (A.F. Ct. Crim. App. 8 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. 12 May 2023) (remand order).

ensure ROTs are complete the first time they are compiled and docketed. "[S]ervicemembers have a due process right to timely review and appeal of courts-martial convictions" and this Court's exercise of its institutional vigilance will serve to protect that right. *Id*. at 135.

Finally, this Court has authority under Article 66, UCMJ, to grant sentence relief for excessive post-trial delay without a showing of actual prejudice under Article 59(a), UCMJ. 10 U.S.C. §§ 859, 866; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citation omitted). The regular docketing of incomplete records leads to unreasonable delay which adversely affects the public's perception of the fairness and integrity of the military justice system. TSgt Donley requests this Court recognize this impact and grant him meaningful relief by disapproving his dishonorable discharge, or in the alternative reducing his period of confinement.

WHEREFORE, TSgt Donley requests this Court disapprove his dishonorable discharge, or, in the alternative, reduce his period of confinement.

VI.

THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO COMPEL PRODUCTION OF MENTAL HEALTH RECORDS FOR IN CAMERA REVIEW.[9]

Respectfully submitted,

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[9] Filed Under Seal with TSgt Donley's Motion to File Under Seal, dated 22 January 2024.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 January 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **KAYE P. DONLEY,** United States Air Force, *Appellant.*	)	No. ACM 40350 22 January 2024

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file Issue VI of Appellant's brief under seal. Issue VI contains discussions of sealed materials found in Appellate Exhibit XI. Appellant's brief, corresponding to Issue VI is three pages in total and is filed under seal.

WHEREFORE, Appellant respectfully requests this motion be granted.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	
	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel No. 3
Technical Sergeant (E-6) **KAYE P. DONLEY**, USAF Appellant.	)	
	)	No. ACM 40350
	)	
	)	21 February 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **KAYE P. DONLEY**, USAF, *Appellant.*	))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR No. ACM 40350 Panel No. 3

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

ISSUES PRESENTED

I.

WHETHER THE VERDICT IS AMBIGUOUS WHEN THE GOVERNMENT INTRODUCED TWO ACTS THAT COULD SATISFY THE ELEMENTS OF SPECIFICATION 4 OF CHARGE II WHEN ONLY ONE ACT WAS CHARGED; THE PANEL RECEIVED NO INSTRUCTION ON WHICH OF THE TWO ACTS WAS THE CHARGED ACT; AND THERE IS NO WAY TO KNOW WHICH ACT THE MEMBERS VOTED ON, OR WHETHER THEY AGREED ON THE SAME ACT.

II.

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY DIRECTING THE MEMBERS, WITHOUT PROPER INSTRUCTION, TO REVIEW THEIR COMPLETED FINDINGS WORKSHEET AND DISCUSS WHETHER SIX OF THE SEVEN REMAINING MEMBERS AGREED ON THEIR FINDINGS WHEN THE PANEL PRESIDENT WAS EXCUSED BEFORE ANNOUNCEMENT OF THE FINDINGS.

III.

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT,'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

IV.

WHETHER APPELLANT'S RECORD OF TRIAL IS SUBSTANTIALLY INCOMPLETE BECAUSE IT OMITS THE MILITARY JUDGE'S RULING ON THE DEFENSE MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT PURSUANT TO MIL. R. EVID. 404(B), WHICH SHOULD HAVE BEEN CAPTURED IN APPELLATE EXHIBIT XXX.

V.

WHETHER THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER UNITED STATES V. MORENO, 63 M.J. 139 (C.A.A.F. 2006), AND ITS PROGENY, WHEN THE GOVERNMENT'S SUBMISSION TO THIS COURT IS MISSING A REQUIRED ITEM UNDER R.C.M. 1112(B).

VI.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO COMPEL PRODUCTION OF MENTAL HEALTH RECORDS FOR IN CAMERA REVIEW.[1]

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS[2]

Appellant was convicted of one specification of sexual assault against his wife, MED between on or about 1 May 2019 and on or about 31 May 2019, in violation of Article 120, UCMJ. (*Entry of Judgment*, 21 July 2022, ROT, Vol 1.) Appellant was also convicted of one

[1] Filed Under Seal with United States' Motion to File Under Seal, dated 21 February 2024.

[2] Appellant only specifically attacks his conviction for assault consummated by a battery upon a spouse, as charged in Charge II, Specification 4. Therefore, this Statement of Facts addresses solely facts related to that conviction.

specification of assault consummated by a battery upon a spouse on 30 June 2019. (Id.) The assault consummated by a battery specification alleged the Appellant: "[d]id , within the state of Washington, on or about 30 June 2019, unlawfully slam [MED], his spouse, to the ground with his hands." (*Charge Sheet*, 15 September 2021, ROT, Vol. 1.)

The Downstairs Incident on 30 June 2019

On 30 June 2019, Appellant called MED and told her to come downstairs to their marital bedroom so they could watch a movie together. (R. at 528). MED complied and once she was downstairs, she laid in bed with Appellant. (Id.) Appellant began kissing MED and trying to arouse her sexually, but MED was not interested in sexual intercourse. (R. at 528-529). MED's lack of interest in sex infuriated Appellant, and he began screaming at MED. (R. at 529). Appellant yelled at MED that if she "would just act like the whore he'd been treating [her] like," he would not have to hurt her, and they would not be having difficulties in their marriage. (Id.) During Appellant's verbal tirade, he was between MED and the door and she unable to leave. (Id.) Appellant continued to scream at MED that his behavior was her fault, and she covered her ears and began screaming at Appellant to stop. (Id.) Appellant stopped screaming and told MED that she was crazy. (Id.) He then grabbed her and pulled her to the edge of the bed. (Id.) Next, Appellant picked her up and threw her across the room. (R. at 530). MED landed on a sheet of linoleum covering the concrete floor and slid into the wall. (Id.) Appellant then went upstairs, leaving MED behind. (Id.) MED hid in her closet until later that evening. (R. at 530-531).

The Upstairs Incident on 30 June 2019

After hiding in her downstairs closet for some time, MED noticed the house had gotten quiet, and she heard their children going to bed. (R. at 531). MED then went upstairs to their

living room/kitchen area to discuss the earlier events with Appellant. (Id.) When MED confronted Appellant, he again grew angry and rushed at her. (Id.) Appellant grabbed MED by the throat and neck and "body slammed" her onto the living room floor so hard that it knocked the air out of her lungs. (R. at 531-532). He then held MED by her throat as he attempted to undo her jeans. (R. at 532-533). Due to how tightly Appellant was holding her throat, MED struggled to breathe. (R. at 533). Eventually, Appellant loosened his grip on her throat, and MED was able to beg him to stop due to their children being in the house. (Id.) Appellant released MED and went to his downstairs bedroom to sleep. (Id.)

Recording of Appellant's Admission

In August of 2019, MED confronted Appellant about sexually assaulting her in May 2019 and the events of 30 June 2019. (Pros. Ex. 1, R. at 538). MED recorded a portion of that conversation, which was introduced at trial as Prosecution Exhibit 1. (R. at 538-539). During the recorded conversation, MED asked Appellant if he body slammed her on the floor and tried to rape her on 30 June 2019. (Pros. Ex. 1 at approx. 02:19). Appellant replied "I have said yes, and I have said that I'm one hundred percent wrong for it. And I've apologized for it. And I've said again that I was a hundred percent wrong, and I lost control of myself, completely, lost control of myself." (Id. at approx. 02:30-02:45.)

The United States provides facts necessary to answer each assignment of error in the Argument section below.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR ASSAULT CONSUMMATED BY A BATTERY AGAINST A SPOUSE WAS NOT AMBIGUOUS.

Additional Facts

During the Government's opening statement, trial counsel referred to the charged assault consummated by a battery:

> Then back to that night on 30 June 2019, after the accused has berated [MED] again told her all of these things that happened in the past are her fault. He doesn't stop with just words, but he slams [MED] on the ground. And then he grabs both of his hands around her neck and begins to strangle her to the point of which it feels like her eyes are going to pop out of her head and she hears ringing in her [ears].

(R. at 500-501). Trial defense counsel did not object to the Government's opening statement, nor did they ask for clarification regarding the charged offense.

During cross-examination, trial defense counsel confronted MED about the events of 30 June 2019:

> [Trial defense counsel]: Can you describe again how Sergeant Donley picked you up and slammed you on the floor?
>
> [MED]: Are you talking about June 30?
>
> [Trial defense counsel]: Yes, ma'am.
>
> [MED]: Downstairs or upstairs later that evening.
>
> [Trial defense counsel]: The charged offense.
>
> [MED]: Yes. We were upstairs and our living room kitchen was open. I was sitting on the ottoman by the far end of the couch that's closer to the kitchen side and he was by the window side and he rushed towards me, not quite a run, but almost. He grabbed me around my throat and picked me up and actually carried me a few

> feet and slammed me down—body slammed like slammed me down.
>
> [Trial defense counsel]: So he picked you up by the neck with a single hand?
>
> [MED]: Yes.
>
> [Trial defense counsel]: How high did he lift you [sic] up the ground?
>
> [MED: I remember just the very tippy toes touching.
>
> [Trial defense counsel]: Do you remember him slamming on the ground?
>
> [MED]: Yes.

(R. at 713). Trial defense counsel again did not attempt to correct MED or ask for clarification regarding the charged offense.

Prior to closing arguments, the military judge properly instructed the members on Specification 4 of Charge II, the battery of which Appellant was convicted:

> To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt: (1) that, on or about 30 June 2019, within the state of Washington, the accused did bodily harm to [MED] by slamming her to the ground with his hands; (2) that the bodily harm was done unlawfully; (3) that the bodily harm was done with force or violence; and (4) that, at the time, [MED] was the spouse of the accused.

(R. at 1039).

The Circuit Trial Counsel explained the charged assault during his closing argument, "[a]nd before she even makes it [Appellant] assaults her. Body slams and strangled her. She felt pressure, her face felt fuzzy, she couldn't cry out, and it felt like her eyes were going to explode." (R. at 1058). Trial defense counsel did not object or ask for clarification.

Standard of Review

Whether a verdict is ambiguous and thus precludes a CCA from performing a factual-sufficiency review is a question of law reviewed *de novo*. United States v. Ross, 68 M.J. 415, 417 (C.A.A.F. 2010) (citing United States v. Rodriguez, 66 M.J. 201, 203 (C.A.A.F. 2008)).

Law and Analysis

A. The verdict is not ambiguous. A court-martial panel may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.

Appellant cites to United States v. Walters, in support of his assertion that the verdict in this case is ambiguous. 58 M.J. 391 (C.A.A.F. 2003), (App. Br. at 11). Appellant's reliance on Walters is misplaced. "Walters applies only in those "narrow circumstance[s] involving the conversion of a 'divers occasions' specification to a 'one occasion' specification through exceptions and substitutions. United States v. Brown, 65 M.J. 356, 358 (C.A.A.F. 2007). In fact, the majority of the cases cited by Appellant to support his position are only applicable where an offense was charged on divers occasions. Ross, 68 M.J. 415 (holding that a military judge excepting the words "on divers occasions" without further explanation leaves a verdict ambiguous); United States v. Holt, 33 M.J. 400 (C.M.A. 1991) (the Government is not required to elect which of several incidents under each charge was being sought for conviction when the offense was alleged as "on divers occasions") ; (App. Br. at 11-13). The primary concern in those situations is that "[w]hen the phrase 'on divers occasions' is removed, the effect is that "the accused has been found guilty of conduct on a single occasion and not guilty of the remaining occasions. Ross, 68 M.J. at 417. Where the record does not indicate which of the alleged incidents forms the basis of the conviction, and thereby leaves it unclear as to which conduct the appellant was acquitted of, "double-jeopardy principles bar the CCA from performing its usual factual sufficiency review." Id. That is not the case here. The specification did not allege

multiple acts, so the court-martial did not acquit Appellant of any conduct. Therefore, Walters and its progenies are not applicable to this case.

In Brown, the government had alleged a single incident of rape at a specific time and place, but introduced evidence that indicated different methods by which the appellant could have committed the underlying offense. 65 M.J. 358. The Court distinguished the case from Walters and its progenies, reasoning that "the crux of the issue is whether a fact constitutes an element of the crime charged, or a method of committing it." Id. at 359.

Appellant cites to two state law cases to support his assertion that the lack of an instruction identifying a specific incident resulted in an ambiguous verdict. (App. Br. at 15). Appellant's reliance on those cases is misplaced, since those cases hinged on state law requiring factfinders to unanimously agree on the facts that meet the elements of the offense. Hoeber v. State, 488 S.W.3d 648, 654 (Mo. 2016); State v. Marcum, 480 N.W.2d 545, 551 (Wis. App. 1992). However, the requirement that the factfinder unanimously agree on the act that constitutes the offense does not apply in the federal system. "In federal criminal cases, the requirement for juror unanimity applies only to the elements of the offense." Richardson v. United States, 526 U.S. 813, 817 (1999). In the military system, a court-martial panel "returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit. United States v. Hardy, 46 M.J. 67, 73 (C.A.A.F. 1997). A court-martial panel may "enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt. United States v. Nicola, 78 M.J. 223, 226 (C.A.A.F. 2019). "Military criminal practice requires neither unanimous panel members, nor panel agreement on one theory of liability, as long as [the statutorily required

percentage] of the panel members agree that the government has proven all the elements of the offense." United States v. Vidal, 23 M.J. 319, 325 (C.M.A. 1987).

Appellant attempts to distinguish this case from Vidal and Brown by asserting that the upstairs and downstairs incidents were not a continuing course of conduct or a single transaction, and that therefore, Vidal and Brown are inapplicable. (App. Br. at 14). But, in United States v. Johnson, this Court did not require a continuing course of conduct or a single transaction for the rule from Vidal and Brown to apply. 2023 CCA LEXIS 330, at *35-36 (A.F. Ct. Crim. App. Aug. 9, 2023) (unpub. op.). In Johnson, evidence of two separate incidents was introduced at trial relevant to the same charge of abusive sexual contact. Johnson, unpub. op. at *1, *36. One incident occurred in the kitchen around dinner time. (Id. at *5). The second incident occurred some hours later on an air mattress in another room. (Id. at *5-6). This Court cited both Vidal and Brown in determining that regardless of the clear demarcation between the two incidents, it made no difference how many members chose the act in the kitchen or the act on the air mattress, as long as there was sufficient evidence to "justify a finding of guilty on any theory of liability submitted to the members." Id. at *36; *see also* Nicola, 78 M.J. 223 (applying the Brown rule where the two government theories presented at trial involved two incidents that were temporarily and locationally distinct). Since the Brown rule is applicable even where the incidents presented at trial are not a continuing course of conduct or a single transaction, Appellant's argument that Brown and Vidal do not apply to this case fails.

Here, as in Vidal, at least three-fourths of the members of the court-martial were satisfied beyond a reasonable doubt that at the specified time and place, Appellant unlawfully slammed MED, his spouse, to the ground with his hands. Therefore, the findings of guilty are proper. "It makes no difference how many members chose one act or the other, one theory of liability or the

other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members." Vidal, 23 M.J. at 325. This Court can "affirm the finding of guilt if either theory is legally sufficient. Nicola, 78 M.J. at 226. Here, given MED's testimony that Appellant slammed her to the ground during the upstairs incident, and the Appellant's own admission to the conduct, there is sufficient evidence to justify the finding of guilt in this case.

Appellant has provided this Court no reason to compel a different outcome than that of Vidal and Brown. Accordingly, Appellant's claim must fail.

B. In any event, given the way the case was presented, there was no confusion over which theory the government was preceding on.

Factual sufficiency is reviewable where members findings are not ambiguous. Brown, 65 M.J. at 358-359. Even though Brown and Vidal allow this Court to affirm under either theory presented at trial, the entirety of the record makes clear which theory the government pursued. The specific charged language in Specification 4 of Charge II highlights this point. The specification alleged that on or about 30 June 2019 Appellant "unlawfully slam[med] MED, his spouse, to the ground with his hands. (*Charge Sheet*, 15 September 2021, ROT, Vol. 1.) While the evidence at trial discussed two separate physical altercations that occurred on 30 June 2019, the upstairs incident and the downstairs incident, it is apparent from the case's presentation and the testimony that the charged misconduct referred to the upstairs incident.

During the Government's opening statement, while discussing the specification at issue, trial counsel specifically oriented the members to the night of 30 June 2019, when Appellant "slam[med] MED on the ground." (R. at 500-501). Trial defense counsel neither objected to this statement, nor sought clarity at any point as to what the charged misconduct was.

While describing the charged incident on direct examination, MED stated Appellant

"body slammed" her onto the living room floor so hard that it knocked the air out of her lungs. (R. at 531-532). On cross-examination, trial defense counsel asked MED to again describe the charged offense. (R. at 713). MED's response referenced being upstairs in the living room area when Appellant "body slammed like slammed [her] down." (Id.) Again, trial defense counsel neither attempted to correct her or to seek out clarity as to what the charged offense was, indicating that they also understood the upstairs incident to be the charged offense. During their case-in-chief, the Government introduced a recorded conversation between MED and the Appellant discussing the events of 30 June 2019. (Pros. Ex. 1, R. at 538). During the recorded conversation, MED asked Appellant if he *body slammed* her on the floor and tried to rape her on 30 June 2019. (Pros. Ex. 1 at approx. 02:19) (emphasis added). Appellant admitted to having done so. (Id. at approx. 02:30-02:45.) While the evidence at trial described two physical incidents that occurred on 30 June 2019, the upstairs incident is the only incident in which MED used the specific language "slam."

Finally, during closing argument, Government trial counsel described the convicted assault as Appellant body slamming and strangling MED, directly referring to MED's description of the upstairs incident. (R. at 1058, 531-532). Trial defense counsel once again did not object or seek clarity or express any sense of confusion over what the charged conduct for Specification 4 of Charge II was. Trial defense counsel never requested a bill of particulars at any point in the proceeding.

While Appellant is correct that the military judge did not orient the members to the specific charged act for Specification 4 of Charge II during findings instructions, he did not need to in this case. (App. Br. at 8). In describing the downstairs incident, MED stated Appellant threw her across the room. (R. at 530). Nowhere in the record was the word "slam" ever used—

by either MED or counsel—to describe the downstairs incident. MED only used the specific language "slam" to describe the upstairs incident. Contrary to Appellant's assertion that throwing and slamming could be seen as synonymous, they were never used synonymously in this case. (App. Br. at 13). In this case, there was a clear delineation between the "throwing" that occurred during the downstairs incident and the "slamming" that occurred during the upstairs incident.

The presentation of the Government's case in both opening and closing, and the repeated use of the specific terms "slam" and "body slam" by MED while describing the upstairs incident properly oriented the finder of fact as to the charged misconduct. Given that the repeated descriptions of the upstairs incident are the only descriptions that fit the specific charged language of Specification 4 of Charge II, the verdict is not ambiguous, and this Court can properly conduct its factual sufficiency review. This Court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT COMMIT PREJUDICIAL ERROR WHEN, AFTER A MEMBER'S EXCUSAL, HE INSTRUCTED THE MEMBERS TO REVIEW THE FINDINGS WORKSHEET TO ENSURE THE STATUTORILY REQUIRED NUMBER OF MEMBERS VOTED TO CONVICT APPELLANT.

Additional Facts

Military Judge's Preliminary Instructions on Deliberation

Prior to deliberations, the military judge instructed the members on the proper voting procedures:

> Your deliberations should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote. The order in which the charges and specifications are to be voted on should be determined by the president subject to objection

> by a majority of the members. You must vote on the specifications under the charge before you vote on the charge. If you find the accused guilty under a charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members.

(R. at 1105). He then provided the members the standard instruction on reconsideration:

> You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that reconsideration of a finding has been proposed. Do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty or which specification and charge is involved. I will then give you specific instructions on the procedure for reconsideration.

(R. at 1106; Dept. of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 2-5-14 (29 February 2020)).

Initial Deliberations by the Members

Appellant's court-martial closed for deliberations on findings at 1540 hours, 21 May 2022. (R. at 1115). After approximately four hours, the panel informed the military judge they had reached a good breaking point for the day. (R. at 1119). The military judge recessed the court for the weekend. (R. at 1120).

The court-martial reconvened the morning of 23 May 2022. (R. at 1121). The military judge announced that the three trial counsel assigned to the case had tested positive for COVID-19 and were unable to be physically present. (Id.) Given the situation, the military judge informed the panel members and gave them the option to continue deliberating or to recess to allow time for the members to test for COVID-19. (R. at 1125-1127). After a brief recess to discuss amongst themselves, the panel members elected to continue their deliberations. (R. at 1127-1128). The Court closed again for deliberations on findings at 0820 hours. (R. at 1128).

The members informed the bailiff they had reached a verdict at approximately 1129 hours, 23 May 2022. (R. at 1129). The military judge confirmed with the board president, DC, that the panel had reached their verdict, and the verdict was reflected on the findings worksheet. (R. at 1133). Due to the inability of trial counsel to be physically present, the military judge determined the findings could not be announced in court at that time. (Id.) The military judge had the bailiff seal the findings worksheet and informed the members that they would reconvene to announce findings once a trial counsel capable of being physically present could be located. (R. at 1135). The military judge ordered the members to not discuss the findings of the court with anyone, until the findings could be announced in open court. (Id.) The panel members were then released. (R. at 1136).

On 24 May 2022, the Court reconvened with newly detailed trial counsel. (R. at 1139). The military judge informed the parties that the board president, DC, had tested positive for COVID-19. (Id.) DC was excused without objection from either party. (R. at 1141-1142). In light of the change, the military judge informed counsel he intended to give the members the opportunity to confirm that none of them wished to request reconsideration on the findings "keeping in mind that six of seven are now required for a finding of guilty." (R. at 1142-1143). Defense counsel expressed concerns that the panel may not remember the overall count for each specification, and requested the military judge instruct the panel to vote anew. (R. at 1144). The military judge explained that defense counsel's suggestion raised concerns because the members had already reached their findings. (R. at 1144). He explained that giving the members the instruction on reconsideration would resolve any concerns, without violating the procedures to be followed once a panel has reached findings. (Id.) After the military judge's explanation, defense counsel acquiesced to the military judge providing the reconsideration instruction in lieu

of defense counsel's initial request to have the members vote anew. (R. at 1145). Defense counsel then requested the military judge make it clear to the members that the required vote for a guilty verdict was now six. (R. at 1147). The military judge adjusted his proposed instruction consistent with defense counsel's concerns and then read the proposed instructions verbatim for both parties. (R. at 1147-1149). Defense asked the military judge to again amend his instruction to include the following:

> In assessing whether or not reconsideration of a verdict is necessary that the panel should ensure that six of the seven remaining members have voted for guilty in order to find a verdict of guilty on a particular specification. If six out of seven votes cannot be ensured, then reconsideration is necessary.

(R. at 1151-1152). The military judge agreed to give the first sentence of that proposed instruction but declined to give the second sentence. (R. at 1152). Defense counsel acquiesced to the military judge's proposed instruction. (R. at 1152-1153). At no point during the proceedings did defense counsel express concerns that the military judge's instructions forced the members to reconsider or forced them to conduct an oral vote, in lieu of secret written ballot.

Instruction to the Seven Remaining Members

The military judge provided the following instruction to the seven remaining panel members:

> As findings have not yet been announced in open court they are still subject to reconsideration. This is particularly important now as I previously instructed you that since you have—since you had eight members, six members must have concurred in any finding of guilty. Now that the panel has been reduced by one, six of the seven currently detailed members must have concurred in any finding of guilty. As such, I'm going to send you back into the deliberation room with the findings worksheet and instruct you to review your findings. In assessing whether or not reconsideration of the verdict is necessary, the panel should ensure that six of the seven members remaining members concurred in a vote of guilty for any specification for which your original votes resulted in a finding of

> guilty. If during your discussion for any reason to include the new composition of the panel any member expresses a desire to reconsider any finding as it is currently reflected on that worksheet I will bring you back into the courtroom and provide you with instructions on reconsideration. The president should announce only that reconsideration of a finding has been proposed. Do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty or which specification and charge is involved. I will then give you specific further instructions on the procedure for reconsideration. If on the other hand you confirm that your findings remain unchanged, you can let me know when we are back in the courtroom and we will proceed with my review of the findings worksheet and your announcement of the verdict.

(R. 1156-57).

The military judge then provided the sealed findings worksheet to the members and returned them to the deliberation room. (R. at 1157-58). The panel returned nine minutes later and confirmed the findings worksheet still accurately reflected the findings of the panel. (R. at 1160).

Standard of Review

Whether a military judge properly instructed a panel is a question of law reviewed *de novo*. United States v. Bailey, 77 M.J. 11, 14 (C.A.A.F. 2017). Where no objection is made to an instruction at trial, this Court will provide relief only upon a finding of plain error. United States v. Brewer, 61 M.J. 425, 430 (C.A.A.F. 2005). Under the plain error test, Appellant must show "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (citing United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014)).

Law and Analysis

Appellant has failed to demonstrate error, let alone a clear and obvious one. Plain error is the correct standard of review given that Appellant did not raise the specific objections to the

military judge's instructions at trial that he is now raising on appeal. Appellant concedes plain error is the correct standard of review. (App. Br. at 19-20).

Appellant asserts the military judge's instruction implied to the panel that they should vote anew, because there was no way for the panel to determine this without voting anew. (App. Br. at 20). However, there were other options for the members to ensure the required number of members had concurred with any guilty finding. First, while trial defense counsel expressed reservations, he implicitly conceded it was entirely possible the members could remember the count from their previous vote. (R. at 1144). The secret ballot procedures are pivotal here. "The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members. (R. at 1105). While the panel president in this case was excused, the junior member was not. This meant the individual who initially compiled and counted the votes was still present and potentially capable of recalling the tally from just the day before. It is even possible that the junior member took notes while he was conducting his tally and still had those available to him to refer to the next day. Thus, the junior member would have known whether there had been at least six votes for each conviction.

Although Appellant asserts that the number of votes was not announced in the deliberation room, neither he nor this Court can know for sure. (App. Br. at 20). The president was never instructed to announce how many members voted to convict. He was only instructed to announce the result of the ballot to the members. (R. at 1105). This leaves open the possibility that the president announced the tally along with the result for each vote the day before. It is also possible he simply informed the members that the vote was unanimous. When these alternative possibilities exist, the Appellant has provided insufficient evidence the

instruction led to a de facto reconsideration of the panel's vote. (App. Br. at 20). Not being privy to what transpired during the court's deliberations, Appellant can only speculate. But speculation is not sufficient to meet the high bar of establishing plain error. At no point in the military judge's instructions did he tell the members to vote anew; in fact, he specifically declined to give such an instruction at defense counsel's request. (R. at 1145). Given the reasonable alternative methods by which the members could have ensured the required votes for a conviction without necessitating a new vote, Appellant's claims that the instructions *required* the members to vote anew is without merit. (App. Br. at 20). Moreover, neither of these alternative methods for ensuring the proper number of votes would have required the members to discuss their vote orally, as Appellant suggests. (Id.) All that would have needed to be discussed was the tally from the day before, without any reference to each particular member's vote. Nothing in the military judge's instructions compelled the members to discuss their individual vote orally. He merely instructed them to review their findings worksheet and determine whether any member felt that reconsideration was appropriate, as comports with the Benchbook instruction on reconsideration. (R. at 1156-1157, D.A Pam. 27-9, para. 2-5-14). Therefore, Appellant has failed to meet his burden of demonstrating any clear and obvious error.

The military judge's instruction did nothing more than require the members to review their findings to ensure that six of the seven remaining members had concurred in a vote of guilty. (R. at 1156). If they could remember the tally and were adequately assured the required votes for a conviction was met, they did not need to vote at all. If they were unable to recall the tally from the day before, reconsideration was an option.

Appellant, somewhat counterintuitively, raises a hypothetical scenario where two members of the panel disagreed with the eight-member panel. (App. Br. 21). Appellant appears

to imply that the military judge's new instruction may have had a chilling effect against them suggesting reconsideration because it would have required them to out themselves to the panel. (Id.) But the instruction at issue regarding reconsideration was the standard Military Judges' Benchbook instruction on reconsideration. (D.A Pam. 27-9, para. 2-5-14). The standard procedure for reconsideration requires a member to "out themselves" and suggest reconsideration. (Id.) The president would then open the court and the military judge would provide them further instruction on the procedures for reconsideration. (Id.) That did not happen here, which indicates that no reconsideration took place, despite Appellant's assertion that a de facto reconsideration occurred. (App. Br. at 20). "In the absence of evidence to the contrary…we presume the members followed the military judge's instructions." United States v. Stewart, 71 M.J. 38, 43 (C.A.A.F. 2012). Appellant has provided no evidence to the contrary, so this Court should presume the members followed the military judge's instruction and did not conduct a reconsideration. Therefore, Appellant's hypothetical is without merit.

Appellant's arguments are based solely on speculation as to what occurred during the nine minutes the members returned to the deliberation room. Speculation is insufficient to meet the Appellant's burden to establish plain error. Therefore, this Court should deny this assignment of error.

III.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURT-MARTIAL.

Standard of Review

The constitutionality of a statute is a question of law that is reviewed *de novo*. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members in accordance with Article 52. (R. at 1105-1106). Appellant made no objection to this at his trial which was completed on 24 May 2022. (Id. at 1108-1109). Appellant now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 22).

In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Our superior Court reaffirmed that servicemembers do

not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF rejected the same claims Appellant raises now:

> [W]e disagree that [Ramos] further held that [a unanimous verdict] is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our superior Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at 302. The Supreme Court denied review of Anderson on 20 February 2024.[3] Appellant concedes the precedent in Anderson is binding on this Court. (App. Br. at 23). This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

IV.

THE OMISSION OF APPELLATE EXHIBIT XXX FROM THE RECORD DID NOT PREJUDICE APPELLANT.[4]

Additional Facts

Trial defense counsel filed two pretrial motions in limine to exclude Mil. R. Evid. 404(b) evidence. (App. Ex. XXII, XXXV). The military judge issued written rulings for each of the motions. (App. Ex. XXIX, Gov. Motion to Attach, dated __ February 24, Appx. A.) At trial, trial counsel marked the two Mil. R. Evid. 404(b) rulings as Appellate Exhibits XXIX and XXX. (R. at 161-162). Appellate Exhibit XXIX was the military judge's ruling on the defense's first motion in limine to exclude Mil. R. Evid. 404(b) evidence. (R. at 161). Appellate Exhibit XXX

[3] https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf
[4] The United States is filing a motion to attach the correct Appellate Exhibit XXX to the record of trial contemporaneously with this Answer brief.

was intended to be the military judge's ruling on the defense's second motion in limine to exclude Mil. R. Evid.404(b) evidence. (R. at 162). However, trial counsel inadvertently submitted a duplicate of Appellate Exhibit XXIX as Appellate Exhibit XXX. (R. at 162, App. Ex. XXIX, App. Ex. XXX). Trial defense counsel neither objected to Appellate Exhibit XXX admission at trial, nor claimed that they had never received the military judge's ruling on their second motion in limine to exclude Mil. R. Evid. 404(b) evidence.

In the military judge's ruling on the defense's second motion in limine, the judge did not admit any evidence pertaining to MED. (Gov. Motion to Attach, Appx. A.) The military judge only admitted Mil. R. Evid. 404(b) evidence for charges of which Appellant was ultimately acquitted – three specifications of battery upon a child under the age of 16. (Id., *Entry of Judgment*, 21 July 2022, ROT, Vol 1.) Specifically, the military judge admitted evidence that: (1) on four occasions while visiting the home shared by MED and the accused, Ms. Debbie Lawrence, MED's mother, observed the accused tell END to "eat, quit playing, or looking outside," while END was eating. When END became nervous or upset, the accused would send him to his room. On one of these occasions, the accused followed END into the room, and Ms. Lawrence heard END say "ow, that hurts." At this point, Ms. Lawrence witnessed MED.try to access END's room, but she was barred by the accused. After the accused left the room, END stated, "he squeezed my shoulder," and the accused responded, "he's exaggerating," and (2) that the accused pushed END in the back in January 2019, causing him to fall and to receive a bloody nose. When END fell, the accused stated, "You're so clumsy, you never watch where you're going." When MED tried to assist END, the accused told her, "No. He needs to learn." (Gov. Motion to Attach, Appx. A.)

Standard of Review

Whether an omission from a record of trial is "substantial" is a question of law reviewed *de novo*. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000). Proper completion of post-

trial processing is a question of law subject to *de novo* review. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 22 Jul. 2004).

Law and Analysis

A complete record of proceedings must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ. Under United States v. Henry, a substantial omission from the record renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. 53 M.J. 108, 111 (C.A.A.F. 2000). A record of trial must include, among other materials, "Exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits." R.C.M. 1112(b)(6). Courts approach the question of what constitutes a substantial omission on a case-by-case basis. United States v. Abrams, 53 M.J. 361, 363 (C.A.A.F. 1999). In determining whether an omission is substantial, the courts assess whether the missing rulings affected "an appellant's rights at trial." United States v. King, 2021 CCA Lexis 415, at *22 (A.F. Ct. Crim. App. 16 Aug. 2021).

The Government acknowledges that a ruling on the admissibility of evidence necessarily implicates "an appellant's rights at trial." Given the military judge did not read his findings of fact, conclusions of law, or ruling into the record, no alternative for the omitted ruling exists in the record. *See* United States v. Allen, 2014 CCA LEXIS 216, at *43-44 (A.F. Ct. Crim. App. Mar. 28, 2014) (finding that where a military judge had read his findings of fact, conclusions of law, and ruling into the record, the omission was not substantial). Therefore, the omission of the proper Appellate Exhibit XXX would constitute a substantial omission that raises a presumption of prejudice, per Henry. However, under the rule in Henry the Government may rebut the presumption of prejudice. 53 M.J. at 111.

Appellant was not prejudiced by the omission for three reasons: (1) Appellant had access to the ruling at trial, (2) admitted evidence admitted pertained to crimes of which Appellant was ultimately acquitted at trial, and (3) the omitted ruling has been attached to the record. King, unpub. op. at *22.

First, Appellant does not complain that he was prejudiced at trial. The military judge's rulings were issued on 15 May 2022, and trial began 18 May 2022. (App. Ex. XXIX; Gov. Motion to Attach, Appx. A; R. at 303). Trial defense counsel either received or had access to the omitted ruling for use during trial. (App. Ex. XXIX, Gov. Motion to Attach, Appx. A) Defense never requested reconsideration of the ruling during trial. Nor has Appellant asserted that the ruling's omission prejudiced him during the clemency process. Therefore, the focus of this Court should be whether the Appellant is prejudiced on appeal.

Second, given that the only evidence admitted per the ruling related to crimes of which Appellant was ultimately acquitted at trial, any claim of prejudice should fail. Even if the military judge had erroneously admitted the relevant 404(b) evidence, it would not have contributed to any of Appellant's convictions.

Third, this Court has decided that the omission of an appellate exhibit from the record does not necessitate remand. In King, this Court found that where the Government obtained the omitted appellate exhibit – a military judge's ruling on a defense motion on illegal pretrial punishment– the Government successfully rebutted the presumption of prejudice by filing a motion to attach including the omitted ruling. Unub. op. at *29 . Given the Government's efforts in that case, appellate review of the ruling was possible. (Id.) Here, like in King, the Government provided the omitted portion of the record by producing a copy of the military

judge's ruling via a motion to attach. By reconstituting the record, the Government has rebutted the presumption of prejudice, and appellate review of the military judge's ruling is now possible.

Appellant claims attachments to the record are irrelevant or should not be considered by the Court, and attachments to the record do not complete the record, but Appellant misapprehends this Court's holdings. (App. Br. at 25-26). King actually stands for the proposition that attachment of omitted exhibits can be used to determine (1) whether the omission is substantial, thereby raising a presumption of prejudice; and (2) in assessing whether the Government successfully rebutted the presumption of prejudice. Thus, this Court should use the attachment in deciding whether Appellant has suffered any prejudice from the missing appellate exhibit. *See* King, unpub. op. at *29-30.

In United States v. Garcia-Arcos, this Court considered attachments to the appellate record in determining whether the appellant was prejudiced, without addressing whether the omission was substantial or not, and this Court declined to return the record for correction under R.C.M. 1112(d). 2022 CCA LEXIS 339, *6-8 (A.F. Ct. Crim. App. June 9, 2022). In United States v. Mardis, this Court again considered attachments for the purpose of determining whether the omission of exhibits constituted a substantial omission. 2022 CCA LEXIS 10, *7 (A.F. Ct. Crim. App. Jan. 6, 2022). Remand would be especially inappropriate in this case, because this Court can already see from the attached ruling that it related to charges of which Appellant was acquitted, and therefore Appellant suffered no prejudice.

This Court should deny this assignment of error and find the omission of Appellate Exhibit XXX from the record did not prejudice Appellant. Thus, remand of the record for correction under R.C.M. 1112(d)(2) is unnecessary.

V.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER MORENO.

Additional Facts

Appellant was sentenced on 24 May 2022. (*Entry of Judgement*, ROT, Vol. 1.) Appellant's case was docketed with this Court on 29 September 2022. Between his sentence and docketing with this Court, 129 days elapsed. After this case was docketed, Appellant requested 13 enlargements of time, and all but one was opposed by the Government. Appellant submitted his brief on 22 January 2024, after 481 days had elapsed since docketing. (App. Br. at 31). Appellant took at least 481 days before notifying anyone of the duplicative appellate exhibits discussed in his fourth assignment of error. (App. Br. at 23). From docketing with this Court to the date of this filing, 511 days have elapsed. To date, Appellant has not made a demand for speedy appellate review.

Standard of Review

This Court reviews *de novo* an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

This Court applies an aggregate standard threshold to ensure appellants' due process rights to timely post-trial and appellate review are protected. Livak, 80 M.J. at 633. To avoid unreasonable delay, the entire period from the end of trial to docketing on appeal must be within 150 days. Id. at 633-634. Additionally, in Moreno, the CAAF held that a presumption of unreasonable post-trial delay should be applied when appellate review is not complete, and a decision is not rendered within 18 months of docketing before the Court of Criminal Appeals.

See Moreno, 63 M.J. at 142. When evaluating whether a case has been docketed within the appropriate timeframe, this Court has not required the ROT to be complete and without errors to stop the clock. *See* United States v. Muller, No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.). Moreover, this Court held so long as a record is docketed within the 150-day Livak standard, an appellant is not entitled to unreasonable post-trial delay when the record is later found to be incomplete. Muller, upub. op. at 16.

When a case does not meet either the 150-day Livak standard or the 18-month Moreno standard, the delay is presumptively unreasonable. *See* Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). When a delay is presumptively unreasonable, courts apply a balancing test to determine whether a due process violation occurred, which includes: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice, which considers preventing oppressive pretrial incarceration, minimizing anxiety of the accused, and limiting the possibility of an impaired defense. Id. All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66, UCMJ, because the statute allows courts "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." 57 M.J. 219, 224 (C.A.A.F. 2002). The existence of a post-trial delay does not necessitate relief;

instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

Analysis

A. The Government met the 150-day Livak standard, and the 18-month Moreno standard has not yet been violated, so Appellant is not yet entitled to the presumption of post-trial delay.

Appellant argues this Court should find that the docketing of an incomplete record does not toll the presumption of unreasonable delay. (App. Br. at 27-30.) But the 150-day Livak standard was met when the case was first docketed 29 September 2022, 129 days after sentencing.. 80 M.J. at 633. Complying with the Livak clock does not require the ROT to be without errors, and the ROT here was therefore adequately docketed, and any incompleteness discovered after docketing does not warrant relief. Muller, unpub. op. at *13.

Moreover, this case is well within the eighteen-month timeframe established in Moreno. 63 M.J. at 142. This case has not been remanded, and as discussed above, remand is not necessary or required for resolution of the duplicative appellate exhibit error. That leaves more than ample time for the Court to meet its 18-month deadline under Moreno. Any prejudice to Appellant is speculative at this point.

B. No due process violation has occurred, and Appellant has not been prejudiced by a post-trial delay.

Even if appellate review exceeds 18 months, ap, there was no due process violation under the Barker factors. As discussed above, the government met the 150-day Livak standard. Livak, 80 M.J. at 633. Even assuming a violation of the 18 month Moreno standard, that does not end the inquiry.

Relevant to the second factor – reasons for the delay – Appellant requested thirteen enlargements of time, resulting in 481 days elapsing between Appellant's case being docketed with this Court and the Appellant filing his Assignments of Error. (App. Br. at 31). The

Government opposed 12 of those 13 requests for an enlargement of time. Appellant explicitly consented to 12 of those 13 requests for an enlargement of time. While Appellant asserts the government has caused unreasonable delay, he failed to mention the time attributable to his requests for enlargements of time. (App. Br. at 29). The government is filing its answer brief within the standard 30-day timeframe for doing so. And as discussed above, any omission from the ROT is non-prejudicial, remand is unnecessary, and appellate review can proceed. Thus, the second Barker factor favors the government. Id.

The third Barker factor favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay. Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528). Appellant did not assert his right to timely review, has consented to almost all requests for enlargement of time to file a brief, and the third factor therefore weighs against him.

The prejudice factor also favors the Government. The Supreme Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in cases of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. Appellant does not allege any particularized or generalized prejudice. (App. Br. at 27-30.) Here Appellant stated the law and then provided no indication of oppressive incarceration pending appeal, undue anxiety and concern, impairment of a retrial, or any other prejudice.

Further detracting from any prejudice argument, Appellant requested thirteen enlargements of time to file his appeal, resulting in an additional 481 days of delay from docketing the case with this Court until filing his assignments of error. To the extent that Appellant was "prejudiced" by any delay caused by the missing appellate exhibit, he was arguably more prejudiced by his own delay in filing an appeal. Because no prejudice occurred, the Court then turns to the analysis under Toohey to determine if 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." 63 M.J. at 362. The Court looks at all four Barker factors considering the public perception standard. Id. In Toohey, no prejudice was found, but the length of the delay played largely into the Court's public perception analysis. Id. Approximately 47 months passed between docketing of the appellant's appeal and the Navy-Marine Court of Criminal Appeals making their decision. 63 M.J. at 357. This delay far exceeded Moreno's 18-month threshold for appellate review and negatively affected the public's perception of fairness in the military justice system. 63 M.J. at 358. In contrast, this Court has not even yet exceeded the 18-month threshold set in Moreno. Because no facially unreasonable delay has occurred and any prejudice to Appellant is speculative, a determination about the public's perception of the fairness and integrity of the military justice system is premature.

In summary, the presumption of post-trial delay has not yet been triggered, and Appellant has not experienced any prejudice. Thus, this Court should deny this assignment of error.

C. Appellant is not entitled to relief under Tardif.

Appellant argues that, even if he is not entitled to relief pursuant to Moreno, the delay in this case still entitles him to have this Court either disapprove of his dishonorable discharge or alternatively reduce his period of confinement under Tardif. (App. Br. at 30). An appellant may

be entitled to relief under Tardif even without a showing of actual prejudice "if [the court] deems relief appropriate under the circumstances." 57 M.J. at 224. The existence of post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. However, this authority to grant appropriate relief is "for unreasonable *and* unexplained post-trial delays." Id. at 220 (emphasis added). Further, relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). The facts and circumstances of this case do not meet any of the non-exhaustive Gay factors. First, the 18-month standard set forth in Moreno has not yet been violated. The government has remedied the omission from the record of trial in order to properly equip this Court with the material it needs to conduct its Article 66, UCMJ, review and prevent any unnecessary post-trial delay. There is

no evidence that up to this point, there has been any harm to the Appellant or to the institution. Given the lack of any delay violative of the Moreno standards, this Court granting relief would not be consistent with the dual goals of justice and good order and discipline, given the seriousness of the charges of which Appellant was convicted and the absence of governmental bad faith. Providing sentence relief without a showing of actual prejudice in this case would not be meaningful. If this Court were to grant sentence relief, it would be rewarding Appellant for taking 481 days to file his brief after this case was originally docketed with this Court.

Further, there is no evidence of institutional neglect concerning timely post-trial processing. On the contrary, despite Appellant's assertions that the current post-trial processing case law incentivizes the Government to docket incomplete records, that position ignores the extensive procedures the Air Force has created to avoid incomplete records. (App. Br. at 29). The Air Force has established comprehensive procedures to ensure complete ROTs are docketed with this Court. DAFI 51-201 contains several measures to ensure ROTs are reviewed multiple times and provided a final review by JAJM. *Administration of Military Justice*, Department of the Air Force Instruction 51-201 (24 January 2024). Specifically, paragraph 20.52.3 states incomplete ROTs should not be submitted to JAJM and will be returned to the legal office when they are incorrectly submitted. The Judge Advocate General has designated JAJM as the "superior competent authority" responsible for designating ROTs as incomplete and ordering corrections. DAFI 51-201, ¶ 21.15.2. Thus, several preventive measures are in place to avoid incomplete records being docketed with the Court. But, despite these great efforts to ensure complete ROTs are submitted, some records are not sufficiently corrected by JAJM and are mistakenly docketed with the Court.[5]

.

[5] The Air Force Trial and Appellate Operations Division (JAJG) does not receive a copy of the Record of Trial until it is docketed with this Court – the same time as Appellant's counsel.

In this case, Appellant has not experienced any prejudice to date, and any future prejudice caused by this Court being unable to render a decision within 18 months is speculative. A remedy is not warranted. A balancing of the six Gay factors weighs in the Government's favor, and no egregious or prejudicial delay yet exists requiring post-trial sentencing relief from this Court. This Court should deny this assignment of error.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE PROPERLY DENIED A DEFENSE MOTION TO COMPEL PRODUCTION OF MENTAL HEALTH RECORDS FOR IN CAMERA REVIEW.[6]

[6] Filed Under Seal with the Government's Motion to File Under Seal, dated 21 February 2024.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 February 2024 via electronic filing.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **KAYE P. DONLEY** United States Air Force *Appellant.*	)	No. ACM 40350 21 February 2024

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

Pursuant to Rules 13.2(b), 17.2(b) and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, the United States hereby moves to file the following portions of its Answer to Appellant's Assignments of Error under seal:

- Pages 34-39 (Issue VI)

This Court granted Appellant's request to file Issue VI under seal. His brief on this issue contained discussion of sealed materials in the record of trial. Due to the nature of the assigned error, the United States' answer to Issue VI required discussion of the same sealed materials, specifically, Appellate Exhibits XI and XXXI and sealed portions of Appellants transcript (pages 72-111). Appellate Exhibits XI and XXXI were ordered sealed by the military judge. Since Issue VI discusses matters that have been sealed, it is appropriate to file Issue VI under seal.

These pages have been excised from the electronic filing. They were appropriately packaged, marked, and delivered to both this Court and the Air Force Appellate Defense Division on the date of this filing.

WHEREFORE, the United States respectfully requests this Honorable Court grant its Motion to File under Seal.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 February 2024.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **KAYE P. DONLEY** United States Air Force *Appellant*	)	No. ACM 40350 21 February 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- Appendix A – Declaration of Lt Col A S and attached ruling (Appellate Exhibit XXX), dated 8 February 2024 (8 pages total)

The attached declaration is responsive to Appellant's Assignment of Error IV concerning Appellate Exhibit XXX's omission from the ROT. (App. Br. at 23-26). In his brief, Appellant alleges the Record of Trial is incomplete due to the omission of the correct version of Appellate Exhibit XXX. (App. Br. at 24). The attachment addresses this omission from the ROT by providing the missing ruling and is directly responsive to the issue raised by Appellant. The attachment's inclusion in the record would be beneficial to this Court for resolution of the issue raised by Appellant.

Our Superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)).

Accordingly, the attached document is relevant and necessary to address Appellant's Assignment of Error IV.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 21 February 2024.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **KAYE P. DONLEY,** United States Air Force, *Appellant.*	)	No. ACM 40350 28 February 2024

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

Appellant, Technical Sergeant (TSgt) Kaye P. Donley, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 21 February 2024 [hereinafter Answer]. In addition to the arguments in his opening brief, filed on 22 January 2024 (Op. Br.), TSgt Donley submits the following arguments.[1]

[1] In his opening brief, TSgt Donley explained three petitions for writ of certiorari were pending before the Supreme Court of the United States, questioning whether military appellants were deprived of their right to a unanimous verdict. Op. Br. at 23. Since the filing of TSgt Donley's opening brief, the Supreme Court denied two of the three petitions. *United States v. Martinez*, 83 M.J. 439 (C.A.A.F. 2023), *cert. denied*, 92 U.S.L.W. 3206 (U.S. Feb. 20, 2024) (No. 23-242); and *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 92 U.S.L.W. 3206 (U.S. Feb. 20, 2024) (No. 23-437). One petition remains pending before the Supreme Court. *United States v. Cunningham*, 83 M.J. 367 (C.A.A.F. 2023), *petition for cert. filed* (U.S. Dec. 15, 2023) (No. 23-666).

ARGUMENT

II.

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY DIRECTING THE MEMBERS, WITHOUT PROPER INSTRUCTION, TO REVIEW THEIR COMPLETED FINDINGS WORKSHEET AND DISCUSS WHETHER SIX OF THE SEVEN REMAINING MEMBERS AGREED ON THEIR FINDINGS WHEN THE PANEL PRESIDENT WAS EXCUSED BEFORE ANNOUNCEMENT OF THE FINDINGS.

This Court assesses cases based on the record of trial, yet the Government asks this Court to excuse the military judge's erroneous instructions based on speculation. *See* Answer at 17. The Government speculates because the junior member presumably collected and counted the votes before the president was excused, the junior member (1) potentially recalled the tally from the day before, and (2) potentially took notes while he was conducting his tally and still had those available to him to refer to. *Id*. The Government also speculates the panel president *might have* announced the tally along with the vote before he was excused. *Id*. These are not facts in the record and this postulation fails to recognize that when the military judge instructed the members, he could not know whether the prior day's tally could resolve this issue.

Moreover, despite the Government's contention that reconsideration was an option if the panel could not remember their tally, the military judge's instruction did not provide an "option." Answer at 18; *See* R. at 1156. The military judge directed the panel, "In assessing whether or not reconsideration of the verdict is necessary, the panel should *ensure* that six of the seven remaining members concurred in a vote of guilty." R. at 1156. (emphasis added). The panel is presumed to follow the military judge's instructions[2] and it could not assess the need for reconsideration, without first voting anew—unless the vote the day prior was known to be more than seven votes

[2] "Absent evidence to the contrary, [appellate courts] may presume that members follow a military judge's instructions." *United States v. Stewart*, 71 M.J. 38, 43 (C.A.A.F. 2012).

for guilt, a fact which the military judge could not have known. Therefore, his instruction directing them to "ensure that six of the seven remaining members concurred in a vote of guilty," encapsulated direction to engage in a de facto reconsideration, without proper instruction, which is clearly erroneous.

The Government also fails to recognize the excused panel president may have been the sixth vote for guilt on a specification. If the panel president was the sixth vote which had secured a finding of guilty the day prior, the remaining panel members would not necessarily have known his personal vote and the tally for guilt would be different after his excusal. Therefore, the prior day's tally would only have been helpful if the tally demonstrated that at least seven members had agreed on each finding of guilt such that the findings count remained unchanged by the panel president's excusal, a fact this Court does not have. The fact this Court can only speculate as to the effect of the military judge's erroneous instructions demonstrates why this Court should find prejudice here: the Government cannot prove this error was harmless beyond a reasonable doubt. *United States v. Jones*, 15 M.J. 967, 969 (A.C.M.R. 1983). Because this Court "cannot limit the extent of prejudice with any degree of certainty [it] must set aside all the findings." *Id*. (citing *United States v. Sexton,* 28 C.M.R. 775 (A.F.B.R. 1959)).[3]

Finally, the Government argues the standard procedure requires a member to out themselves and suggest reconsideration, contesting the chilling effect of the military judge's instructions. Answer at 19. However, TSgt Donley's case differs from the usual case wherein a

[3] *Cf. United States v. Thomas*, No. 41035, 1993 CMR LEXIS 669, *28, N-M. C.M.R. (1993) (Appellant's Sixth Amendment right to a fair trial includes proper voting procedures.) *Cf. United States v. Lenoir*, 13 M.J. 452, 453 (C.M.A. 1982) (quoting *United States v. Moore*, 4 U.S.C.M.A. 675, 678 (1954) ("The accused has the statutory right to have his innocence determined and his punishment imposed by a court composed entirely of members whose qualifications meet the standards of eligibility as set forth in the Code and the Manual. A denial of that right is prejudicial.")

member could request reconsideration without expressing their stated reason for the request. Here, the military judge directed the panel's reconsideration and if a member were to suggest reconsideration at this point, it would be blatantly obvious to their fellow panel members their reason for doing so. Moreover, that member would have reason to believe that the senior ranking member of the panel, the panel president, had voted for guilt based on the prior day's vote outcome and that the panel president would have known the outcome of panel's vote before he was excused. Therefore, there is a real possibility that the military judge's erroneous instructions—which in effect, required a member to reveal their vote—resulted in the chilling of panel members' disagreement with the findings and a guilty verdict with less than the statutorily required minimum.

WHEREFORE, TSgt Donley respectfully requests this Honorable Court set aside the findings and the sentence with prejudice.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 February 2024.

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