UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40318**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Angelo L. CEPEDA	)	**DOCKETING**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

On 18 December 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

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

ORDERED:

The case in the above-styled matter is referred to Panel 3.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40318**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Angelo L. CEPEDA	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 18 December 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this court. The above-styled case was docketed on 19 December 2023 and the court ordered the Government to "forward a copy of the record of trial to the court forthwith." Over 90 days have elapsed and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 19th day of March, 2024,

ORDERED:

Government appellate counsel will inform the court in writing not later than **2 April 2024** of the status of this case with regard to this court's 19 December 2023 order.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	UNITED STATES' NOTICE OF STATUS OF COMPLIANCE
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **ANGELO L. CEPEDA**, USAF *Appellant*	)	No. ACM 40318 2 April 2024

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

Pursuant to this Court's 19 March 2024 order, the United States hereby provides notice of status of compliance.

On 18 December 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this Court. The above-styled case was docketed on 19 December 2023 and the Court ordered the Government to "forward a copy of the record of trial to the court forthwith." (*Order*, dated 19 December 2023.) This Court further ordered, "Government appellate counsel will inform the court in writing not later than 2 April 2024 of the status of this case with regard to this court's 19 December 2023 order." (*Order*, dated 19 March 2024.)

As of the date of this notice, JAT informed JAJG that the estimated transcript completion date is 19 April 2024. The original court reporter and miliary judge have retired, so the case is now pending detailing of a new military judge to certify the completed transcript. With the Court's permission, JAJG will provide another update no later than 30 days from the date of this notice, 2 May 2024.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the Government's compliance with its 19 March 2024 order.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

STEVEN R. KAUFMAN, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 2 April 2024.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MFLTF DEMAND FOR SPEEDY APPELLATE REVIEW**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ANGELO L. CEPEDA,** United States Air Force, *Appellant.*	)	No. ACM 40318
	)	8 April 2024

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

Pursuant to Rule 23(d) and 23.3 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file a demand for speedy appellate review of his case. Appellant further so demands speedy appellate processing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant Appellant leave to file this motion and grant him the relief specified herein.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

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 Appellate Government Division on 8 April 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40318**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Angelo L. CEPEDA	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 8 April 2024, Appellant moved this court for leave to file a demand for speedy appellate review in his case. He further "demands speedy appellate processing." The Government did not respond to Appellant's motion.

On 18 December 2023, Appellant filed with this court a notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A). While Appellant's filing was not accompanied by a record of trial, the court docketed Appellant's case on 19 December 2023. In this court's notice of docketing, it further ordered the Government to "forward a copy of the record of trial to the court forthwith."

On 19 March 2024, after more than 90 days since Appellant's case was docketed, we then ordered the Government to apprise this court not later than 2 April 2024 of compliance with the court's prior order of production.

On 2 April 2024, the Government responded advising that the record of trial was still incomplete, but that the current estimated date of completion was 19 April 2024. Specifically, the Government stated, "The original court reporter and military judge have retired, so the case is now pending detailing of a new military judge to certify the completed transcript," and the Government would "provide another update no later than 30 days from the date of [their] notice, 2 May 2024."

Accordingly, it is by the court on this 16th day of April, 2024,

ORDERED:

Appellant's Motion for Leave to File Demand for Speedy Appellate Review is **GRANTED**.

Appellant's demand for speedy appellate review will be treated as such.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A), UCMJ**
v.	)	
	)	
Technical Sergeant (E-6)	)	No. ACM 40318
ANGELO L. CEPEDA	)	
United States Air Force	)	15 December 2023
Appellant	)	

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

On 18 January and 4-8 April 2022, a panel with enlisted members, sitting as a general court-martial, convicted TSgt Cepeda, contrary to his pleas, of Specification 1 of Charge I, alleging that he was willfully derelict in his duty to refrain from sexually harassing JJ, in violation of Article 92, UCMJ. The members sentenced him to a reprimand, 60 days of confinement, and reduction to E-4 (Entry of Judgement, 26 May 2022). On 28 November 2023, the Government sent TSgt Cepeda the required notice by mail of his right to submit a direct appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A) (2022), TSgt Cepeda files his notice of appeal with this Court.

Respectfully submitted,

[redacted]

TAMI L. MITCHELL
Civilian Defense Counsel
Law Office of Tami L. Mitchell
5390 Goodview Drive
Colorado Springs, CO 80911
(719) 426-8967
tamimitchelljustice@gmail.com

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 and Appellate Defense Division on 15 December 2023.

TAMI L. MITCHELL
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tamimitchelljustice@gmail.com

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. TSgt Angelo Cepeda ACM: 40318

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 13 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals.

I hereby certify that I am admitted to practice before this court.

12/15/2023
Date

Signature

Tami L Mitchell
Print Name Bar Number

5390 Goodview Drive
Address

Colorado Springs CO 80911
City State Zip Code

719-426-8967 tamimitchelljustice@gmail.com
Phone Number E-Mail

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Technical Sergeant (E-6) **ANGELO L. CEPEDA**, USAF *Appellant*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE NOTICE OF STATUS OF COMPLIANCE** Before Panel No. 3 No. ACM 40318 1 May 2024

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

Pursuant to this Court's 19 March 2024 order, the United States respectfully requests that this Court grant leave to file a notice of status of compliance. The motion for leave to file and the status of compliance are combined in a single motion in accordance with Rule 23(d) of this Court's Rules of Practice and Procedure.

On 18 December 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this Court. The above-styled case was docketed on 19 December 2023 and the Court ordered the Government to "forward a copy of the record of trial to the court forthwith." (*Order*, dated 19 December 2023.) On 19 March 2024, this Court further ordered "Government appellate counsel will inform the court in writing not later than 2 April 2024 of the status of this case with regard to this court's 19 December 2023 order." (*Order*, dated 19 March 2024.)

On 2 April 2024, JAJG provided this Court with the following update. JAT informed JAJG that the estimated transcript completion date was 19 April 2024. The original court reporter and military judge have retired, so the case was pending detailing of a new military judge to certify the completed transcript. JAJG stated that it would provide another update no later than 30 days from the date of this notice, 2 May 2024.

JAT informed JAJG that the court reporter transcribing this case has a new estimated completion date set for 20 May 2024. The court reporter had active court-martial hearings taking place at the base the court reporter is attached to accounting for the delay. Although the court reporter completed her initial transcription, trial counsel and trial defense counsel are reviewing the transcript and providing edits to the court reporter. Next a military judge will have to review and certify the transcript. The base legal office will provide a copy of the record of trial along with the certified verbatim transcript to JAJM once completed.

WHEREFORE, the United States requests this Honorable Court grant its motion for leave and accept this filing.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 1 May 2024.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **ANGELO L. CEPEDA,** United States Air Force, *Appellant.*	**MOTION TO AMEND PLEADING** Before Panel No. 3 No. ACM 40318 6 June 2024

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

Pursuant to Rules 23 and 23.3(n) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Angelo L. Cepeda hereby moves to amend the pleading filed earlier today in this case, related to a motion for sanctions. The earlier filed pleading incorrectly contained information related to *United States v. Bartolome*, ACM 22045, and an incorrect citation to R.C.M. 112, as opposed to R.C.M. 1112. The corrected portions resulted in a repagination of page 3. The corrected portions of the pleading (pages 3-6) are contained in the Appendix.

WHEREFORE, TSgt Cepeda respectfully requests this Honorable Court grant this motion.

Respectfully submitted,

[redacted]

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[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

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 6 June 2024.

Respectfully submitted,

TAMI L. MITCHELL
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APPENDIX

Law and Analysis

Courts of Criminal Appeals "may set and enforce deadlines," and have power to act to address delays in appellate proceedings. *United States v. Roach*, 66 M.J. 410, 419 (C.A.A.F. 2008). The Court exercised this authority in this case by instructing the Government to forward the record of trial "forthwith," then after no response from the Government for more than 90 days, issuing orders and granting motions which, together, set two different deadlines for the Government to provide a verbatim transcript in this case. *See* Order, dated 19 March 2024; Order, United States' Notice of Status of Compliance, 1. This Court also granted TSgt Cepeda's demand for speedy appellate review. "[C]ounsel appearing before this court have a duty to obey all orders of this court, except in the extraordinary situation where the court issues an order plainly calling for counsel to engage in unlawful or unethical conduct." *United States v. Sauk*, 74 M.J. 594, 600 (A.F. Ct. Crim. App. 2015). Unfortunately, the Government has repeatedly failed to obey this Court's orders to provide a verbatim transcript, or even to comply with its own promised deadlines. The United States should be held accountable for its repeated failures to comply with the orders of this Court and for its dereliction, or even willful refusal, in the performance of its duties.

The Government's actions in this case demonstrate an institutional apathy towards this Court's orders. Between the time of docketing TSgt Cepeda's appeal and the date of this filing, 140 days have elapsed, with the first 91 days elapsing after the Government was ordered to forward the record of trial "forthwith." The Government failed to meet its own proposed deadlines for completing the verbatim transcript. Especially in light of this Court granting TSgt Cepeda's demand for speedy appellate review, the lack of diligence or sense of priority with which Government actors have treated this situation reveal a simple truth: the United States is not giving this Court's orders in this case the attentiveness the Court deserves and the law requires. These failures by the Government warrant sanctions from this Court to reinforce the importance of dutifully complying with the Court's orders.

This Court has previously recognized two remedies at its disposal for addressing failures to comply with its orders: dismissing the charges and specifications in the case and holding counsel in contempt of court. *Sauk*, 74 M.J. at 600. While both are available here, TSgt Cepeda does not believe holding counsel in contempt of court is an appropriate remedy for this situation. Counsel for the Government appear to have little control over the actions of other Government actors which are required to fulfill the Court's orders. Sanctioning counsel will not address the Government's overall failure to comply with this Court's orders. An appropriate sanction must reach an interest of the party as a whole.

Dismissing Charge I and Specification 1 appropriately sanctions the Government's conduct by reaching one of its interests. At one point, the United States decided it was in its best interest to prosecute TSgt Cepeda, ultimately leading to his conviction and this appeal. However, now that the case is on appeal, the United States apparently cannot muster the resources to produce a verbatim transcript in accordance with the deadlines this Court set, or which the Government itself proposed. The Government as an institution seems unconcerned that its interests will be negatively affected by not complying with this Court's orders, and sanctions from the Court should show otherwise. Dismissing the Charge and Specification will negatively affect the United States' interest in bringing this case against TSgt Cepeda, sending a clear message to all involved that the United States, as a party to this case, must comply with this Court's orders. It is also the only meaningful relief available to TSgt Cepeda, as his sentence has been served in its entirety. *See* EOJ.

Two additional considerations warrant dismissing Charge I and Specification 1. First, it is virtually impossible for the Government to provide a certified verbatim transcript, because the only two individuals who are authorized to certify a verbatim transcript under R.C.M. 1112(c)—the military judge and court reporter—are both retired. Detailing another military judge to certify a verbatim transcript does not comport with R.C.M. 1112(c) because this other military judge did not

preside over TSgt Cepeda's court-martial. Only a military judge who presided over his court-martial can certify a verbatim transcript. *See United States v. Donoho*, ACM 39242, Order dated 23 May 2018, 2 (only a military judge who presided over the court-martial may issue a certificate of correction). Under the circumstances, the Government cannot provide a record of trial that enables this Court to conduct a full Article 66, UCMJ review. Second, TSgt Cepeda demanded speedy appellate review, which this Court granted. Considering the four *Barker v. Wingo* factors (length of the delay, reasons for the delay, demand for speedy appeal, and prejudice), and *United States v. Toohey*, 63 M.J. 353, 362-63 (C.A.A.F. 2006) (a showing a prejudice is not required to grant relief for dilatory appellate processing), this Court should grant relief by dismissing Charge I and Specification 1 with prejudice.

Finally, other direct appeals cases await transcription. *See e.g. United States v. Bartolome*, ACM 22045, notable for arising from the same jurisdiction as *United States v. Cepeda*, which also provided a notice of the right to appeal on 28 November 2023. Allowing the Government to effectively ignore this Court's orders in this case without notable consequences will likely lead to similar institutional behavior in other direct appeals cases because the Government will have little incentive to change its priorities. This Court should send a clear message to the Government as a whole that it must take necessary steps to comply with the Court's orders, and it can do so by dismissing the Charge and Specification for the Government's failure to do so here.

WHEREFORE, TSgt Cepeda respectfully requests this Honorable Court grant this motion for sanctions, set aside the findings of guilty and the sentence, and dismiss Charge I and Specification 1 with prejudice. This relief will moot the Government's Motion for Leave to File Notice of Status of

Compliance, so TSgt Cepeda also respectfully requests the Court dismiss that motion.

Respectfully submitted,

[redacted]

TAMI L. MITCHELL
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MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40318**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Angelo L. CEPEDA	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 December 2023, Appellant filed with this court a notice for direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A). While Appellant's filing was not accompanied by a record of trial, the court docketed Appellant's case on 19 December 2023. In this court's notice of docketing, it directed the Government to produce and forward a verbatim trial transcript to the Defense and this court "forthwith." As of the date of this order, this court has not yet received a verbatim trial transcript.

On 6 June 2024, Appellant's counsel moved for leave to file a Motion for Sanctions, accompanied by his Motion for Sanctions. In that motion, counsel sought dismissal with prejudice of the sole charge and specification of which Appellant stands convicted as sanction for the Government's failing to produce a verbatim trial transcript as ordered.

On 13 June 2024, the Government responded to Appellant's motion for sanctions asserting that the verbatim transcript was, in fact, completed and certified on 4 June 2024 by a replacement court reporter and military judge after the original court reporter and military judge retired. The Government further asserted that on 4 June 2024 the servicing legal office (Minot Air Force Base, North Dakota) mailed the transcript to the Military Justice Law & Policy Division.

This court has considered Appellant's motions, 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 June, 2024,

ORDERED:

Appellant's Motion for Leave to File a Motion for Sanctions is **GRANTED**.

Appellant's Motion for Sanctions is **DENIED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **ANGELO L. CEPEDA,** United States Air Force, *Appellant.*	**MOTION FOR LEAVE TO FILE MOTION FOR SANCTIONS AND MOTION FOR SANCTIONS** Before Panel No. 3 No. ACM 40318 6 June 2024

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

Pursuant to Rules 23 and 23.3 of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Angelo L. Cepeda hereby requests that this Court grant leave to file a motion for sanctions and sanction the United States for failing to comply with this Court's orders by dismissing Charge I and Specification 1 with prejudice. The motion for leave to file and the motion for sanctions are combined in a single motion in accordance with Rule 23(d).

Facts

A panel with enlisted members, sitting as a general court-martial, convicted TSgt Cepeda, contrary to his pleas, of Specification 1 of Charge I, alleging that he was willfully derelict in his duty to refrain from sexually harassing JJ, in violation of Article 92, UCMJ. The members sentenced him to a reprimand, 60 days of confinement and reduction to E-4. The convening authority approved the findings and sentence on 13 May 2022 (Convening Authority Memo to Military Judge, dated 13 May 2022). Judgment was entered on 26 May 2022 (Entry of Judgment), and TSgt Cepeda's case was reviewed pursuant to Article 65(d), UCMJ on 29 June 2022 (Article 65(d), UCMJ review).[1] TSgt Cepeda was notified of his right to file a direct appeal to this Court

[1] Appellant did not receive a copy of this review until 5 April 2023.

on 28 November 2023 (Memorandum from 8AF/JA Sub: Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals, dated 28 November 2023). TSgt Cepeda timely filed a notice of direct appeal with this Court on 18 December 2023, and the Court docketed the case on 19 December 2023. Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ; Notice of Docketing. In its docketing notice, this Court ordered the Government to forward a copy of the record of trial to the court "forthwith." Notice of Docketing.

By 19 March 2024, the Government still had not forwarded a copy of the record of trial to this court; therefore, this Court ordered the Government to inform the Court NLT 2 April 2024 as to the status of the case. Order dated 19 March 2024. On 2 April 2024, the Government submitted its notice of compliance, claiming that the estimated completion date for the transcript was 19 April 2024. United States' Notice of Status of Compliance, 1. The Government also noted that both the military judge and court reporter retired, so the case was pending detail of a new military judge to certify the transcript. *Id*. The Government stated it would provide another status update on 2 May 2024. *Id*.

On 8 April 2024, Appellant moved this Court for leave to file a demand for speedy appellate review. MFLTF Demand for Speedy Appellate Review. The Government did not respond; this Court granted the motion eight days later. Order dated 16 April 2024. On 1 May 2024, the Government filed *another* notice of compliance, claiming that the verbatim transcript was estimated to be completed by 20 May 2024, as the court reporter had to prioritize active-duty cases, the trial counsel and trial defense counsel were still reviewing the transcript and providing edits, and the military judge still needed to certify it. United States' Motion for Leave to File Notice of Status of Compliance, 2. As of 6 June 2024, the Government has failed to provide a completed transcript and record of trial; nor has it provided any further status updates.

Law and Analysis

Courts of Criminal Appeals "may set and enforce deadlines," and have power to act to address delays in appellate proceedings. *United States v. Roach*, 66 M.J. 410, 419 (C.A.A.F. 2008). The Court exercised this authority in this case by instructing the Government to forward the record of trial "forthwith," then after no response from the Government for more than 90 days, issuing orders and granting motions which, together, set two different deadlines for the Government to provide a verbatim transcript in this case. *See* Order, dated 19 March 2024; Order, United States' Notice of Status of Compliance, 1. This Court also granted TSgt Cepeda's demand for speedy appellate review. "[C]ounsel appearing before this court have a duty to obey all orders of this court, except in the extraordinary situation where the court issues an order plainly calling for counsel to engage in unlawful or unethical conduct." *United States v. Sauk*, 74 M.J. 594, 600 (A.F. Ct. Crim. App. 2015). Unfortunately, the Government has repeatedly failed to obey this Court's orders to provide a verbatim transcript, or even to comply with its own promised deadlines. The United States should be held accountable for its repeated failures to comply with the orders of this Court and for its dereliction, or even willful refusal, in the performance of its duties.

The Government's actions in this case demonstrate an institutional apathy towards this Court's orders. Between the time of docketing TSgt Cepeda's appeal and the date of this filing, 140 days have elapsed, with the first 91 days elapsing after the Government was ordered to forward the record of trial "forthwith." The Government failed to meet its own proposed deadlines for completing the verbatim transcript. Especially in light of this Court granting TSgt Cepeda's demand for speedy appellate review, the lack of diligence or sense of priority with which Government actors have treated this situation reveal a simple truth: the United States is not giving this Court's orders in this case the attentiveness the Court deserves and the law requires. These

failures by the Government warrant sanctions from this Court to reinforce the importance of dutifully complying with the Court's orders.

This Court has previously recognized two remedies at its disposal for addressing failures to comply with its orders: dismissing the charges and specifications in the case and holding counsel in contempt of court. *Sauk*, 74 M.J. at 600. While both are available here, TSgt Cepeda does not believe holding counsel in contempt of court is an appropriate remedy for this situation. Counsel for the Government appear to have little control over the actions of other Government actors which are required to fulfill the Court's orders. United States' Motion for Enlargement of Time (First) Out of Time, 2 (stating that JAJG "does not have authority or management capabilities over the Air Force's court reporters and therefore has had difficulty effectively managing the production of verbatim transcripts"). The Government's own chronology also makes it clear that Government counsel have sought regular status updates on this matter, while others throughout the Government have repeatedly failed to prioritize and diligently execute the task ordered by this Court. *See* Declaration of Cora Claire Applen. Sanctioning the counsel will not address the totality of the Government's utter failure to comply with this Court's orders. An appropriate sanction must reach an interest of the party as a whole.

Dismissing Charge I and Specification 1 appropriately sanctions the Government's conduct by reaching one of its interests. At one point, the United States decided it was in its best interest to prosecute TSgt Cepeda, ultimately leading to his conviction and this appeal. However, now that the case is on appeal, the United States apparently cannot muster the resources to produce a verbatim transcript in accordance with the deadlines this Court set, or which the Government itself proposed. The Government as an institution seems unconcerned that its interests will be negatively affected by not complying with this Court's orders, and sanctions from the Court should show

otherwise. Dismissing the Charge and Specification will negatively affect the United States' interest in bringing this case against TSgt Cepeda, sending a clear message to all involved that the United States, as a party to this case, must comply with this Court's orders. It is also the only meaningful relief available to TSgt Cepeda, as his sentence has been served in its entirety. *See* EOJ.

Two additional considerations warrant dismissing Charge I and Specification 1. First, it is virtually impossible for the Government to provide a certified verbatim transcript, because the only two individuals who are authorized to certify a verbatim transcript under R.C.M. 1112(c)—the military judge and court reporter—are both retired. Detailing another military judge to certify a verbatim transcript does not comport with R.C.M. 112(c) because this other military judge did not preside over TSgt Cepeda's court-martial. Only a military judge who presided over his court-martial can certify a verbatim transcript. *See United States v. Donoho*, ACM 39242, Order dated 23 May 2018, 2 (only a military judge who presided over the court-martial may issue a certificate of correction). Under the circumstances, the Government cannot provide a record of trial that enables this Court to conduct a full Article 66, UCMJ review. Second, TSgt Cepeda demanded speedy appellate review, which this Court granted. Considering the four *Barker v. Wingo* factors (length of the delay, reasons for the delay, demand for speedy appeal, and prejudice), and *United States v. Toohey*, 63 M.J. 353, 362-63 (C.A.A.F. 2006) (a showing a prejudice is not required to grant relief for dilatory appellate processing), this Court should grant relief by dismissing Charge I and Specification 1 with prejudice.

Finally, other direct appeals cases await transcription. *See United States v. Bartolome*, ACM _____; *United States v.* _____; Allowing the Government to effectively ignore this Court's orders in this case without notable consequences will likely lead to similar institutional

behavior in other direct appeals cases because the Government will have little incentive to change its priorities. This Court should send a clear message to the Government as a whole that it must take necessary steps to comply with the Court's orders, and it can do so by dismissing the Charge and Specification for the Government's failure to do so here.

WHEREFORE, TSgt Cepeda respectfully requests this Honorable Court grant this motion for sanctions, set aside the findings of guilty and the sentence, and dismiss Charge I and Specification 1 with prejudice. This relief will moot the Government's motion for an enlargement of time, so TSgt Cepeda also respectfully requests the Court deny that motion.

Respectfully submitted,

[redacted]

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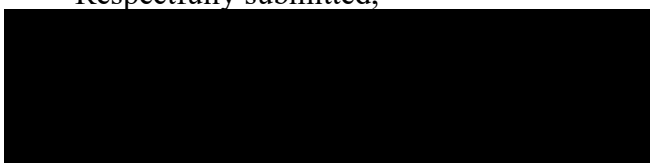
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 June 2024.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' RESPONSE TO MOTION FOR SANCTIONS**
v.	)	Panel 3
Technical Sergeant (E-6) **ANGELO L. CEPEDA** United States Air Force, *Appellant.*	)	No. ACM 40318 13 June 2024

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 responds to Appellant's Motion for Sanctions, dated 6 June 2024. This Court should deny Appellant's request to impose sanctions on the government for failure to forward a copy of the record of trial.

Background

On 23 December 2022, Congress amended Article 66, UCMJ to provide appellate review by a Court of Criminal Appeals (CCA) to servicemembers convicted at general and special courts-martial, regardless of the adjudged sentence. *See* James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, Public Law No. 117-263, 136 Stat. 2395, Section 544. These amendments enlarge the number of servicemembers who are eligible for CCA review. Before 23 December 2022, the Air Force did not prepare verbatim transcripts for servicemembers like Appellant whose sentences did not meet the threshold for CCA review under Article 66, UMCJ. Since the change in the law, the Air Force Government Trial and Appellate Operations Division (JAJG) has been supportive of providing verbatim transcripts to all servicemembers who file for direct appeal with this Court. JAJG and the Air Force Appellate Defense Division (JAJA) agree that military appellate defense counsel cannot adequately

perform their duties toward their new clients without verbatim transcripts of the court-martial proceedings.

A certified verbatim transcript is now required in all general and special courts-martial in which there is a finding of guilty. *See* Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 9 April 2024, para. 20.47.1. However, Appellant filed his direct appeal with this Court before the Air Force's new policies for production of verbatim transcripts went into full effect.

The following timeline details some of the relevant events related to preparation of the verbatim transcript in Appellant's case:

15 December 2023 – Appellant filed a notice of direct appeal with this Court. (*Notice of Appeal Pursuant to Article 66(b)(1)(A), UCMJ*, dated 15 December 2023.)

19 December 2023 – This Court docketed the case and ordered the government to forward a copy of the record of trial to the court forthwith. This Court did not specify a deadline to have the record of trial forwarded. (*Notice of Docketing*, dated 19 December 2023.)

19 March 2024 – This Court ordered the government to inform the Court no later than 2 April 2024 as to the status of the record of trial because a copy of the record of trial was not forwarded to the Court as of the date of the order. (*Order*, dated 19 March 2024.)

2 April 2024 – JAJG provided a notice of status of compliance explaining that the estimated completion date for the verbatim transcript was 19 April 2024. This status also explained that both the military judge and court reporter retired, so the case was pending detailing of a new military judge to certify the transcript. (*United States' Notice of Status of Compliance*, dated 2 April 2024.)

8 April 2024 – Appellant moved this Court for leave to file a demand for speedy appellate review. This Court granted this motion on 16 April 2024. (*MFLTF Demand for Speedy Appellate Review*, dated 8 April 2024; *Order*, dated 16 April 2024.)

1 May 2024 – JAJG submitted a motion for leave to file a notice of status of compliance, which stated that the new estimated completion date for the verbatim transcript was 20 May 2024. The notice also explained that the court reporter had active court-martial hearings taking place at the base the court reporter was attached to, which accounted for the delay. As of 1 May 2024, the court reporter completed her initial transcription, and counsel were reviewing the transcript and providing edits to the court reporter. Next, a military judge would have to review and certify the transcript. Lastly, the update informed the Court that the legal office would provide a copy of

the record of trial along with the certified verbatim transcript to the Air Force Military Justice Law and Policy Division (JAJM) once completed. (*United States' Motion for Leave to File Notice of Status of Compliance*, dated 1 May 2024.)

6 June 2024 – Appellant submitted a motion for leave to file for sanctions and motion for sanctions. (*Appellants Motion for Leave to File for Sanctions and Motion for Sanctions*, 6 June 2024). Appellant amended his motion for sanctions. (*Motion to Amend Pleadings*, dated 6 June 2024.)

11 June 2024 – Minot Air Force Base legal office informed undersigned counsel that it mailed the record of trial along with the verbatim transcript to JAJM on 4 June 2024.

Analysis

Although the government acknowledges that the progress on preparation of Appellant's verbatim transcript has been less than ideal, sanctions are not warranted. The creation of the verbatim transcript was necessary to complete the record of trial. The Minot Air Force Base legal office mailed Appellant's verbatim transcript along with a copy of the record of trial to JAJM on 4 June 2024. The government has never refused to comply with this Court's 19 December 2023 order directing the government to forward a copy of the record of trial. And this Court never set a specific deadline for forwarding a copy of the record of trial.

The government took steps to produce a verbatim transcript necessary to complete Appellant's record of trial as soon as practicable. The notices of status of compliance filed with this Court demonstrated that the Air Force Trial Judiciary (JAT) had been making progress in transcribing Appellant's court-martial, even though the progress was slower than desirable. This Court did not request any further updates after the 1 May 2024 Notice of Status of Compliance.

The government diligently worked on the verbatim transcript. Thus, there were no lack of diligence or disregard to this Court's 19 December 2023 order to produce a copy of the record of trial requiring a verbatim transcript. Although the government did not mail the record of trial and verbatim transcript until 4 June 2024, there were explanations that demonstrated something

other than a lack of diligence or disregard for this Court's orders to produce a copy of the record of trial forthwith. The court reporter transcribing the court-martial audio had active court-martial hearings taking place at the base the court reporter was attached to accounting for the delay. Further, JAT had to detail a new military judge to review and certify the verbatim transcript because the original court reporter and military judge retired. Appellant characterizes the delay in producing a verbatim transcript as the government repeatedly failing to obey this Court's orders or even to comply with its own promised deadlines. (App. Mot. to Amend Pleadings at 3.) But the government never failed to obey this Court's orders to forward a copy of the record of trial. This Court never set a specific deadline for completion; instead, it outlined that the "[g]overnment will forward a copy of the record of trial forthwith." (*Notice of Docketing*, dated 19 December 2023.) And the government has complied with this order. On 4 June 2024, the government mailed a copy of the record of trial along with a verbatim transcript to JAJM as soon as practicable notwithstanding the court reporter's schedule causing delays. Also, the government never made promised deadlines, but had estimated completion dates that changed given the court reporter's substantial workload.

Appellant mentions two additional considerations that it believes warrants sanctions, such as the dismissal of Charge I, Specification 1. First, Appellant states that it is impossible for the government to provide a certified verbatim transcript because the only two individuals who were authorized to certify a verbatim transcript under R.C.M. 1112(c) – the original court reporter and military judge – are now retired. (App. Mot. to Amend Pleadings at 4-5.) But Appellant failed to articulate how this resulted in harm to his case. For this Court to conduct appellate review, a verbatim transcript is vital. *See* United States v. Credit, 4 M.J. 118, 119 (C.M.A. 1977) (explaining that "a trial transcript is, indeed, the very heart of the criminal proceedings and the

single element essential to our meaningful appellate review…"). Here, the government created a verbatim transcript ensuring that this Court can conduct appellate review. Thus, Appellant did not demonstrate any prejudice suffered. And Appellant failed to show how this Court cannot conduct appellate review regardless of which military judge certified the verbatim transcript.

Second, Appellant mentions that he demanded speedy appellate review and given the delay in this case, this Court should grant relief. (App. Mot. to Amend Pleadings at 5.) Appellant has not articulated how this delay prejudiced him. He also failed to articulate why he is entitled to relief due to a delay in appellate processing. 177 days have elapsed from docketing Appellant's case to the date of this filing – well within the 18-month deadline for this court to complete appellate review and render its decision. United States v. Moreno, 63 M.J. 129, 142-143 (C.A.A.F. 2006). In any event, Appellant can ask for relief for post-judgment delay under Article 66(d)(2). Thus, relief in the form of sanctions is not appropriate in this case.

The circumstances of this case do not represent a flagrant flouting of this Court's orders to forward a copy of the record of trial that required a verbatim transcript for appellate review. Instead, the circumstances of this case reflect the difficulties that can ensue when the law imposes new requirements on the government without much advanced warning, and the Air Force has to play catch-up. As mentioned above, new procedures have been put in place so that a verbatim transcript will already be part of every record of trial docketed with this Court. Although there was a delay, the legal office mailed a copy of the record of trial along with the verbatim transcript showing compliance with this Court's 19 December 2023 order.

Sanctions, especially the drastic one of dismissal of the charge and specification with prejudice, are not appropriate. The government has not acted in bad faith, nor has Appellant

demonstrated any prejudice from the delay in producing a verbatim transcript and forwarding a copy of the record of trial.

WHEREFORE, the United States requests that the Court deny Appellant's Motion for Sanctions.

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MATTHEW D. TALCOTT, Colonel, USAF
Chief
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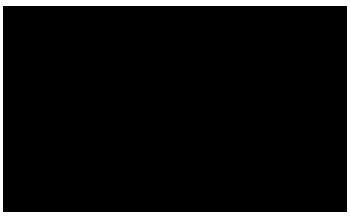
FOR



MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 13 June 2024 via electronic filing.

VANESSA BAIROS, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40318**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Angelo L. CEPEDA	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 2 August 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 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 6th day of August, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **11 October 2024.**

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent *exceptional circumstances*.

[redacted]
OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **ANGELO L. CEPEDA,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 3 No. ACM 40318 2 August 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **11 October 2024**. The case was docketed with this Court on 19 December 2023. This Court acknowledged receipt of the record of trial on 13 June 2024. From the date of that receipt to the present date, 50 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,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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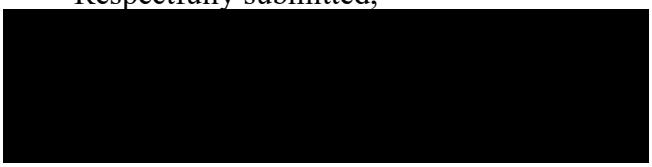
United States Air Force
(240) 612-4770

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 Appellate Government Division on 2 August 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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5 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ANGELO L. CEPEDA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40318 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 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.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 5 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40318**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Angelo L. CEPEDA	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 9 October 2024, counsel for Appellant submitted a Motion to Examine Sealed Materials, specifically, transcript pages 64–71, 72–83, 467–495, and 498–500 which pertain to a closed hearing; and Appellate Exhibits VI, VIII, and X related to the same hearing. All requested items were reviewed by trial and defense counsel at Appellant's court-martial or preliminary hearing. On 9 October 2024, the United States responded that it does not object to Appellant's motion as long as it can also review the sealed portions of the record as necessary to answer to any assignments of error by Appellant that reference the sealed materials.[1]

Appellate defense counsel argues it is necessary to review the entire record, including the requested sealed materials, to ensure undersigned counsel provides "competent appellate representation." Appellate defense counsel further explains that examination of the sealed materials is reasonably necessary to assess "whether the [record] is complete and whether the military judge properly ruled on motions and admissibility of evidence."

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* (2024 ed.).

The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is reasonably necessary to fulfill counsel's duties

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[1] In its opposition to Appellant's motion, the Government also states that it "would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this [c]ourt has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113." Having examined the sealed materials requested by Appellant, this court finds that they contain no references to an in-camera review.

of representation to Appellant. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 17th day of October, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **trial transcript pages 64–83, 467–495, and 498-500; Appellate Exhibits VI,[2] VIII, and X,** 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.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

[2] We note that redactions were present on pages 2, 5, 6, 8, and 9 of Appellate Exhibit VI, and on page 4 of Appellate Exhibit VIII. Our review of the verbatim transcript leads us to believe that those redactions related to excising personally identifiable information (PII) pertaining to a separate crime victim unrelated to the underlying motion concerned, and were present on the documents at the time they were entered into the record at trial

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **ANGELO L. CEPEDA,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 3 No. ACM 40318 9 October 2024

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 Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following items:[1]

- Appellate Exhibit VI – Defense Motion to Admit Evidence under MRE 412 (JJ), undated
- Appellate Exhibit VIII – Affidavit of TSgt Angelo Cepeda (JJ), undated
- Appellate Exhibit X – Government Response to Defense Motion to Admit Evidence under MRE 412 (JJ), dated 9 November 2021
- Pages 64-71; 72-83; 467-495; and 498-500 of the trial transcript which address MRE 412 matters.

[1] Counsel originally submitted this motion on 9 October 2024 at approximately 1007, Eastern Standard Time. However, that motion referenced the incorrect panel. Counsel respectfully withdraws that motion and submits this one instead.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced materials is reasonably necessary to assess whether the ROT is complete and whether the military judge properly ruled on motions and the admissibility of evidence. The sealed portions raise the potential for appellate issues.

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing these exhibits.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 9 October 2024.

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ANGELO L. CEPEDA, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40318 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 responds to Appellant's Motion to Examine Sealed Materials. Appellant does not identify if the materials he wishes to review were reviewed by all parties at trial. The United States does not object to Appellant's counsel reviewing transcript pages and exhibits that were released to both parties at trial so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

WHEREFORE, the United States respectfully responds to Appellant's motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
(240) 612-4800

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 9 October 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **ANGELO L. CEPEDA,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME, OUT OF TIME (SECOND)** Before Panel No. 3 No. ACM 40318 15 October 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 15 days, which will end on **30 October 2024**. The case was docketed with this Court on 19 December 2023. This Court acknowledged receipt of the record of trial on 13 June 2024. From the date of that receipt to the present date, 124 days have elapsed.[1] On the date requested, 139 days will have elapsed.

A panel with enlisted members, sitting as a general court-martial convened at Minot Air Force Base, North Dakota, convicted TSgt Cepeda, contrary to his pleas, of Specification 1 of Charge I, alleging that he was willfully derelict in his duty to refrain from sexually harassing JJ, in violation of Article 92, UCMJ. (R. at 992.) The members sentenced him to a reprimand, 60 days of confinement and reduction to E-4. (R. at 1044.) The convening authority approved the findings and sentence on 13 May 2022. (Convening Authority Memo to Military Judge, dated 13 May 2022.)

[1] The filing deadline for this case was 11 October 2024. However, this Court extended all filings due on that day to today, 15 October 2024, on account of court closure for the Federal holiday.

The record of trial contains a 1004 page transcript. There are 17 prosecution exhibits, one defense exhibit, and 24 appellate exhibits. Appellant is not currently in confinement. Appellant has been advised of his right to speedy appellate review and this request for an enlargement of time. Appellant has agreed to the request. Additionally, undersigned counsel has advised Appellant as to the current status of the case. Appellant is also represented by Ms. Tami Mitchell.

Through no fault of appellant, undersigned counsel has been unable to review the sealed materials in this case due to a pending motion with this court to view said materials which was submitted on 9 October 2024. Good cause exists to file this motion out of time because of the pending motion The assignment of errors has been otherwise fully drafted with civilian counsel and is ready to file. However, before filing counsel must exercise due diligence under Article 70 to ensure that the record of trial has been fully reviewed. Additionally, counsel must inspect the sealed portions to ensure that the record of trial is complete. This final step is the only thing standing between submission of the assignment of errors with this court. Accordingly, an enlargement of time is necessary for counsel to review the sealed materials and make whatever modifications are necessary to the assignment of errors based on that review.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

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 Appellate Government Division on 15 October 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
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(240) 612-4770

17 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ANGELO L. CEPEDA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME ACM 40318 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 general opposition to Appellant's Motion for Enlargement of Time Out 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.

[redacted]

MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division and civilian counsel on 17 October 2024.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **ANGELO L. CEPEDA** Technical Sergeant (E-6) U. S. Air Force, *Appellant*	**BRIEF ON BEHALF OF APPELLANT** No. ACM 40318 Before Panel No. 3 23 October 2024

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

Issues Presented

I.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DERELICTION OF DUTY?

II.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROSECUTION EXHIBIT 13 (EXCERPTS OF AIR FORCE INSTRUCTION 36-2706) INTO EVIDENCE?

III.

WHETHER APPELLANT WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL?

IV.[1]

WHETHER THE VERBATIM TRANSCRIPT IS LEGALLY SUFFICIENT GIVEN THAT IT WAS NOT CERTIFIED BY EITHER THE MILITARY JUDGE OR COURT REPORTER?

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

V.[2]

WHETHER APPELLANT'S CONVICTION SHOULD BE DISMISSED FOR VIOLATING HIS RIGHT TO SPEEDY APPELLATE REVIEW?

Statement of Statutory Jurisdiction

Technical Sergeant (TSgt) Angelo Cepeda, United States Air Force, was convicted of willful dereliction of duty by a general court-martial, and received a sentence of a reprimand, 60 days of confinement, and reduction to E-4. His case is reviewed by this Court pursuant to Article 66, Uniform Code of Military Justice (UCMJ). Article 66(b)(1)(A), UCMJ.

Statement of the Case

A panel with enlisted members, sitting as a general court-martial, convicted TSgt Cepeda, contrary to his pleas, of Specification 1 of Charge I, alleging that he was willfully derelict in his duty to refrain from sexually harassing JJ, in violation of Article 92, UCMJ. (R. at 992.) The members sentenced him to a reprimand, 60 days of confinement and reduction to E-4. (R. at 1044.) The convening authority approved the findings and sentence on 13 May 2022. (Convening Authority Memo to Military Judge, dated 13 May 2022.) Judgment was entered on 26 May 2022 (Entry of Judgment), and TSgt Cepeda's case was reviewed pursuant to Article 65(d), UCMJ on 29 June 2022 (Article 65(d), UCMJ review).[3] TSgt Cepeda was notified of his right to file a direct appeal to this Court on 28 November 2023 (Memorandum from 8AF/JA Sub: Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals, dated 28 November 2023),[4] and submitted his notice of direct appeal on 15 December 2023. Therefore, this appeal is timely.

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[2] This issue is raised pursuant to *Grostefon*, 12 M.J. 431.
[3] Appellant did not receive a copy of this review until 5 April 2023.
[4] Appellant previously filed an appeal pursuant to Article 69, UCMJ. However, on 12 December 2023, he was informed that he was not eligible for an Article 69, UCMJ appeal, due to changes in Article 69 resulting from NDAA FY23 § 544, Pub. L. No. 117-263, 136 Stat. 2395 (2022).

Article 66(c)(1)(A), UCMJ.

Statement of Facts

The alleged victim, JJ, was an Airman (E-2) who worked with TSgt Cepeda. They worked the mid-shift, which was approximately 2300-0700; TSgt Cepeda was the expediter. (R. at 448-49.) He assigned jobs to JJ and drove the airmen to work in their designated areas. (R. at 446.) JJ was allowed to work on a jet. (R. at 450.) JJ claimed Appellant had "inappropriate conversations" with her during their drives, wherein he complimented her physical appearance. (R. at 451-52.) She accepted his compliments and did not tell him to stop or indicate his comments made her "uncomfortable." (R. at 452-53.) JJ had been a "Teal Rope in tech school," "someone who represented the Sexual Assault Prevention and Response (SAPR) and Sexual Assault Response Coordinator (SARC) or those resources for the Airmen." (R. at 505-06.)

JJ testified that mid-shift had fewer personnel, so usually there were only two four-person crews. (R. at 454-55.) Sometimes TSgt Cepeda picked her up by herself. (R. at 455.) Sometimes the "run" back to the shop took only a few minutes, but sometimes it took a few hours, depending on where she was on the flightline. (R. at 455-56.) In September or October of 2018, they had to pull over and wait for a jet that was being taxied or towed in front of them (R. at 460.) JJ claimed that was when TSgt Cepeda tried to touch her thigh and kiss her. (*Id*.) When he leaned in to kiss her, JJ told him "no" (R. 461-62). He stopped. (*Id*.)

An OSI agent interviewed JJ on 24 October 2019. (R. at 505.) JJ knew she had to tell the truth and that she had to tell them everything TSgt Cepeda did to make her feel uncomfortable (*id*.). JJ repeatedly told the agent that TSgt Cepeda did not touch her in a way that made her feel uncomfortable. (R. at 504, 750.) She told the agent TSgt Cepeda never asked her questions about her sex life, talked about having sex with her, made any sexual gestures or advances to her, or

treated female airmen differently than male airmen. (R. at 506.) She claimed she was harassed by other male airmen who commented about her body and told her she should be dating them instead of her boyfriend at the time (R. at 508-09, 515) and she told TSgt Cepeda about it. (R. at 509.) JJ told the agent that she did not think "too much of it" because it was "really common to hear stuff like that" in the Air Force environment; it was so common she questioned if it was really "harassment." (R. at 520.) She also told OSI that she was not "close" to Airman LS and that she did not associate with co-workers outside of work. (R. at 507.)

The same OSI agent attempted to interview JJ again, but JJ "blew her off" several times (R. 744). JJ was supposed to return to Minot AFB, but she did not. (*Id.*) The agent asked JJ for consent to search her cell phone several times because JJ claimed it had corroborating evidence, but JJ never provided her phone. (R. at 745.) The agent obtained a search warrant for her phone, but JJ subsequently claimed it was lost. (R. at 745-46.) The agent later interviewed JJ a second time in California in March of 2020; she recorded the interview. (R. at 747-48; Def. Ex. A.) During that interview, JJ claimed TSgt Cepeda "sexually harassed" her but denied that he touched her. (R. at 750.)

JJ voluntarily showed TSgt Cepeda pictures of herself on Instagram, mostly her legs. (R. 515-16.) She told him about exercises she liked to do at the gym, as he would ask her about her gym progress. (*Id.*) JJ also told TSgt Cepeda about a time she performed oral sex on her boyfriend with "pop rocks" in her mouth, as they were discussing sexual matters with other co-workers. (R. at 512.) She discussed her sex life with close friends at work. (*Id.*) JJ talked with Airman LS about the amount of time she [JJ] spent with Appellant, as Airman LS noticed JJ was spending

time with him. (R. at 523.)[5] They had gone to tech school together. (*Id*.) JJ told Airman LS that TSgt Cepeda occasionally complimented her and that he never made her feel uncomfortable. (*Id*.)

The Government introduced excerpts from an obsolete Air Force Instruction (AFI) 36-2706, as they related to the definition of "sexual harassment." (Pros. Ex. 13.) However, "sexual harassment" is defined as "unwelcome" conduct, not "nonconsensual." (*Id*.) During litigation over instructions on the elements of Charge I and its specifications, the Government asked the military judge to change "nonconsensual" to "unwanted," based on the duty in the AFI (R. at 840-45), the defense argued to stay with "nonconsensual." (*Id*.) The military judge ultimately denied the Government's request, holding that because the Government charged sexual harassment as being "nonconsensual," the Government was bound by the that language. (R. at 846-47.) The military judge also held that the "unwanted" standard was a lower standard than "nonconsensual." (R. at 840.) However, while instructing the members on the elements of Charge I, the military judge failed to instruct the members on the difference between "unwelcome" and "nonconsensual." (R. at 881.)

Additional relevant facts are included in the argument section.

ARGUMENT

I.

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DERELICTION OF DUTY.

Standard of Review

This Court reviews issues of factual sufficiency *de novo*. 10 U.S.C. § 866(c) (2018); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Factual sufficiency review is "limited to

[5] Airman LS was the other complainant against TSgt Cepeda; he was acquitted of all charges related to her.

the evidence produced at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). Questions of legal sufficiency of the evidence are reviewed *de novo*. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Discussion

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found *all* the essential elements beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis added). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court are themselves convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). "Factual sufficiency demands that we be able to exclude 'every fair and rational hypothesis except that of guilt.'" *United States v. Brown*, 2018 CCA Lexis 316, *34 (N-M Ct. Crim. App. Jul. 2, 2018) (unpub. op.) (citing *United States v. Loving*, 41 M.J. 213, 281 (C.A.A.F. 1994)). If "the record leaves us with a fair and rational hypothesis other than guilt," then the conviction must be set aside for insufficient evidence. *United States v. Gilpin*, 2019 CCA Lexis 515 (N-M. Ct. Crim. App. 30 Dec. 2019) (unpub. op.); *United States v. Wilson*, 2019 CCA Lexis 276, *40 (N-M. Ct. Crim. App. 1 Jul. 2019) (unpub. op.); *United States v. Whisenhunt*, 2019 CCA Lexis 244 (Army Ct. Crim. App. 3 June 2019) (unpub. op.) (reversing cadet's sexual assault conviction for factual insufficiency because the "record also supported the defense's scenario that the alleged victim was a willing and active participant") (citing *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003)).

Assessment of the factual and legal sufficiency of the evidence is limited to a review of the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). In weighing

factual sufficiency, the Court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *Wilson*, 76 M.J. at 6. The Judge Advocate General is to judge the credibility of witnesses, determine controverted questions of fact, and substitute his judgment for that of the fact-finder. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

"When weighing the credibility of a witness, this office, like a fact-finder at trial, examines whether discrepancies in witness testimony resulted from an innocent mistake, such as a lapse of memory, or a deliberate lie." *United States v. Patrick*, 78 M.J. 687, 715 (N-M. Ct. Crim. App. 2018). While "the testimony of only one witness may be enough to meet the burden of proving an accused's guilt, the witness's testimony [must be] relevant *and sufficiently credible*" to be sufficient to affirm the finding of guilt on appeal. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) (citation omitted) (emphasis added); *see also United States v. Prasad*, 80 M.J. 23, 31 (C.A.A.F. 2020). In evaluating credibility of that witness, the Court assesses whether the Government introduced any corroborating evidence, such as forensic or physical evidence, or witnesses who could independently verify the alleged victim's account. *Prasad*, 80 M.J. at 31. Motive to fabricate must also be considered. *Id*.; *Patrick*, 78 M.J. at 715-16.

Appellant was charged with willful dereliction of his duty to not "sexually harass" JJ. This required the Government to prove the following elements: (1) TSgt Cepeda had a duty to refrain from sexually harassing JJ; (2) he knew he had this duty; and (3) he was willfully derelict in that duty. Manual for Courts-Martial [MCM] (2018 ed.), pt. IV, para. 16.b(3). Because the Government charged TSgt Cepeda exclusively with willfully derelict in his duty (EOJ[6]), the

[6] The EOJ noted that the Charge Sheet was amended after arraignment to delete the words "or should have known."

Government had to prove he *actually knew* he had a duty to refrain from "sexually harassing" JJ in the specific manner charged, and that he intended to sexually harass her; that is, that he had to knowingly and purposefully "sexually harass" JJ, specifically intending the "natural and probable consequences" of this act. MCM, pt. IV, para. 16.c(3)(a)-(c).

A duty may not be merely self-imposed or the product of happenstance. *United States v. Dallman*, 34 M.J. 274, 275 (C.A.A.F. 1992). Rather, "[a] duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." *Id*. at para. 16.c(3)(a); *see United States v. King*, 2020 CCA LEXIS 316, *11 (A.F. Ct. Crim. App. 14 Sep. 2020) (unpub. op.) (Government introduced testimony from an Air Force psychiatrist that their ethical code prohibited sexual relationships between patient and provider, and AFI 36-2909, which prohibited sexual activity between patients and providers). While actual knowledge of the duty may be proven by circumstantial evidence, there must still be evidence of the source of the duty. MCM, pt. IV, para. 16.c(3)(b); *see King*, 2020 CCA LEXIS 316 at *11, 18 (Government introduced text messages from Appellant establishing his knowledge of his duty not to engage in sexual activity with a former patient); *see also United States v. Da Silva*, 2020 CCA Lexis 213, *11 (A.F. Ct. Crim. App. 25 Jun. 2020) (unpub. op.) (Appellant recruiter convicted of violating AETCI 36-2909, prohibiting sexual relationships between recruiters and recruits and RAPers, Court holding that several sources put Appellant on fair notice of the meaning of "making sexual advances").

a. The Government presented no evidence of a duty to refrain from "sexual harassment" as defined in their argument.

The Government presented no evidence that TSgt Cepeda had a duty to refrain from "sexually harassing" JJ in the manner that they articulated in closing argument. At the time of his court-martial, there was no codified version of "sexual harassment" in the UCMJ. Instead, the

Government argued for the existence of a duty based on a modified definition of "sexual harassment" in an obsolete Air Force Instruction. (R. at 907.) This definition was as follows:

> "Sexual harassment" means nonconsensual sexual advances and nonconsensual request for sexual favors. Other verbal or physical conduct of a sexual nature constitutes "sexual harassment" when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such an individual; or (3) such conduct has the purpose or effect of unreasonable interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. To establish that "sexual harassment" occurred based on the nature of the working environment, the [G]overnment must prove that the accused's actions created a working environment that was intimidating, hostile, or offensive when viewed objectively under all the circumstances.

(R. at 881.)

The Government bore the burden of proving beyond a reasonable doubt that TSgt Cepeda was bound to the duty as described in this definition. However, there was no evidence presented in any form to show that this was the case. The only evidence offered was the aforementioned outdated regulation, which the military judge refused to accept as law through judicial notice. (R. at 837) ("I do not believe that that is the version of the [AFI] that would have been in force and effect at the time of the allegations in this case.")

To the contrary, this definition of "sexual harassment" was at odds with the definition outlined by regulations that *were* in effect at the time within Department of Defense Instruction (DoDI), 1020.03, *Harassment Prevention and Response in the Armed Forces* (8 February 2018). Importantly, when a duty is prescribed by regulation, that duty must be enforced as defined within the regulation, and cannot be modified in reference to an extrinsic source. *United States v. Johanns*, 20 M.J. 155, 159 (C.M.A. 1985) ("[T]here can be no such thing as a custom that is contrary to existing law or regulation.") Put differently, TSgt Cepeda could not be held responsible for a definition of "sexual harassment" that was at odds with the one prescribed by DoD regulation.

To suggest otherwise would have allowed the prosecution to lower their burden below what was imposed by the Secretary of Defense. *See generally United States v. Curry*, 28 M.J. 419, 424 (C.M.A. 1989) (describing the impermissibility of charging novel version of specifications under Article 92 which relieve the Government of the burden imposed by a higher authority.)

DoDI 1020.03, was published on 8 February 2018. It included an order for military departments to "incorporate the definitions in the Glossary of this issuance into their respective harassment prevention and response implementing regulations . . . ." para. 1.2.c. The definition of sexual harassment contained in the DoD mandate was:

> (1) Conduct that:
>
> > (a) Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:
> >
> > > 1. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or
> > >
> > > 2. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
> > >
> > > 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment; *and*
> >
> > (b) Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.
>
> (2) Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the Armed Forces.
>
> (3) Any deliberate or repeated unwelcome verbal comments or gestures of a sexual nature by any member of the Armed Forces or civilian employee of the Department of Defense.

DoDI 1020.3, para. 3.3. (emphasis added).

Importantly, *the Government never offered DoDI 1020.3 into evidence*. Regardless, the definition utilized by the Government departed from the one mandated by the Secretary of Defense

in a crucial way. The DoDI requires that all instances of sexual harassment be proven to have been "so severe and pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile and offensive." However, the definition used by the Government only required them to prove the harassing conduct was "other verbal or physical conduct" as opposed to "sexual advances" or "request for sexual favors." Aside from presenting no evidence of any duty to refrain from sexual harassment, the Government presented no evidence for why TSgt Cepeda was subject to a different definition of "sexual harassment" than the one imposed by the Secretary of Defense.

Moreover, the definition relied on by the Government refers to the conduct as "unwelcome," as opposed to "nonconsensual." Pros. Ex. 13; Executive Order 14062, Fed. Reg. Vol. 87, No. 20 at 4784-86 (Jan. 31, 2022) (creating a new Article 134, UCMJ offense of "sexual harassment"). "Unwelcome" and "nonconsensual" are not legally equivalent. There must be a "focus on the personal interactions as issue to determine whether the remarks [are] unwelcome." *United States v. Brown*, 55 M.J. 375, 384-85 (C.A.A.F. 2001). The C.A.A.F. has recognized that "[i]n most cases . . . it is necessary to examine the nature of the interaction between the parties to the conversation to determine whether the person the remarks has reasonable notice that the comments would be regarded as unwelcome . . . ." *Id.* at 385. Moreover, "co-workers may be offended from time to time by the behavior of their colleagues." *Id.* "However, to qualify as criminal conduct, the unwelcome behavior must be so severe and pervasive that it creates a hostile work environment." *Id.* The definition of "sexual harassment" found in the DoDI reflects this particular standard, namely that whether conduct is "welcome" requires an examination of the parties total interaction, and also that it must be shown as severe and pervasive.

The difference between the terms requires a nuanced understanding of both. Conduct can be "unwelcome" but still "consensual," due to the alleged victim's voluntary participation in, or response to, the conduct. *See* Lori E. Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should "Yes" Mean "No?"*, 91 IND. L.J. 1363, 1394 (2016); *see also* Emily A. Impett and Letitia Anne Peplau, *Why Some Women Consent to Unwanted Sex with a Dating Partner: Insights from Attachment Theory*, 26 PSYCHOLOGY OF WOMEN QUARTERLY, 360–370 (2002).

The Government presented no evidence to justify the departure from the definition mandated by the Secretary of Defense. Put differently, the Government failed to meet the burden of showing that TSgt Cepeda had a unique and particular duty to refrain sexual harassment that omitted the requirement for the conduct to be severe and pervasive as defined in the DoDI. To this end the Government offered no evidence which totally precluded the fact-finder from determining that such a duty existed.

b. The Government presented no evidence that TSgt Cepeda actually knew the particularized duty to refrain from "sexual harassment" that the Government advocated for.

The Government presented no evidence that TSgt Cepeda knew that he had to duty to refrain from sexual harassment, and certainly not in a manner different than that defined by the Secretary of Defense. Service members may reasonably be expected to know the general orders and regulations that they are subject to. *United States v. Gifford*, 75 M.J. 140, 143 n.4 (C.A.A.F. 2016). However, the Government's theory involved a version of "sexual harassment" that diverged from the one found in regulations in effect at the time. The Government charged TSgt Cepeda with willful dereliction of duty, meaning that it had to prove he possessed an actual awareness of the *modified version* of sexual harassment. The Government provided no evidence to show this, nor did they provide any evidence for why TSgt Cepeda should have been aware of

the duty alleged as opposed to the one promulgated by the Secretary of Defense. Without this, TSgt Cepeda could not reasonably be aware of "the facts that make his conduct fit the definition of the offense." *Elonis v. United* States, 135 S. Ct. 2001, 2009 (2015). Without a reasonable awareness, he certainly could not have had actual awareness.

c. The evidence failed to show that TSgt Cepeda was derelict in the performance of his duties by sexually harassing JJ.

The evidence presented by the Government was insufficient to show that TSgt Cepeda was derelict in his duties by failing to refrain from sexually harassing JJ. The Government principally relied on the testimony of JJ to try and prove this element. However, her testimony undermined the allegation of sexual harassment. As a representative for both SAPR and SARC, JJ was uniquely qualified to recognize and address sexual harassment, should it have been taking place. (R. at 464.) Despite this, JJ offered incredible testimony about her interactions with TSgt Cepeda.

JJ only alleged a single incident of TSgt Cepeda engaging in an unwelcome sexual advance. (R. at 521.) This involved the episode where JJ claimed that TSgt Cepeda attempted to kiss her and touched her leg. (R. at 460.) JJ testified at trial that prior to this, she never necessarily felt harassed by TSgt Cepeda. (R. at 518.) Rather, JJ described her relationship with TSgt Cepeda as personal, and that she would "vent" to him about things going on in her life outside of work. (R. at 507-508.) JJ would voluntarily show TSgt Cepeda photographs of her body that showed off the results of her workout regime. (R. at 516.) JJ admitted to initiating sexual conversation with TSgt Cepeda on at least one occasion by telling him how she would perform oral sex on her boyfriend with pop rocks in her mouth. (R. at 512.) JJ clarified that this was a topic she discussed with multiple other Airmen, and that she did not feel uncomfortable talking about it with TSgt Cepeda. (R. at 513.) JJ denied ever telling TSgt Cepeda prior to the attempted kiss to "stop" or that he had engaged in conduct that made her uncomfortable. (R. at 452-453.) This testimony seriously

undermined any finding that TSgt Cepeda had engaged in a pattern of unwelcome conduct that was so severe and pervasive to a reasonable person that it would form criminal sexual harassment.

Moreover, JJ's testimony of any harassing behavior, including the alleged attempted kiss, was seriously contradicted by her interview with OSI. Crucially, JJ denied that the only unwelcome sexual advance later alleged at trial had ever taken place. During her OSI interview, JJ said that TSgt Cepeda had never tried to touch her. (Def. Ex. A.) JJ initially told investigators that TSgt Cepeda never asked her questions about sex, talked about having sex with her, made any sexual gestures or advances to her, or treated female airmen differently than male airmen. (R. at 453; 506.) JJ's statements during the interview were confirmed by testimony from the agent that had interviewed her. (R. at 743.) Finally, she evidenced a motive to lie based on the fact that her boyfriend became upset upon learning about her interactions with TSgt Cepeda. (R. at 521.) All of this ran counter to the allegation that TSgt Cepeda had engaged in any sort of unwelcome conduct that was severe and pervasive enough to be criminal sexual harassment.

Finally, JJ's credibility was further diminished by her interactions with OSI. JJ would routinely not show up for interviews, and fall out of communication with investigators. (R. at 744.) Importantly, JJ refused to provide her cell phone to agents after multiple requests, in spite of its likely containing messages between her and TSgt Cepeda. (R. at 744-745.) JJ later claimed that the phone had either been either lost or broken. (R. at 526.) This evasiveness, especially given the potential for exculpatory evidence contained on the phone, cuts against her credibility. Given this, the evidence presented by the Government was factually and legally insufficient to sustain the conviction.

II.

THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBIT 13 (EXCERPTS OF AFI 36-2706) INTO EVIDENCE.

Standard of Review

This Court retains the authority to pierce waiver in this case, given that it is subject to an earlier rendition of the Uniform Code of Military Justice. *United States v. Hardy*, 77 M.J. 438, 43 (C.A.A.F. 2018). The standard of review where there is no objection is plain error. *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006)

Discussion

Plain error is shown where (1) there is error, (2) the error is plain and obvious, and (3) the error materially prejudices a substantial right. *Id.* The military judge's decision to admit Pros. Ex. 13 into evidence was plain and obvious error. The military judge recognized on the record that the exhibit consisted of an obsolete version of the regulation concerning Air Force policy on sexual harassment. (R. at 827.) During findings instructions, the military judge told the panel that they could use the exhibit "for the limited purpose of its tendency, if any, to prove the existence of a duty . . . ." (R. at 896.) The military did not clarify that the regulation was obsolete. This was plain error given the absence of relevance that an obsolete regulation could carry in this proceedings, and incurred substantial prejudice due its high tendency to mislead the panel concerning whether there was a duty to refrain from sexual harassment and what the specific elements of the offense were. This is especially so given that previous definitions of sexual harassment employed by the service branches were superseded by DoDI 1020.03.

As the error related to an incorrect legal standard for sexual harassment, the error should be considered one of constitutional magnitude. Constitutional errors are tested for harmlessness beyond a reasonable doubt, with the Government bearing the burden of proving the error was harmless beyond a reasonable doubt. *United States v. Long*, 81 M.J. 362, 369-70 (C.A.A.F. 2021). By admitting the exhibit and failing to provide a more limiting instruction that made it clear to the

member's that the regulation was obsolete and non-binding, the military invited a substantially likelihood that the panel would be misled as to the offense. This especially grave considering that the standard for sexual harassment outlined in exhibit was lower and easier to prove than the one mandated by the Secretary of Defense. This Court should not be convinced that the error was harmless beyond a reasonable doubt.

WHEREFORE, TSgt Cepeda respectfully requests that this court set aside his finding of guilty.

III.

TECHNICAL SERGEANT CEPEDA WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

Additional Facts

On 19 December 2023, this Court docketed this case after TSgt Cepeda filed notice of direct appeal. As of 19 March 2024, the Government had still not forwarded a copy of the complete record of trial to this Court. This Court ordered the Government provide this Court with an update by 2 April 2024 concerning the status of the case. On 2 April 2024, the government submitted a notice of compliance, estimating that the verbatim transcript would be ready by 19 April 2024. On 8 April 2024, TSgt Cepeda demanded speedy appellate review. The Government did not forward the complete record of trial to this Court until 13 June 2023. From the date of sentencing until the provision of the complete record of trial, 620 days had elapsed. From the date of docketing until the provision of the complete record of trial, 177 days had elapsed.

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 & Analysis

This Court should find that the Government's 177-day delay in forwarding the complete record of trial with this Court is a due process violation. TSgt Cepeda has suffered particularized anxiety and concern because of the delay. Even if this Court finds that TSgt Cepeda was not prejudiced, this Court should find a due process violation as the delay adversely affects the public's perception of the fairness and integrity of the military justice system. Finally, if this Court does not find a due process violation, it should still grant TSgt Cepeda relief as the Government acted with gross indifference, there was harm to TSgt Cepeda, and relief is consistent with the goals of both justice and good order and discipline.

A. The Barker Analysis Favors TSgt Cepeda.

Whether an appellant has been deprived of their due process right to speedy appellate review is determined by balancing the four factors outlined in *Barker*. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). 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. *Barker*, 407 U.S. at 135. 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"). Analyzing these factors requires determining which factors favor the Government or the appellant and then balancing these factors. *Id.* No single

factor is dispositive, and the absence of a given factor does not prevent this Court from finding a due process violation. *Id.*

1. *A 177-Day Delay is Presumptively Unreasonable.*

The Government took 177 days from sentencing to docket TSgt Cepeda's case with this court, which makes the delay presumptively unreasonable. *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, at *131-32 (A.F. Ct. Crim. App. 23 May 2022) (citing *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020) (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*")). When a case does not meet the 150-day standard, it triggers an analysis of the four non-exclusive factors set forth in *Barker*. *Jackson* 2022 CCA LEXIS 300, at *132. The delay is over the 150-day benchmark outlined in *Livak* and the 120-day *Moreno* standard.

2. *There is No Justification for the Lengthy Delay.*

The Government asserted that the delay in producing the record of trial was due to the retirement of both the military judge and the court reporter. However, the Government also explained the this problem could be obviated by detailing a new military judge to certify the transcript. Given the mechanisms in place to work through issues with missing personnel, the Government's explanation is without merit. The Government provided no explanation for why this detailing process required an excess of 177 days to complete. This Court should use the fact that the Government failed to provide adequate reasons for the delay as a negative factor against them. If the Government cared about speedy post-trial processing, it would have provided an explanation for why it was unable to more expediently detail a new military judge so as to meet speedy post-trial processing standards like it has done in other cases. *United States v. Lampkins*,

No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *5 (A.F. Ct. Crim. App. Nov. 2, 2023). From the silence in the record, this Court should presume the Government did not have any valid reason for the delay. *See Id.* ("We note a troubling period during post-trial processing wherein for 77 days the record sat untouched, in a cubicle at the base legal office. We find no good reasons were provided to justify delay, and accordingly find that this factor weighs in favor of Appellant.").

3. *TSgt Cepeda Asserts His Right to Speedy Post-Trial Processing.*

TSgt Cepeda asserted his right to speedy appellate review. This factor favors him and is particularly compelling given that the Government bears primary responsibility for post-trial processing. *See also Moreno*, 63 M.J. at 138.

4. *TSgt Cepeda suffered prejudice from the Government's delay.*

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

TSgt Cepeda has faced the "impairment of [his] grounds for appeal." *Moreno*, 63 M.J at 138-39. Because of the presumptive, unreasonable delay, TSgt Cepeda was unable to petition this Court for relief sooner. Like the appellant in *United States v. Turpiano*, TSgt Cepeda has been "impeded in his ability to exercise his post-trial rights because of the actions, or more aptly delayed actions, of the Government." No. ACM 38873 (f rev), 2019 CCA LEXIS 367, at *19 (A.F. Ct. Crim. App. Sep. 10, 2019).

5. *Even if this Court finds no* Barker *prejudice, the Government's delay adversely affects the public's perception of the military justice system.*

Where an appellant does not show prejudice from the delay, there is no due process violation unless "in balancing the three other factors, the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). Assuming, *arguendo*, this Court is unconvinced TSgt Cepeda was not prejudiced by the Government's 412-day delay, this Court should consider its superior court's the C.A.A.F.'s admonition when deciding if there is a due process violation: "delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court [] is the least defensible of all and worthy of the least patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). The reason this Court should have little patience with the Government is because "this stage involves no discretion or judgment; and, unlike an appellate court's consideration of an appeal, this stage involves no complex legal or factual issues or weighing of policy considerations." *Id*. This Court should find a due process violation because a member of the public could reasonably question the "integrity" of the military justice system in this case. In this case, the military justice system failed to prevent TSgt Cepeda from being "subjected to inordinate and inexcusable delay after he has been tried." *Dunbar*, 31 M.J. at 70.

WHEREFORE, TSgt Cepeda respectfully requests that this court re-assess his sentence.

Conclusion

Wherefore, Appellant respectfully requests that his conviction and sentence be set aside and dismissed.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division and Appellate Defense Division on 23 October 2024.

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APPENDIX

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

IV.

THE VERBATIM TRANSCRIPT IS NOT LEGALLY SUFFICIENT GIVEN THAT IT WAS NOT CERTIFIED BY EITHER THE MILITARY JUDGE OR COURT REPORTER.

"A court reporter shall prepare and certify that the record of trial includes all items required under subsection (b). If *the* court reporter cannot certify the record of trial because of the court reporter's death, disability, or absence, *the* military judge shall certify the record of trial." R.C.M. 1112(c) (emphasis added).

Although the first sentence suggests that any court report can prepare and certify that a record of trial contains all of the required documentation to be legally sufficient, the second sentence does not. Instead, the second sentence suggests that only a court reporter who participated in the court-martial can certify the actual record of trial. Furthermore, if a court reporter who participated in the court-martial cannot certify the record of trial due to death, disability, or absence, then only *the* military judge who presided over the court-martial can certify the record of trial.

In Appellant's case, both the court reporter and the military judge who presided over the trial are retired. The rule makes no provisions for who can certify a record of trial in the absence of both the court reporter and military judge. As the rules have no alternate to both of these key members, the certificate of the verbatim transcript cannot be legally sufficient. To remedy this legal deficiency, Appellant's conviction should be dismissed.

V.

APPELLANT'S CONVICTION SHOULD BE DISMISSED FOR VIOLATING HIS RIGHT TO A SPEEDY APPEAL.

Claims of due process violations resulting from post-trial delay are reviewed *de novo*. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). The Military Justice Act of 2016 altered the post-trial process. Now, this Court looks at the timeframe between the date of sentencing and the date the case was docketed with this Court to determine whether a due process violation occurred; delay exceeding 150 days is facially unreasonable. *Livak*, 80 M.J. at 633-34. This Court continues to assess whether relief is warranted by analyzing the four *Barker v. Wingo* factors: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Moreno*, 63 M.J. at 135. The remedy should be proportional to the harm generated by the delay. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). The remedy can include dismissal of charges with prejudice. *Id*.

Appellant was sentenced on 8 April 2022 (EOJ), but his case was not docketed with this Court until 19 December 2023 (Notice of Docketing). The length of delay in this case was 620 days. The reasons for the delay were the late notice to Appellant of his right to appeal to this Court under Article 66(b)(1)(A), UCMJ (28 November 2023), and the length of time to obtain a verbatim transcript to complete Appellant's record of trial (*see* Notice of Appeal dated 15 December 2023; Order, dated 19 March 2024). Appellant asserted his right to a speedy appeal on 8 April 2024. Finally, as outlined in Appellant's declaration, he has experienced prejudice. Disapproving his sentence will not make Appellant whole; the only remedy is to dismiss Appellant's conviction with prejudice.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ANGELO L. CEPEDA,** United States Air Force, *Appellant.*	)	No. ACM 40318
	)	23 October 2024

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to attach the Appendix to this motion to Appellant's Record of Trial. The Appendix may be attached consistent with *United States v. Jessie*, because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). The Appendix totals two (2) pages in length and consists of the following:

Declaration of TSgt Angelo L. Cepeda: A Declaration made under penalty of perjury and signed by TSgt Cepeda. This declaration is relevant and necessary in resolving the third and fifth assignments of error TSgt Cepeda has raised before this Court. In determining whether there has been a due process violation for post-trial delays, this Court is required to examine whether an appellant has suffered prejudice from the delay. *United States v. Anderson*, 82 M.J. 82, 87 (C.A.A.F. 2022). Even if this Court finds no due process violation, it can still determine whether an appellant was harmed by a delay and grant relief accordingly. *United States v. Jackson*, No.

ACM 39955, 2022 CCA LEXIS 300, at *133 (A.F. Ct. Crim. App. 23 May 2022) (citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)). In his Declaration, TSgt Cepeda outlines the prejudice he has suffered as a result in the Government's delay in filing his case with this Court.

Consideration of the matters described above is necessary for this Court to resolve a matter already raised in the record itself. That is, whether TSgt Cepeda suffered prejudice as a result of the Government's delay in filing his case with this court.

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

Respectfully submitted,

[redacted]

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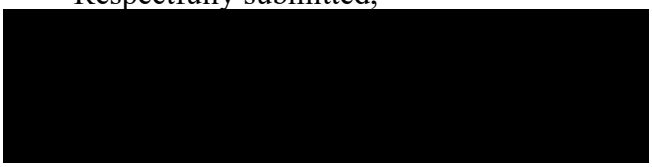
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 23 October 2024.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **ANGELO L. CEPEDA** United States Air Force *Appellant.*	)	No. ACM 40318
	)	22 November 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,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **ANGELO L. CEPEDA** United States Air Force *Appellant.*	)	No. ACM 40318 22 November 2024

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

ISSUES PRESENTED

II.[1]

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROSECUTION EXHIBIT 13 (EXCERPTS OF AIR FORCE INSTRUCTION 36-2706) INTO EVIDENCE?

I.

WHETHER EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DERELICTION OF DUTY?

III.

WHETHER APPELLANT WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL?

[1] For ease of understanding, the Government reordered Issues I and II of Appellant's brief as AFI 36-2706's admissibility goes directly to the factual and legal sufficiency of Appellant's conviction.

IV.[2]

WHETHER THE VERBATIM TRANSCRIPT IS LEGALLY SUFFICIENT GIVEN THAT IT WAS NOT CERTIFIED BY EITHER THE MILITARY JUDGE OR COURT REPORTER?

V.

WHETHER APPELLANT'S CONVICTION SHOULD BE DISMISSED FOR VIOLATING HIS RIGHT TO SPEEDY APPELLATE REVIEW?

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case. Appellant received Article 65(d), UCMJ, review on 29 June 2022. Thus, Appellant's court-martial was final under Article 57(c)(1), UCMJ, before the 23 December 2022 change to Article 66, UCMJ, that would purportedly give this Court jurisdiction over his court-martial. *See* Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (23 Dec. 2022). The United States asserts that this Court has no jurisdiction to review Appellant's case, but recognizes this Court's contrary, published decision in United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 2024), *pet. granted*, 2024 CAAF LEXIS 640 (C.A.A.F. 17 October 2024). The United States continues to assert this position regarding lack of jurisdiction pending litigation at our superior Court.

STATEMENT OF FACTS

A panel of members found Appellant guilty of one specification of dereliction of duty for sexually harassing his subordinate JJ in violation of Article 92, UCMJ. (R. at 992). More specifically, that Appellant:

> knew of his duties at or near Minot Air Force Base, North Dakota, on divers occasions, between on or about 1 August 2018 and 30 September 2018, was derelict in those duties in that he willfully

[2] Appellant raises issues IV-V pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982.)

> failed to refrain from sexually harassing [JJ], as it was his duty to do."

(ROT, Vol 1).

Appellant was found not guilty of a second specification of dereliction of duty for sexually harassing another subordinate, in addition to several charges of sexual assault, battery, and stalking that other subordinate in violation of Articles 120, 128, and 130, UCMJ. Id.

Per MSgt ML, one of Appellant and JJ's supervisors, Appellant oversaw personnel during mid shift as expediter. (R. at 777). Appellant had "full reign" to direct junior airman under him. (Id.) Appellant received supervisory training from programs such as Airman Leadership School (ALS), as well as feedback and mentorship sessions from his own supervisors. (R. at 778). MSgt ML stated Appellant would have known from these trainings not to sexually harass junior enlisted airman. (Id.) Maintenance units used to have "locker room kind of talk" in the past, but there was a culture shift about ten years ago, and "locker room talk" became unacceptable. (R. at 779). This cultural shift included removing inappropriate sexual material from the workplace. (Id.) It has been unacceptable for a Technical Sergeant to speak to junior enlisted airmen about sexual topics for the last 11 years. (Id.)

JJ testified that in August 2018 while stationed at Minot, Appellant was her mid shift expediter and assigned her duties at the beginning of each shift. (R. at 445-8). At this time, Appellant was either 32 or 33 years old. (R. at 741). JJ was an Airman at that time and Appellant was a Technical Sergeant. (R. at 450). MSgt ML testified that a Technical Sergeant is usually the highest-ranking member in shop. (R. at 777). Due to the nature of their jobs, Appellant was the highest-ranking person on JJ's shift, and higher leadership would not directly see his interactions with her. (R. at 448-9). Appellant would always pick JJ up in the expediter truck to have her assist on a "run." (R. at 455, 538). Runs should usually only take about five to

ten minutes to go to the back shop and collect a part for work. (R. at 440, 455). JJ testified that Appellant was not required to bring an airman along on these runs. (R. at 539-40). When Appellant asked JJ to get in the expediter truck with him, JJ took that as an order from her superior. (R. at 542-43). These trips ranged from a few minutes to a few hours with JJ alone in the truck with Appellant. (R. at 455). JJ did not see Appellant do this with any male airman, and her coworker, CR, corroborated this. (R. at 457, 577). JM, another coworker of JJ's under Appellant, testified that he saw Appellant pick JJ up in the expediter truck on about five occasions. (R. at 548). JJ would be gone with Appellant for four to eight hours at a time, which was not considered normal by JJ's coworkers. (R. at 440, 548, 576-7). According to MSgt ML, it was not normal for an expediter to drive around with a junior airman for hours at a time. (R. at 780).

Appellant began speaking with JJ more due to this proximity. (R. at 450). Their conversations were originally about JJ's "background" and "where [she] came from." (R. at 457). JJ complained to Appellant that she was harassed about her body by males at places like the gym, Base Exchange, and base commissary. (R. at 508-9). JJ also told Appellant that other men encouraged her to be "with them" instead of GS, another airman at Minot AFB who was her boyfriend at the time. (R. at 509). Initially, JJ felt comfortable sharing these stories with Appellant. (R. at 509-10).

JJ then felt Appellant asked her "more personal questions that were inappropriate." (R. at 451). This included Appellant commenting on JJ's body, appearance, and face in a "sexualized manner," such as that JJ's "ass looks good" and that her breasts looked good in uniform. (R. at 451-2). These comments made JJ feel "uncomfortable." (R. at 452). JJ did not speak to Appellant about these comments because she felt it wasn't her "place" due to his position as her

noncommissioned officer (NCO). (R. at 452-3). JJ feared speaking out would "be considered disrespecting an NCO." (R. at 453).

JJ became "more and more uncomfortable" with Appellant. (R. at 452). Appellant began asking JJ about her sex life with GS. (R. at 453, 557). Appellant then told JJ he could "fuck [her] better than [her] boyfriend." (R. at 453). JJ was "very comfortable" and "felt disrespected. . . because nobody wants to hear that." (R. at 454). Appellant's comments were "unwanted." (Id.)

Appellant's behavior then escalated to physical "sexual advances." (R. at 457). While stopped in the expediter truck, Appellant placed his hand on JJ's thigh. (R. at 459-460). Appellant then leaned over and tried to kiss JJ. (R. at 460). Appellant said he "knew that JJ wanted to kiss him." (Id.) When Appellant leaned in to kiss JJ, JJ leaned away to the right, so his lips did not touch her face. (R. at 461-2). JJ told Appellant she "felt uncomfortable" and "no." (R. at 461). After apologizing, Appellant touched JJ's thigh again. (R. at 462). JJ was scared. (Id.) In his testimony, JM recalled that JJ once returned from a run with Appellant "upset" and "stressed," and she stated Appellant asked to kiss her. (R. at 548). In the aftermath, JJ cried and did not want to go back to work. (R. at 463). Following this incident, JM noticed JJ tried to "evade" Appellant. (R. at 550). JJ told JM that she was uncomfortable with Appellant and would no longer go to Appellant to ask work-related questions. (Id.) JM recalled that after this incident, Appellant asked JM if he would ever have sex with JJ, which JM felt was an abnormal and inappropriate question for Appellant to ask JM. (R. at 551-52). One of JJ and Appellant's supervisors, MSgt ML, agreed that it was inappropriate for a Technical Sergeant to proposition a junior airman for sex or talk about sex. (R. at 780).

JJ did not speak up to report Appellant at the time because, despite her Sexual Assault Prevention and Response (SAPR) training, she believed her allegation wouldn't matter due to her rank and limited time spent in the military. (R. at 464).

GS testified that Appellant referred to JJ as "our girl" when discussing her with GS. (R. at 559). He also testified that JJ told him that Appellant would "try to flirt with her in the car" since she arrived at that duty location. (R. at 560). JJ told GS that Appellant "asked to kiss her." (R. at 561). Appellant later apologized to GS for trying to "get at [JJ] when [GS] was with her," which GS took to mean Appellant was trying to "hit on her." (R. at 560).

JJ also testified that in her original interview with Air Force Office of Special Investigation (AFOSI) in October 2019, JJ denied that Appellant had done anything to make her uncomfortable. (R. at 505-507). At that time, JJ was scheduled to return to her home of record to give birth and was worried that a report would jeopardize those plans. (R. at 505). JJ also still feared she would not be believed. (Id.) In the days following the AFOSI interview, JJ sought guidance from MSgt ML regarding what to do if someone wasn't truthful with AFOSI. (R. at 510).

At her second AFOSI interview in March 2020, JJ stated that Appellant "leaned in once to try to kiss me but he never touched me." (Defense Exhibit A). During her testimony, JJ was unable to recall saying this to AFOSI. (R. at 503, 530-31).

On cross-examination, JJ denied sharing details about her sex life with GS with Appellant. (R. at 511-12). JJ admitted to once discussing oral sex with GS using Pop Rocks, but clarified that the conversation happened with close friends and that Appellant joined later. (R. at 512). JJ stated it was "not common" to talk about "sex lives at work." (Id.) JJ admitted to showing Appellant pictures of herself regarding her workout progress when Appellant asked, and

that these pictures showed her legs. (R. at 516). JJ denied showing Appellant pictures of her private areas or buttock. (Id.)

Regarding possible text messages between JJ and Appellant, JJ testified that she had a new phone at the time of her AFOSI interview and did not turn over her old phone to AFOSI because she did not know where it was. (R. at 540). JJ believed the original phone was in a shipment of her household goods, but the transportation management office lost part of her shipment. (R. at 540-41). When questioned about the phone directly by the members, JJ clarified that she had looked for the phone among her delivered belongings but could not find it. (R. at 819). JJ was not sure if the contents of that phone had a back-up anywhere. (R. at 820).

In their case in chief, the Government introduced an excerpt from Air Force Instruction (AFI) 36-2706, *Equal Opportunity Program Military and Civilian,* dated 5 October 2010, as Prosecution Exhibit 13. (R. at 293). The military judge asked the Defense if there were any objections, to which the Defense answered "no." (Id.) The excerpt contained the first five pages of the AFI, which included a definition and prohibition on sexual harassment. (ROT, Vol 1). AFI 36-2706 defined sexual harassment in two places: under paragraph 1.1.1 and paragraph 1.2. Id. Paragraph 1.1.1 provided, in relevant part:

> Unlawful harassment includes unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature particularly when submission to such conduct is made directly or indirectly as a term or condition of employment, and/or when submission to or rejection of such conduct is used as a basis for an employment decision affecting the person.

Id.

Paragraph 1.2., Prohibition on Sexual Harassment, provided an almost identical definition, but added that "[u]nlawful harassment also includes creating an intimidating, hostile working environment." Id.

ARGUMENT

II.

THE MILITARY JUDGE DID NOT ERR BY ADMITTING EXCERPTS OF AIR FORCE INSTRUCTION 36-2706 INTO EVIDENCE.

Additional Facts

When the military judge asked the Defense if they had any objection to admitting AFI 36-2706 into evidence, the Defense affirmatively said "no." (R. at 293). The military judge later suggested that he take judicial notice of law of AFI 36-2706, to which neither party objected. (R. at 827). However, the military judge found that the 2010 version of AFI 36-2706 offered by the government was not in effect at the time of Appellant's offense and declined to take judicial notice. (R. at 837). The military judge also noted that several changes and versions of AFI 36-2706 had been published since 5 October 2010 up until 2017, but said "the relevant portions [didn't] seem to be impacted." (Id.)[3]

Prior to closing argument, the military judge instructed the members that they could only consider Prosecution Exhibit 13 for the "limited purpose of its tendency, if any, to prove the existence of a duty prohibiting sexual harassment and the accused's knowledge of that duty. (R. at 896). The military judge further instructed the members that they "must apply only the statement of the law [the military judge has] provided within these instructions during [their] deliberations." (Id.)

[3] AFI 36-2706 appears to have been in effect until 2020, when it was superseded by AFI 36-2710, *Equal Opportunity Program*, dated 18 June 2020. *See* https://www.af.mil/portals/1/documents/diversity/dafi_36-2710_equal_opportunity_program.pdf

The military judge defined sexual harassment to the members as:

> *[N]onconsensual* sexual advances and *nonconsensual* requests for sexual favors. Other verbal or physical conduct of a sexual nature constitutes "sexual harassment" when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such an individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. To establish that "sexual harassment" occurred based on the nature of the working environment, the government must prove that the accused's actions created a working environment that was intimidating, hostile, or offensive when viewed objectively under all the circumstances.

(R. at 881) (emphasis added).

The Defense originally objected to including "when viewed objectively under all the circumstances" in the instructions. (R. at 842). However, following a discussion with the military judge during which he clarified the language was necessary to ensure the members found Appellant's actions constituted sexual harassment from an objective viewpoint, the Defense affirmatively withdrew their objection. (R. at 843). The military judge asked if the Defense had any other objections to the proposed instruction on sexual harassment, and the Defense said "no." (Id.) The Defense did request instructions on "consent" and "mistake of fact" as to consent." (R. at 845-847). When asked if they requested any additional instructions, the Defense said "no," and when the military judge confirmed there was nothing else to take up except an unrelated issue, the Defense said "yes." (R. at 849-53, 857).

The military judge allowed the Defense to argue mistake of fact as to consent for the sexual harassment specification and provided the members with an instruction regarding what "consent" and "mistake of fact" meant. (R. at 881-3).

Standard of Review

Objections must be raised before the court-martial is adjourned in that case. R.C.M. 905(e)(2). Failure to raise such an objection constitutes forfeiture, absent an affirmative waiver. Id. In deciding whether there is an affirmative waiver, the court looks to the record to see if the party's statements demonstrate a purposeful decision. United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999). Affirmative waiver means the issue is permanently waived and will be not reviewed for plain error. United States v. Hardy, 77 M.J. 438, 441 (C.A.A.F. 2018) (citing United States v. Swift, 76 M.J. 210 (C.A.A.F. 2017)).

If an issue is not waived, this Court reviews a military judge's decision to admit evidence for plain error. "[W]hen an appellant has forfeited a right by failing to raise it at trial, [this Court] review[s] for plain error." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). Thus, Appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. Id.

Law and Analysis

Appellant affirmatively waived this issue when the Defense stated they had no objection to the admission of AFI 36-2706. *See* United States v. George, 2024 CCA LEXIS 224, at *2 (A.F. Ct. Crim. App. June 7, 2024) (unpub. op.) (citing United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020)). Because the issue was permanently waived, this Court should not review it under plain error and should deny the assignment of error outright.

If this Court decides to pierce waiver, which it should not given that Appellant suffered no prejudice, Appellant did not meet his burden under the plain error standard.

First, the military judge did not plainly err when he admitted the excerpt of AFI 36-2706 into evidence – especially in light of trial defense counsel's affirmative non-objection. Evidence is relevant if it tends to make a fact of consequence more or less probable than it would be

without the evidence. Mil. R. Evid. 401. The Government introduced AFI 36-2706 as evidence that Appellant had a duty to refrain from sexually harassing JJ by Air Force custom. As the military judge noted, AFI 36-2706 was updated between 5 October 2010 and the dates of Appellant's offense. (R. at 837). Despite these updates, the military judge noted that the "relevant portions" were not "impacted." (Id.) In the Air Force Guidance Memorandum (AFGM) to AFI 36-2706, dated 9 February 2017, para. 1.1.1., as referenced by the military judge, unlawful sexual harassment:

> includes unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature particularly when submission to such conduct is made directly or indirectly as a term or condition of employment, and/or when submission to or rejection of such conduct is used as a basis for an employment decision affecting the person.

Despite being technically obsolete, because the updated version of the AFI did not change the definition of sexual harassment, it was not error, and certainly not plain and obvious error, to admit AFI 36-2706 into evidence for its tendency to prove whether Appellant had a duty to refrain from sexual harassment. And although Appellant waived any instructional error on the matter, it was not plain error for the military judge to fail to instruct the members that the version of AFI 36-2706 was obsolete because the substantive explanation of sexual harassment had not changed in the applicable version of the AFI.

The Defense did not offer any alternative definitions of sexual harassment at trial, though Appellant now cites to DoDI 1020.03, *Harassment Prevention and Response in the Armed Forces*, (8 February 2018) (DoDI 1020.03) which was in effect at the time of Appellant's offenses. (App. Br. at 9). In para. 3.3, the definition of sexual harassment in effect at the time of Appellant' offense was, in relevant part:

(1) Conduct that:

(a) Involves *unwelcome* sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;

2. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment; and

(b) Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.

(2) Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the Armed Forces.

(3) Any deliberate or repeated unwelcome verbal comments or gestures of a sexual nature by any member of the Armed Forces or civilian employee of the Department of Defense.

(Emphasis added).

But DoDI 1020.03 has no bearing on whether the military judge erred in admitting AFI 36-2706. First, the stated "purpose" of the DoDI on page 1 was geared toward the DoD preventing and responding to sexual harassment rather than creating a punitive offense for servicemembers who engaged in it. While paragraph 1.2.a said that the Department of Defense "does not tolerate or condone harassment," the DoDI (in contrast to AFI 36-2706) never specifically stated that sexual harassment by a particular person was "prohibited." This again supports that the DoDI did not intend to create the only acceptable punitive definition for sexual

harassment. Next, although paragraph 1.2.c told military departments to incorporate the definitions from the DoDI's Glossary into their own regulations, sexual harassment was not defined in the Glossary – it was explained in Section 3.3. And in any event, paragraph 1.2.c. also allowed the military departments to "supplement the definitions, as necessary." Finally, while paragraph 1.2.d of the DoDI stated,"[v]iolations of the policies in this instruction *may* constitute violations of specific articles of . . .[the UCMJ] and *may* result in administrative or disciplinary action" (emphasis added), it again did not imply that violation of its policies was the sole way a servicemember could be prosecuted for sexual harassment.

Since DoDI 1020.03 did not purport to create the only acceptable punitive definition for sexual harassment, it did not make AFI 36-2706 obsolete or ineffective. AFI 36-2706, which specifically prohibited sexual harassment, could still establish a duty for the accused to refrain from sexual harassment as explained therein. Thus, the military judge did not plainly err by allowing the government to admit AFI 36-2706 for that purpose.

Even if the DoDI's explanation of sexual harassment were controlling as far as establishing the duty not to sexually harass, the AFI's explanation does not substantially differ. Both include "sexual advances" and "requests for sexual favors," and both make clear that sexual harassment includes creating a hostile environment. Under either regulation, there was a duty not to engage in such behaviors. Again, there was no plain and obvious error in admitting AFI 35-2706 to establish that duty.

Finally, even if this Court finds it was plain and obvious error to admit AFI 36-2706, Appellant has not shown that he suffered any prejudice. First, the military judge did not take judicial notice of any portion of AFI 36-2706. (R. at 837). On the contrary, the military judge specifically informed the members that they could only consider the regulation for the "limited

purpose of its tendency, if any, to prove the existence of a duty prohibiting sexual harassment and the accused's knowledge of that duty. (R. at 896). The military judge provided a different definition of sexual harassment within his instructions and directed the members to use *that* definition in their deliberations. (Id.) After a discussion with the military judge, the Defense stated they had no objection to the proposed instruction on sexual harassment (R. at 843), and so affirmatively waived any objection on that ground as well. Hardy, 77 M.J. at 441. The Government reminded the members of their obligation to follow the military judge's instructions during their closing argument. (R. at 907). "Absent evidence to the contrary, this Court may presume that members follow the military judge's instructions." United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000). There is no evidence that the members departed from the military judge's instructions. On the contrary, considering the panel found Appellant not guilty of sexual harassment of the other named victim, it can be assumed the panel carefully considered and applied the legal standard provided by the military judge.

Looking at the language used by the military judge, the instructions provided to the members as the law created a higher burden for the Government to prove Appellant sexually harassed JJ. The military judge specifically declined to define sexual harassment as "unwanted" as he believed it would create a lower burden of proof. (R. at 840-844). In AFI 36-2706 and DoDI 1020.03, sexual harassment is described as "unwelcome," which is closer to the "unwanted" originally requested by the Government. But the military judge used the word "nonconsensual" and allowed the Defense to argue reasonable mistake of fact as to consent. (R. at 881-2). In so doing, the military judge provided Appellant with two boons: a higher standard for the Government to prove sexual harassment to the members, and a defense that would otherwise not have been available to him.

Finally, the Government also introduced testimony by MSgt ML. MSgt ML testified that Appellant would have received training through a "supervisory training course," "ALS," and "feedback sessions" from his own supervisors. (R. at 778). From these trainings, Appellant would "have known he was not to sexually harass junior enlisted Airmen." (Id.) She also testified that it would be "inappropriate" for a "Technical Sergeant to talk about wanting to have sex with one of his junior enlisted Airman" or to "proposition a junior enlisted Airman for sex." (R. at 780). This testimony satisfied the Government's obligation to provide evidence of a custom against sexual harassment. As a result, even if admitting the AFI was error, it did not have a substantial influence on the findings where the government presented additional evidence of Appellant's duty to refrain from sexual harassment.

In light of these factors, Appellant was not prejudiced by admission of the 2010 version of AFI 36-2706 into evidence.

Despite Appellant's contention, this issue is not one of constitutional magnitude that requires the Government to prove the error was harmless beyond a reasonable doubt and Appellant cites no case law to support this proposition. Therefore, the burden rests solely upon him to show material prejudice to a substantial right. He has not done so.

Because Appellant affirmatively waived this issue and, even under a plain error standard, has failed to articulate obvious error or prejudice to a substantial right, Appellant is not entitled to relief.

I.

THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DERELICTION OF DUTY.

Standard of Review

Issues of factual and legal sufficiency are reviewed de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016) (citing Washington, 57 M.J. at 399). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (2018). In applying this test, this

Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted). "In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

To sustain a conviction for willful dereliction of duty through sexual harassment in violation of Article 92, UCMJ, beyond a reasonable doubt, the government must show: 1) that the accused had a certain prescribed duty, that is: to refrain from sexually harassing JJ; 2) that the accused actually knew of the assigned duty; and 3) that at or near Minot Air Force Base, North Dakota, on divers occasions between on or about 1 August 2018 and 30 September 2018, the accused was willfully derelict in the performance of that duty, by sexually harassing JJ. Manual for Courts-Martial, United States (MCM), part. IV, para. 18.b.(3)(a)-(c) (2016 ed.) (as amended by Exec. Order 13825, 83 Fed. Reg. 9,889 (1 Mar. 2018)). A duty may be imposed by regulation, lawful order, or custom of the service. Id. at para. 18.c.(3)(a). A person is "derelict" in the performance of his duties when he willfully fails to perform them. Id. at para. 18.c.(3)(c). "Willfully" means intentionally. Id. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. Id. "Custom arises out

of long established practices which by common consent have attained the force of law in the military or other community affected by them." United States v. Johanns, 20 M.J. 155, 159 (C.M.A. 1985). To prosecute based on custom of military service, "testimony must be offered by a knowledgeable witness—subject to cross-examination—about that custom." United States v. Zier, 2024 CCA LEXIS 3, at *9 (A.F. Ct. Crim. App. Jan. 5, 2024) (unpub. op.) (citing United States v. Wales, 31 M.J. 301, 309 (C.M.A. 1990)).

The military judge provided a definition of sexual harassment to which both parties had only minor objections. (R. at 881).

A. Appellant had a duty to refrain from sexually harassing JJ by military custom.

The Government offered two pieces of evidence to demonstrate Appellant had a duty to refrain from sexually harassing JJ under Air Force custom: testimony by MSgt ML and AFI 36-2706.

The Government did not solely argue at trial that Appellant's duty was prescribed by regulation. It told the members to "follow [the military judge's] explanation of the law," but consider AFI 36-2706 as evidence that Appellant did "have a duty" and "he knew of his duties." (R. at 907). However, the Government also highlighted that MSgt ML testified that there was an "Air Force wide" cultural shift approximately ten years prior to the trial and that a Technical Sergeant should not discuss or proposition sex with junior enlisted Airmen. (R. at779-80). AFI 36-2706 was published on 5 October 2010, roughly 11.5 years before the trial in April 2022 and eight years before Appellant committed the offense. The Government acknowledged to the members that they needed to follow the military judge's instruction on the definition of sexual harassment but encouraged the members to use AFI 36-2706 as evidence that the Accused did have a duty to refrain from sexually harassing JJ. (R. at 907). While not the controlling version

of the AFI in effect at the time of Appellant's offense, the relevant part of AFI 36-2706 entered into evidence did not differ from the version of the AFI in effect at the time of the offense. It provided evidence that, since at least 2010, it was a "long established practice" in the Air Force to refrain from sexually harassing fellow airmen. Johanns, 20 MJ at 159. MSgt ML's testimony bolstered this by providing examples of how sexually inappropriate behavior and material had been removed from workplaces with maintenance. (R. at 779). In addition, similar to the custom against fraternization in United States v. King, MSgt ML testified that supervisors receive training to refrain from sexual harassment during ALS, bolstering the Government's argument that Appellant had a duty by custom as a supervisor to refrain from such behavior. *See* 2020 CCA LEXIS 316, at *11 (A.F. Ct. Crim. App. Sep. 14, 2020) (unpub. op.) (testimony that an Air Force psychiatrist would be trained on the prohibition against inappropriate sexual relationships with patients was evidence of duty and knowledge of duty.) This testimony also distinguished this case from Zier, in which the Government failed to offer any evidence of a duty against unprofessional relationships. MSgt ML did not just testify that Appellant's behavior was inappropriate; she testified that standard training for supervisors included the prohibition against sexual harassment, which included discussing sex with junior enlisted airman or propositioning them for sex. (R. at 780).

Appellant erroneously relies on United States v. Brown, 55 M.J. 375 (C.A.A.F. 2001), but that case indirectly supports the Government's use of the AFI. (App. Br. at 11). In Brown, CAAF upheld the admission of a pamphlet on prohibited conduct as "evidence of customs and standards" and "providing notice of the distinction between permissible banter and impermissible remarks" for conduct unbecoming an officer in violation of Article 133, UCMJ. Id. at 384. The pamphlet was not a binding legal regulation, and the accused in that case was not

charged with dereliction of duty, but it still provided evidence of a military custom. AFI 36-2706 and MSgt ML's testimony accomplished that same goal in the present case by demonstrating that sexual harassment had been prohibited since at least 2010, and all supervisors were trained *not* to sexually harass their subordinates. In addition, in Brown, the Court dismissed the accused's charge as it related to inappropriate comments because "the record reflect[ed] a working atmosphere in and around the operating room and lounge which accepted discussions involving physical appearance and sexual matters." Id. at 386. That is *not* the situation here, where MSgt ML testified that such "locker room talk" was no longer permitted in the unit, and JJ specifically testified that she did not discuss details of her sex life at work barring a single occasion with close friends that Appellant later joined. (R. at 512-3).

Appellant spends much time complaining that AFI 36-2706 did not comport with DoDI 1020.30, and therefore AFI 36-2706 did not establish the correct duty. (App. Br. 10-11). But DoDI 1020.03 is not relevant to the issue of factual or sufficiency because it was not offered at trial. "It is well established that a Court of Military Review's assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." Dykes, 38 M.J. at 272 (citing United States v. Turner, 25 MJ 324, 325 (CMA 1987)). Not only was DoDI 1020.03 not offered, but the Defense also offered no countervailing evidence against MSgt ML's testimony on custom or against AFI 36-2706 that would suggest that evidence did not create a duty for Appellant. However, should this Court consider the DoDI relevant, there was no meaningful difference between the regulations as applied to Appellant's case given the similarities between AFI 36-2706 and DoDI 1020.03. The Government proved that Appellant had a duty to refrain from sexually harassing his subordinate from a decade long custom of the Air Force, and that this custom was part of supervisor training to become a Technical Sergeant.

The evidence established beyond a reasonable doubt that Appellant had a duty to refrain from sexual harassment by Air Force custom.

B. Appellant knew he had a duty to refrain from sexually harassing JJ.

Knowledge of a duty can be proven by circumstantial evidence. MCM, part. IV, para. 18.c.(3)(b). As stated above, MSgt ML testified that Appellant received training for his position as a supervisor on the prohibition against sexual harassment when he promoted to Technical Sergeant. (R. at 778). AT testified that Appellant was either 32 or 33 at the time of the offense. (R. at 741). Given the length of time Appellant must have been in the Air Force to achieve the rank of Technical Sergeant, there can be no doubt that Appellant received training regarding sexual harassment and that he knew he had a duty to refrain from sexually harassing JJ.

C. Appellant did willfully sexually harass JJ.

Between the testimony of JJ, her coworkers, and MSgt ML, the Government proved that Appellant's actions constituted unlawful sexual harassment beyond a reasonable doubt.

JJ was Appellant's direct subordinate during the charged timeframe. (R. at 445-8). Appellant took steps to isolate JJ alone with him in the expediter truck when he ordered her into the truck and kept her there unnecessarily for hours at a time. (R. at 455). JM testified he did this at least five times. (R. at 548). Appellant made multiple sexual advances toward JJ. Appellant made a verbal sexual advance toward JJ when he stated he would "fuck her better" than her current boyfriend. (R. at 453). The sexual harassment culminated in Appellant placing his hand on JJ's thigh and trying to kiss her or, at the very least, asking to kiss her. (R. at 460, 548). This action was both a sexual advance and a request for a sexual favor. JJ was uncomfortable with this behavior, but felt she could not tell him to stop because (1) she was an E-2; (2) he was her supervisor and an E-6; and (3) she worried it would be seen as "disrespect."

(R. at 453, 464). Appellant's actions constituted a nonconsensual sexual advance in line with the military judge's instructions. Appellant's behavior was objectively hostile and offensive under the circumstances. MSgt ML and JM, as reasonable objective parties, both testified that Appellant's behavior toward JJ was inappropriate. (R. at 551-52, 780). JJ found the environment hostile or offensive, as she testified to feeling fear regarding Appellant, crying, and wishing to stay home from her assigned duty location. (R. at 463). JM saw how upset JJ was in the immediate aftermath. (R. at 548). JM also testified that following this incident, JJ avoided Appellant at work and told JM she was doing so. (R. at 550). This avoidance included JJ seeking help with work related issues from other personnel instead of Appellant in his capacity as her supervisor. (Id.) Appellant's action therefore unreasonably interfered with JJ's work performance and created an intimidating work environment for her. Even if the government had been required to prove that JJ subjectively found the work environment intimidating, hostile, or offenses, they did so.

Appellant's statements were not accidents. Appellant's claim that he could "fuck [JJ]" better than her boyfriend and a request for a kiss could only be taken as deliberate sexual advances. (R. at 453, 460).

Appellant did not have a reasonable mistake of fact to believe JJ consented to his behavior. JJ asserted Appellant requested to see pictures of her and started making comments about her body. (R. at 516). She denied showing Appellant any pictures of her private areas. (Id.) Her testimony consistently described Appellant as the instigator in these interactions. Despite persistent questions from the Defense, JJ denied ever voluntarily speaking with Appellant about her sex life. (R. at 521). On the contrary, JJ asserted that she complained to Appellant about harassment she faced from other men in her daily life. (R. at 508). The only

incident where she discussed her sex life with GS was with her close friends that Appellant then joined. (R. at 512). Appellant cannot reasonably argue that such comments created a reasonable mistake of fact that JJ would welcome *his* sexual advances.

The Defense had the opportunity to argue to the members that JJ had made inconsistent statements regarding what Appellant did and said to her while in the expediter truck. (R. at 928). The Defense also pointed out that JJ previously indicated there was harassing text messages from Appellant on her phone, but she never provided them. (R. at 936). Throughout the trial, there was virtually no evidence provided of JJ's motive to fabricate. JJ provided credible testimony for the loss of her phone due to a missing household goods shipment on which the members questioned her further. (R. at 819). JJ also provided several reasons for her delayed report, which the members would have considered in evaluating her credibility. (R. at 464, 505). None of the evidence convincingly undermined JJ's credibility.

After an impartial view of the evidence, this Court should conclude that the evidence presented at trial constituted proof of each required element beyond a reasonable doubt.

Because Appellant's conviction is factually sufficient, it meets the lower standard for legal sufficiency. A rational factfinder could have found all the elements of dereliction of duty for sexual harassment beyond a reasonable doubt, as the members did in this case. Therefore, Appellant is unentitled to relief. This Court should deny this assignment of error.

III.

APPELLANT WAS NOT DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE VERBATIM TRANSCRIPT.

Additional Facts

At issue in this assignment of error is the government's delay to produce the verbatim transcript. Appellant was not entitled to Article 66(d), UMCJ, appellate review at the announcement of his sentence on 8 April 2022, and therefore the court reporter only prepared a summarized transcript. On 23 December 2022, Congress amended Article 66, UCMJ, to provide appellate review by a Court of Criminal Appeals (CCA) to servicemembers convicted at general and special courts-martial, regardless of the adjudged sentence. *See* James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, Public Law No. 117-263, 136 Stat. 2395, Section 544. These amendments enlarge the number of servicemembers who are eligible for CCA review. Before 23 December 2022, the Air Force did not prepare verbatim transcripts for servicemembers like Appellant whose sentences did not meet the threshold for CCA review under Article 66, UMCJ.

A certified verbatim transcript is now required in all general and special courts-martial in which there is a finding of guilty. *See* Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, para. 20.47.1 (24 January 2024). However, Appellant filed his direct appeal on 15 December 2023 with this Court before the Air Force's new policies for production of verbatim transcripts went into full effect. As a result, there was a delay in producing a verbatim transcript.

The following facts details the relevant events related to the preparation of the verbatim transcript in Appellant's case. On 15 December 2023, Appellant filed a notice of direct appeal

with this Court. (*Notice of Appeal Pursuant to Article 66(b)(1)(A), UCMJ*, dated 15 December 2023). Four days later, this Court docketed the case and ordered the government to forward a copy of the record of trial to the court forthwith. (*Notice of Docketing*, dated 19 December 2023). This Court did not specify a deadline to have the record of trial forwarded. (Id.) On 19 March 2024, this Court ordered the Government Trial and Appellate Operations Division (JAJG) to inform the Court no later than 2 April 2024 as to the status of the record of trial because a copy of the record of trial had not been forwarded to the Court as of the date of the order. (*Order*, dated 19 March 2024). JAJG then provided a notice of status of compliance explaining that the estimated completion date for the verbatim transcript was 19 April 2024. (*United States' Notice of Status of Compliance*, dated 2 April 2024). This status also explained that both the military judge and court reporter retired, so the case was pending detailing of a new military judge to certify the transcript. (Id.)

Appellant moved this Court for leave to file a demand for speedy appellate review. (*MFLTF Demand for Speedy Appellate Review*, dated 8 April 2024). This Court granted this motion on 16 April 2024. (*Order*, dated 16 April 2024).

JAJG submitted a motion for leave to file a notice of status of compliance, which stated that the new estimated completion date for the verbatim transcript was 20 May 2024. (*United States' Motion for Leave to File Notice of Status of Compliance*, dated 1 May 2024). The notice also explained that the court reporter had active court-martial hearings taking place at the base the court reporter was attached to, which accounted for the delay. (Id.) As of 1 May 2024, the court reporter completed the initial transcription, and counsel were reviewing the transcript and providing edits to the court reporter. (Id.) Next, a military judge would have to review and certify the transcript. (Id.) Lastly, the update informed the Court that the legal office would

provide a copy of the record of trial along with the certified verbatim transcript to the Air Force Military Justice Law and Policy Division (JAJM) once completed. (Id.) On 13 June 2024 JAJM served the record of trial with the completed verbatim transcript on this Court, JAJG, and the Appellate Defense Division (JAJA). Additional relevant facts are included in the analysis below.

Standard of Review

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

Law

In Moreno, CAAF established thresholds for facially unreasonable delay, including docketing with the CCA more than 30 days after the convening authority's action or when a CCA completes appellate review and renders its decision more than 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold of 150 days from the day an appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and in reviewing claims of unreasonable post-trial delay this Court evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). All four factors are considered together and "[n]o single factor is

required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66(c), UCMJ, because it 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

Livak and Moreno are not a perfect fit for analyzing this case, because an abbreviated record of trial had been completed at the time this Court docketed the case, but it contained no verbatim transcript. Assuming the 150-day standard from Livak apply to production of the verbatim transcript, there was a facially unreasonable delay. The government forwarded the verbatim transcript 177-days after this Court ordered the government to forward the record of trial, which is more than the 150-day threshold required to show a facially unreasonable delay. Livak, 80 M.J. at 633. Assuming there is a facially unreasonable delay, this Court must assess whether there was a due process violation by considering the four Barker factors. Although Appellant asserted his right to speedy post-trial processing, he suffered no prejudice. Under the

Barker factors, Appellant is not entitled to relief for post-trial delay because there are reasonable explanations for the delay to complete a verbatim transcript.

Length of the Delay

Even assuming the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis. First courts look at the length of the delay. The length of time was not "egregious," it was only 27 days more than the 150-day benchmark set out in Livak. Even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding that 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.") Given that the delay was not egregious, this factor favors the government.

Reasons for the Delay

There was no "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. The court reporter's busy schedule caused the delay in this case. From the notice of docketing until June 2024, the court reporter attended four court-martials and transcribed an additional three court-martials, including Appellant's court-martial that is 1047 pages. (*Court Reporter Chronology*, undated, ROT, Vol. 4). Lastly, both the military judge and court reporter retired, so the case was pending detailing of a new military judge to certify the transcript. (*United States' Notice of Status of Compliance*, dated 2 April 2024). The delay was not intentional and therefore should not weigh heavily against the government.

Appellant's Assertion of the Right of Timely Review and Appeal

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). In this case, Appellant did not assert his right to speedy post-trial processing until 8 April 2024, almost four months after he filed a notice of direct appeal with this Court. (*Notice of Appeal Pursuant to Article 66(b)(1)(A), UCMJ*, dated 15 December 2023). Appellant is not entitled to strong evidentiary weight for this factor.

Prejudice

The prejudice factor also favors the Government. CAAF has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Moreno, 63 M.J. at 138. The most serious factor in analyzing prejudice is evaluating the ability of an appellant to assert arguments on appeal or prepare for a defense in the event of a retrial or resentencing. Id. at 148.

Although Appellant states that the "financial strain has been overwhelming, leading to an uncertainty and stress about how [he] can continue to provide for [his] family," this is a general claim of prejudice. (*Appellant's Declaration*, 14 October 2024). In United States v. Dunbar, our superior Court said that a "general assertion" is insufficient to establish prejudice. 31 M.J. 70, 73 (C.M.A. 1990). All incarcerated criminals have limited ability to provide for their family

financially. Appellant has not cited any law or other compelling arguments to support his position that his family's reliance on him financially is the type of prejudice that entitles him to relief. Appellant provided no indication of oppressive incarceration pending appeal, undue anxiety and concern other than not being able to financially provide for his family, impairment of a retrial, or any other prejudice. Although unfortunate that Appellant suffered a death in the family while he served his term of confinement, this was not a cognizable claim of prejudice. (*Declaration*, 14 October 2024.) Once again, all incarcerated criminals have limited ability to support family through grief.

Notably, the delay did not impair Appellant's defense, specifically his ability to make arguments on appeal. In fact, the delay at issue was necessary to provide counsel and this Court a verbatim transcript to conduct meaningful appellate review. If Appellant was so concerned with his post-trial expediency, he should not have agreed to appellate defense counsel's two time request for an enlargement of time after he filed a motion for sanctions. *(Appellant's Motion for Enlargement of Time (second)*, 15 October 2024). The enlargements of time granted in this case, exceeded the 27-day post-trial delay in dispute. For these reasons, Appellant did not suffer any prejudice because of the 27-day post-trial delay to create a verbatim transcript.

Because Appellant did not suffer any prejudice, the Court then turns to the analysis under Toohey to determine whether the delay was "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.

Id. at 357. This delay far exceeded Moreno's 18-month threshold and negatively affected the public's perception of the military justice system. Id. at 358. In contrast, here there was only a delay in creating a verbatim transcript. Because Appellant was not entitled to Article 66(d), UCMJ, review with this Court at the time of his sentence, a verbatim transcript was not included in Appellant's original record of trial. Importantly, this Court has not exceeded the 18-month threshold after docketing required under Moreno to render a decision. In fact, Appellant's case was docketed with this Court less than a year ago, on 19 December 2023, leaving this Court with ample time to conduct appellate review within 18 months, despite the delay in production of the verbatim transcript. Because no facially unreasonable delay has occurred in appellate review, and any prejudice to the Appellant is speculative, a determination about the public's perception of the fairness and integrity of the military justice system is premature.

Relief Under Tardif and Gay

Appellant is also not entitled to relief under United States v. Tardif, 57 M.J. at 224, and United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). 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 this case." Id. at 225. However, this authority to grant appropriate relief is "for unreasonable *and* unexplained post-trial delays." Id. at 220 (emphasis added). Relief is not required, but the court may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. 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.

Gay, 74 M.J. at 744. The delay in this case does not meet any of the non-exhaustive Gay factors. Here, the delay was only 27 days past the typical standard. The delay was attributed to manning issues and a backlog to create verbatim transcripts in cases that originally did not require a verbatim transcript but later became eligible for a direct appeal. Efforts were further complicated by the retirement of the original court report and military judge. There was no bad faith nor neglect concerning the post-trial processing. Appellant suffered no harm as he was still able to file his direct appeal. And there was no institutional neglect from the government to delay Appellant's case given that the court reporter diligently worked on creating Appellant's verbatim transcript while presiding over other court-martials and transcribing other hearings.

As a result, this Court should not provide Appellant relief. Appellant makes the incredible claim that providing relief is consistent with the goals of both justice and good order and discipline. (App. Br. at 17.) This argument fails because Appellant's actions had an impact

on good order when he sexually harassed his co-worker, another active duty airman. Granting relief would amount to an appellate windfall which is not consistent with justice or good order and discipline, given the seriousness of Appellant's crime in the absence of governmental bad faith.

The existence of a post-trial delay does not require relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Tardif, 57 M.J. at 224. Appellant did not experience any prejudice from the minor 27-day delay, and a remedy is not warranted. The four Barker factors and the six Gay factors weigh in the government's favor, and the delay to create a verbatim transcript is not an egregious and prejudicial delay requiring post-trial sentencing relief from this Court. This Court should deny this assignment of error and decline to reassess Appellant's sentence.

IV.[4]

THE VERBATIM TRANSCRIPT IS LEGALLY SUFFICIENT EVEN THOUGH IT WAS NOT CERTIFIED BY EITHER THE MILITARY JUDGE OR COURT REPORTER THAT PRESIDED OVER APPELLANT'S COURT-MARTIAL.

Additional Facts

The military judge and court reported initially detailed to Appellant's court-martial have retired. (*United States' Notice of Status of Compliance*, dated 2 April 2024). A new court-reporter was detailed to produce a verbatim transcript for Appellant's court-martial on 26 December 2023. (*Court Reporter Chronology*, undated, ROT, Vol. 4). A new military judge was also detailed to the case to review and certify the transcript. (*United States' Motion for Leave to File Notice of Status of Compliance*, dated 1 May 2024); (*United States' Notice of*

[4] Issues IV was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Status of Compliance, dated 2 April 2024). The newly detailed military judge reviewed the transcript and certified that it was an accurate reflection of Appellant's court-martial in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, paragraph. 3.7.3. (21 April 2021). (*Certification of Transcript*, 17 May 2024, ROT, Vol. 4).

Standard of Review

This Court reviews de novo whether a record of trial is complete. United States v. Henry, 53 M.J. 109, 110 (C.A.A.F. 2000).

Law and Analysis

Appellant asserts that the certification of the verbatim transcript cannot be legally sufficient because the court reporter and military judge who presided over Appellant's court-martial are retired. (App. Br. Appendix at 23). R.C.M. 1112(c) states that if the court reporter cannot certify the record of trial due to death, disability, or absence, then the military judge shall certify the record of trial. Even the Department of the Air Force Manual governing records of trials states that "the military judge detailed to the case must certify the transcript if the detailed court reporter is unavailable to certify the transcript…." DAFMAN 51-203, para. 3.7.3. So all that is required to certify a transcript absent the original detailed court-reporter is simply a detailed military judge. The governing regulations and rules do not require the military judge presiding over the court-martial be the detailed military judge that can certify a transcript.

Further, the Rules for Court-Martial contemplate that military judges who are detailed after findings and sentence are announced can act during post-trial processing. For example, R.C.M. 1111(a)(1) provides that "[i]f the Chief Trial Judge determines that the military judge is not reasonably available, the Chief Trial Judge may detail another military judge to enter" the entry of judgment. So, it follows that if a military judge, who did not preside over a court-

martial, can enter judgment, then a military judge who did not preside over the trial can also certify a court-martial transcript. And that was done in this case. The newly detailed military judge here confirmed that he reviewed the transcript and certified that it is an accurate reflection of Appellant's court-martial in accordance with DAFMAN 51-203, paragraph 3.7.3. (*Certification of Transcript*, 17 May 2024, ROT, Vol. 4).

Lastly, Appellant did not suffer any prejudice. Appellant failed to articulate how the certification of transcript resulted in harm to his case. For this Court to conduct full Article 66 appellate review, a verbatim transcript is vital. *See* United States v. Credit, 4 M.J. 118, 119 (C.M.A. 1977) (explaining that "a trial transcript is, indeed, the very heart of the criminal proceedings and the single element essential to our meaningful appellate review…"). Appellant failed to show how this Court cannot conduct appellate review regardless of which military judge certified the verbatim transcript. Notably, Appellant makes no claims concerning record of trial omissions or any other error that questions the validity of the record of trial or verbatim transcript. For these reasons, this Court should not dismiss Appellant's conviction and deny this assignment of error.

V.[5]

APPELLANT'S CONVICTION SHOULD NOT BE DISMISSED FOR VIOLATING HIS RIGHT TO A SPEEDY APPEAL.

Additional Facts

At the time of Appellant's sentence, he was not entitled to Article 66(d), UCMJ, review. A panel of members sentenced Appellant to a reprimand, reduction in grade to E-4, and 60 days of confinement. (R. at 1044.) Appellant received Article 65(d), UCMJ, review on 29 June 2022.

[5] Issues V was raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

(*Entry of Judgment*, 26 May 2022, ROT, Vol, 1). The Numbered Air Force notified Appellant of his right to submit a direct appeal with this Court on 28 November 2024. (*Memorandum from 8 AF/JA*, 28 November 2023, ROT. Vol. 1). On 15 December, Appellant filed his notice of direct appeal. (*Notice of Appeal Pursuant to Article 66(b)(1)(A), UCMJ*, dated 15 December 2023).

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 and Analysis

Appellant argues that his speedy appellate review was violated because the length between his sentence and docketing with this court was 620 days. (App. Br. Appendix at 24). While true that Appellant was sentenced on 8 April 2022, and his case was docketed with this Court on 19 December 2024, the trigger date for post-trial processing delays, in direct appeal cases such as Appellant, should not be the sentencing date, but the date in which this Court docketed Appellant's case.

Appellant argues the delay in this case did not meet the time standards established in Moreno, 63 M.J. at 142. (App. Br. Appendix at 24). However, the Moreno time standards are inapt for non-automatic appeals under Article 66(b)(1), UCMJ (2022), such as this one, which are procedurally different from automatic appeals and did not exist at the time of Moreno. The case was docketed with this Court on 19 December 2023, four days after Appellant filed his notice of appeal. But a verbatim transcript had not been prepared because prior to the changes to Article 66, UCMJ, effective 23 December 2022, Appellant had no right to a verbatim transcript. Therefore, to the extent the Moreno clock is even applicable to this unique situation, the proper

trigger date for the beginning of appellate review should be the date of docketing and the date forwarding of the record of trial was ordered by this Court, which was19 December 2023.

Whether this Court adopts the notice of direct appeal or the date of docketing as the starting point for appellate review, this case is still within the eighteen-month timeframe for appellate review established in Moreno, 63 M.J. at 142. From the date of docketing to the date the United States filed this answer, 339 days have elapsed. Any prejudice to Appellant is speculative at this point.

The United States maintains its argument that this Court does not have jurisdiction to review Appellant's case given that his case was already final under Article 57(c) at the time the law expanding appellate review went into effect. Furthermore, the government should not be at fault for the delay in docketing Appellant's case because at the time of Appellant's sentence he was not eligible for an appeal under Article 66(d), UCMJ. Nevertheless, under this Court's holding in Vanzant, Appellant now has the opportunity to seek appellate review with this Court. The delay in docketing this case with this Court or the delay in obtaining a verbatim transcript, previously addressed, are not grounds for a dismissal. Since Appellant's notice of appeal, less than one year ago, the government provided a verbatim transcript, and counsel have submitted briefs. Although Appellant asserted his right to a speedy appeal, he has not experienced any prejudice that hampered his defense on appeal. This Court can still meet the 18-months Moreno threshold. This Court should deny this assignment of error and decline to grant Appellant post-trial relief.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and civilian appellate counsel on 22 November 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. **ANGELO L. CEPEDA** Technical Sergeant (E-6) U. S. Air Force, Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** ACM 40318 2 December 2024

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

Appellant, Technical Sergeant (TSgt) Angelo L. Cepeda, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to Appellee's Answer, dated 22 November 2024 (Ans.). In addition to the arguments in his opening brief, TSgt Cepeda submits the following arguments for the issues listed below.

Issues Presented

I.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DERELICTION OF DUTY?

II.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBIT 13 (EXCERPTS OF AIR FORCE INSTRUCTION 36-2706) INTO EVIDENCE?

V.

WHETHER APPELLANT'S CONVICTION SHOULD BE DISMISSED FOR VIOLATING HIS RIGHT TO SPEEDY APPELLATE REVIEW?

Jurisdictional Issue

This Court's decision in *United States v. Vanzant* was correct. 84 M.J. 671 (A.F. Ct. Crim. App. 2024). The Government's position that the Article 65(d), UCMJ review conducted on 29 June 2022 constitutes a "final judgment" under Article 57(c)(1)(A), UCMJ is incorrect. First, if an Article 65(d), UCMJ review constituted a "final judgment" due to completion of appellate review, then no Servicemember would have been able to appeal his/her court-martial results under Article 69, UCMJ. This interpretation of the interplay between Articles 57 and 65, UCMJ makes no sense. Second, TSgt Cepeda's case became eligible for direct review under Article 66, UCMJ, by virtue of the FY 23 NDAA.

ARGUMENT

I.

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DERELICTION OF DUTY.

TSgt Cepeda could not be prosecuted for any version of sexual harassment other than the one outlined in Department of Defense regulation which was in effect at the time of the alleged misconduct. Contrary to the Government's brief, Department of Defense Instruction (DoDI) 1020.03, *Harassment Prevention and Response in the Armed Forces* (February 8, 2018) was punitive. In fact, it dictated that "[v]iolations of the policies in this instruction may constitute violations of specific articles of Chapter 47 of Title 10, U.S.C., also known and referred to in this issuance as the 'Uniform Code of Military Justice (UCMJ)' and may result in administrative or disciplinary action." *Id.* at ¶ 1.2(d). The Government's departure from the DoDI's definition of sexual harassment, and instead relying on its own novel definition, is significant because it eliminated the Government's burden to prove that the offending conduct was "deliberate and repeated" ***and*** that it was "so severe and pervasive that a reasonable person would perceive, and

the victim does perceive, the environment as hostile or offensive." *Id.* at ¶ 3.3. The Government never provided a justification for departing from the DoDI. Because the Government improperly departed from the DoDI's definition of "sexual harassment," it failed to prove the one-time instance that JJ alleged was subjectively or objectively "so severe and pervasive" as to create a hostile work environment. *United States v. Brown*, 55 M.J. 375, 384-85 (C.A.A.F. 2001). The evidence fails legally and factually.

The Government attempts to circumvent this problem by suggesting that the Government could rely on a prohibition against sexual harassment as a custom of the service. (Ans. at 18.) However, "there can be no such thing as a custom that is contrary to existing law or regulation." *United States v. Johanns*, 20 M.J. 155, 159 (C.M.A. 1985). The definition of sexual harassment relied upon by the Government was contrary to the regulation put forth by the Secretary of Defense because it did not contain all of the elements found in DoDI 1020.03. Instead, the Government relied on an impermissible novel version of the prohibition against sexual harassment, which the Secretary of Defense required for the service branches to implement. The imposition of a novel duty was improper. *See generally United States v. Curry*, 28 M.J. 419, 424 (C.M.A. 1989) (describing the impermissibility of charging novel version of specifications under Article 92 that relieves the Government of the burden imposed by a higher authority.) As a matter of factual and legal sufficiency, the Government failed to establish a legal justification for why TSgt Cepeda was subject to a different duty from all other Airmen, as it was their obligation to do. In the face of this, the Government now attempts to shift the burden to TSgt Cepeda, suggesting that he was somehow obligated to offer "countervailing evidence" against the Government's theory. (Ans. at 20.) TSgt Cepeda had no such burden. Rather, it was the Government burden to prove the duty that TSgt Cepeda was bound to. The Government did not prove this novel duty, thereby under-

mining the factual and legal sufficiency of TSgt Cepeda's conviction.

This Court's review of the record is limited to the evidence presented to the members—including the novel theory the Government used, and its own novel definition of "sexual harassment." As applied to TSgt Cepeda, the Government defined "sexual harassment" as "nonconsensual," not "unwelcome." As the Government chose to redefine "sexual harassment" as "nonconsensual" instead of "unwelcome," the Government is now stuck with its choice. And, the Government cannot point to any "regulation, lawful order, standard operating procedure, or custom of the service" that defines "sexual harassment" as "nonconsensual" conduct, as opposed to "unwelcome." While there was testimony about changes the Air Force made to respond to complaints about sexually charged environments, and discouraged "boorish" or "inappropriate" behavior, that testimony did not distinguish between "nonconsensual" and "unwelcome." Essentially, the Government charged a novel theory of "sexual harassment" by alleging it was "nonconsensual" instead of "unwelcome." This the Government cannot do. *See generally Curry*, 28 M.J. at 424. Therefore, the evidence fails legally as well as factually.

JJ's voluntary discussion in the workplace of performing oral sex on her boyfriend (also an Airman) with pop rocks in her mouth, as well as her complaints about other Airmen making sexual comments about her body while she worked out, demonstrated her consent to TSgt Cepeda allegedly making sexual comments to her. At the very least, he had an honest and reasonable belief JJ consented. Without evidence that "sexual harassment" included "nonconsensual" conduct, the Government was unable to prove TSgt Cepeda had a duty to refrain from "sexually harassing" JJ ***as the Government defined it***, or that he had ***actual knowledge*** of such a duty. The Government's failure to prove that TSgt Cepeda actually knew he had a unique and particular duty to refrain from "sexual harassment" over a one-time incident that was not objectively "so severe

and pervasive" as to create a hostile work environment results in a factually and legally insufficient conviction. *See Elonis v. United* States, 135 S. Ct. 2001, 2009 (2015).

II.

THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBIT 13 (EXCERPTS OF AFI 36-2706) INTO EVIDENCE.

One of the "essential elements" of sexual harassment as an Article 92, UCMJ violation is "unwelcome," not "nonconsensual." The Government conflates "unwelcome" with "nonconsensual" in arguing that TSgt Cepeda "sexually harassed" JJ. Therein lies the problem with the Government's argument; as the military judge recognized, "unwelcome" is a different, and lower, standard than "nonconsensual" (R. 840-47). But, the military judge did not clarify the difference between these two terms during instructions. Therefore, even though the military judge instructed the members that the conduct had to be "nonconsensual" instead of "unwelcome," when reviewing Pros. Ex. 13, they also likely conflated the two terms and incorrectly found TSgt Cepeda guilty. This created the risk that even though the members were instructed with the term "nonconsensual," they still used the term as if it was the same as "unwelcome," which would have created a lower burden. Moreover, the instructions did not include the requirement under DoDI 1020.03 that the Government prove the offending conduct was "deliberate and repeated" and that it was "so severe and pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive." Again, TSgt Cepeda's conviction is not only factually insufficient, it is also legally insufficient.

Under the circumstances of this case, the military judge's decision to admit Pros. Ex. 13 into evidence, even for the limited purpose of establishing that TSgt Cepeda had a duty to refrain from "sexually harassing" JJ, was plain error. The "duty" established in Pros. Ex. 13 did not apply to TSgt Cepeda. The military judge failed to explain to the members the difference between

"unwelcome" conduct, as sexual harassment was defined in Pros. Ex. 13, and "nonconsensual" conduct, which was the Government's unique theory of "sexual harassment." Without instructions as to the nuanced difference between "unwelcome" and "nonconsensual," the members were likely misled into believing these two terms were interchangeable. They were not. This is what makes this error one of constitutional magnitude, which the Government must prove was harmless beyond a reasonable doubt.

V.

APPELLANT'S CONVICTION SHOULD BE DISMISSED FOR VIOLATING HIS RIGHT TO A SPEEDY APPEAL.

If this Court were to give any weight to the Government's argument that this Court lacks jurisdiction to consider TSgt Cepeda's appeal, then under *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020), this Court must find prejudice. Under the Government's theory, TSgt Cepeda has ***no*** appellate avenue to challenge his conviction because there is no jurisdiction for this Court to review his case under Article 66, UCMJ, and he does not qualify for Article 69, UCMJ review because, by the time he was notified of his appellate rights, Congress changed the law to eliminate Article 69, UCMJ review by the Judge Advocate General. Dismissal of the Charge is the only way to remedy the violation of TSgt Cepeda's speedy appeal rights. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006).

Conclusion

Wherefore, Appellant respectfully requests that his conviction and sentence be set aside and dismissed.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial & Appellate Operations Division on 2 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MFLTF SECOND DEMAND FOR**
	)	**SPEEDY APPELLATE REVIEW**
Appellee,	)	
	)	
v.	)	Before Panel No. 3
	)	
Technical Sergeant (E-6),	)	No. ACM 40318
ANGELO L. CEPEDA,	)	
United States Air Force,	)	4 April 2025
Appellant.	)	

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

Pursuant to Rule 23(d) and 23.3 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file a second demand for speedy appellate review of his case. Appellant further so demands speedy appellate processing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant Appellant leave to file this motion and grant him the relief specified herein.

Respectfully submitted,

[redacted]

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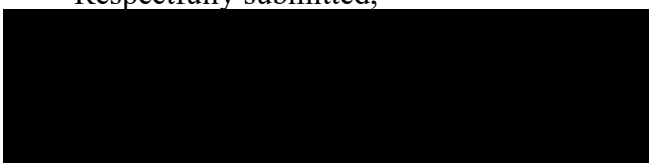
CERTIFICATE OF FILING AND SERVICE

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 4 April 2025.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40318**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Angelo L. CEPEDA	)	**PANEL CHANGE**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of May, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

Chief Commissioner